3-20-2015

Ballard v. Kerr Clerk's Record Dckt. 42611

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants-Appellants.	Supreme Court Case No. 42611

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE DEBORAH BAIL

JEREMIAH A. QUANE	DAVID Z. NEVIN
ATTORNEY FOR APPELLANT	ATTORNEY FOR RESPONDENT
BOISE, IDAHO	BOISE, IDAHO

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
3/16/2012	NCOC	MCBIEHKJ	New Case Filed - Other Claims	Deborah Bail
	COMP	MCBIEHKJ	Complaint Filed	Deborah Bail
	SMFI	MCBIEHKJ	Summons Filed (2)	Deborah Bail
	MOTN	MCBIEHKJ	Motion for Limited Admission of P Gregory Haddad	Deborah Bail
	MOTN	MCBIEHKJ	Motion for Limited Admission of James B Perrine	Deborah Bail
3/19/2012	AFOS	CCWRIGRM	(2) Affidavit Of Service (03/16/12)	Deborah Bail
3/22/2012	ORDR	CCTHERTL	Order Granting Motions for Limited Admission	Deborah Bail
4/2/2012	NOAP	CCVIDASL	Notice Of Appearance (Quane for Brian Calder Kerr and Silk Touch Laser LLP)	Deborah Bail
	NOTS	CCVIDASL	Notice Of Service of Discovery	Deborah Bail
4/16/2012	ANSW	TCORTEJN	Answer (Quane for Brian Kerr MD, Silk Laser Touch)	Deborah Bail
4/18/2012	HRSC	DCDOUGLI	Hearing Scheduled (Status Conference 05/09/2012 03:30 PM)	Deborah Bail
		DCDOUGLI	Notice of Status Conference	Deborah Bail
5/2/2012	NOTS	CCKHAMSA	Notice Of Service Of Discovery	Deborah Bail
5/4/2012	STIP	CCHOLMEE	Stipulation for Scheduling and Planning	Deborah Bail
5/7/2012	CONV	CCTHERTL	Hearing result for Status Conference scheduled on 05/09/2012 03:30 PM: Conference Vacated	Deborah Bail
5/16/2012	HRSC	DCDOUGLI	Hearing Scheduled (Jury Trial 09/24/2013 09:30 AM) 10 days	Deborah Bail
		DCDOUGLI	Notice of Trial Setting and Order Governing Further Proceedings	Deborah Bail
5/17/2012	MOTN	CCWRIGRM	Motion for First (Automatic Disqualification of Alternate Judge)	Deborah Bail
5/18/2012	ORDR	CCTHERTL	Order for First (Automatic) Disqualification of Alternate Judge (Williamson)	Deborah Bail
6/6/2012	NOTS	CCWRIGRM	Notice Of Service of Plaintiffs First Set of Interrogatories, Requests for Production and Requests for Admissions to Defendants	Deborah Bail
6/26/2012	NOTS	CCSWEECE	Notice Of Service	Deborah Bail
6/29/2012	NSDR	CCSWEECE	Notice Of Service Of Discovery Responses	Deborah Bail
8/24/2012	MOTN	CCHEATJL	Plaintiff's Motion To Compel Defendant's Answers To Plaintiff's First Set Of Interrogatories	Deborah Bail
	AFCO	CCHEATJL	Affidavit Of Counsel	Deborah Bail
	MEMO	CCHEATJL	Plaintiff's Memorandum Of Law In Suuport Of Plaintiff's Motion To Compel Defendant's Answers To Plaintiff's First Set Of Interrogatories	Deborah Bail
8/27/2012	NOTH	CCMEYEAR	Notice Of Hearing (09/12/2012 @ 2:30 pm)	Deborah Bail
	HRSC	CCMEYEAR	Hearing Scheduled (Motion to Compel 09/12/2012 02:30 PM)	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
9/5/2012	AFFD	CCAMESLC	Affidavit for the Certification per Rule 32 a 2 [file stamped 09/06/2012]	Deborah Bail
	MEMO	CCAMESLC	Memorandum in Opposition to Compel [file stamped 09/06/2012]	Deborah Bail
9/12/2012	DCHH	CCTHERTL	Hearing result for Motion to Compel scheduled on 09/12/2012 02:30 PM: District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: 50	Deborah Bail
9/14/2012	AFFD	CCRANDJD	Affidavit of Counsel	Deborah Bail
9/19/2012	OBJE	MCBIEHKJ	Objection to Proposed Order on Motion to Compel	Deborah Bail
	AFFD	MCBIEHKJ	Affidavit of Jeremiah A Quane for Objections	Deborah Bail
9/20/2012	RESP	CCDEREDL	Plaintiffs Response in Opposition to Defendants Objeciton to Plaintiffs Proposed Order and Claim for Fees and Expenses Related to Plaintiffs Motion to Compel Defendants Answers to Plaintiffs First Set of Interrogatories	Deborah Bail
9/24/2012	NOTS	CCNELSRF	Notice Of Service	Deborah Bail
9/27/2012	NOTC	CCKHAMSA	Notice Of Change Of Address	Deborah Bail
10/11/2012	ORDR	CCTHERTL	Order (Granting Motion to Compel)	Deborah Bail
1/4/2013	NOTD	CCWRIGRM	Notice to Take Video Deposition	Deborah Bail
	NOTD	CCWRIGRM	(4) Notice Of Taking Deposition	Deborah Bail
1/11/2013	NOTD	CCWATSCL	Notice Duces Tecum Of Taking the Video Deposition of Charles Ballard	Deborah Bail
2/1/2013	RSPN	CCPINKCN	Plaintiff's Responses to Defendants' Notice Duces Tecum of Taking the Video Deposition of Charles Ballard	Deborah Bail
2/11/2013	NOTS	CCMEYEAR	(2) Notice Of Service	Deborah Bail
3/14/2013	NOTD	CCSWEECE	Notice Of Taking Videotaped Deposition	Deborah Bail
3/22/2013	NOSV	CCHOLMEE	Notice Of Service	Deborah Bail
3/26/2013	NOTS	MCBIEHKJ	Notice Of Service	Deborah Bail
	MISC	MCBIEHKJ	Plaintiffs Expert Witness Disclosure	Deborah Bail
5/14/2013	NOTD	MCBIEHKJ	Notice Of Taking Deposition of Charles Ballard	Deborah Bail
	NOTS	CCSWEECE	Notice Of Service	Deborah Bail
5/16/2013	SUBC	MCBIEHKJ	Substitution Of Counsel (New Firm)	Deborah Bail
5/28/2013	DEWI	CCWATSCL	Defendant's Disclosure of Expert Witness List	Deborah Bail
6/3/2013	NOTC	CCHOLMEE	Notice to Take Deposition	Deborah Bail
6/4/2013	NOTS	CCPINKCN	Notice Of Service of Discovery	Deborah Bail
6/17/2013	NOTD	CCHOLMEE	Notice Of Taking Video Deposition of Dr John P Lundeby MD	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
6/21/2013	NOTC	CCREIDMA	Notice Of Service of Plaintiff's Third Set of Discovery Requests to Defendants	Deborah Bail
6/26/2013	MOTN	CCSWEECE	Plaintiffs Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
	AFFD	CCSWEECE	Affidavit of Scott McKay	Deborah Bail
	MEMO	CCSWEECE	Memorandum of Law in Support of Plaintiffs Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
	NOHG	CCSWEECE	Notice Of Hearing	Deborah Bail
	HRSC	CCSWEECE	Hearing Scheduled (Motion 07/10/2013 03:30 PM) Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
7/2/2013	AFFD	CCKINGAJ	Affidavit of Counsel in Opposition to Plaintiff's Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
	MEMO	CCKINGAJ	Memorandum in Opposition to Plaintiff's Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
7/3/2013	NOTD	CCHOLMEE	Notice Of Taking Deposition of Dr Geoffrey Stiller	Deborah Bail
7/8/2013	RPLY	CCPINKCN	Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
7/9/2013	MEMO	CCHOLMEE	Supplemental Memorandum in Opposition to Motion in Limine Experts	Deborah Bail
7/10/2013	DCHH	CCVILLTL	Hearing result for Motion scheduled on 07/10/2013 03:30 PM: District Court Hearing Hel Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: 50 -Motion to Exclude Cumulative Expert Witnesses	Deborah Bail
7/23/2013	NOTS	CCSWEECE	Notice Of Service of Discovery	Deborah Bail
7/24/2013	ORDR	CCVILLTL	Order Denying Plaintiff's Motion to Exclude Cumulative Expert Witness	Deborah Bail
7/25/2013	NOTC	CCMARTJD	Notice of Intent to Serve Subpoena	Deborah Bail
7/29/2013	AMEN	CCPINKCN	Amended Notice of Take Video Deposition of Dr. John P lundeby MD	Deborah Bail
7/31/2013	NOTD	CCHOLMEE	Notice Of Taking Deposition Duces Tecum of Dr Dean Sorensen	Deborah Bail
8/12/2013	AMEN	CCSWEECE	Amended Notice to Take Video Deposition of Dr Thomas Coffman MD	Deborah Bail
	NOTD	CCMARTJD	Notice Of Taking Deposition	Deborah Bail
8/13/2013	NOTS	CCMARTJD	Notice Of Service	Deborah Bail
8/14/2013	NOTS	CCMEYEAR	Notice Of Service	Deborah Bail
8/26/2013	NOTC	CCHOLMEE	Notice of Change of Address	Deborah Bail
8/30/2013	NOTC	CCKHAMSA	Plaintiff's Notice Of Intent To Offer Testimony Of Medical Expert By Video Teleconference And Request For Leave To Permit Same	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
8/30/2013	NOTC	CCKHAMSA	Notice Of Telephonic Status Conference	Deborah Bail
	HRSC	CCKHAMSA	Hearing Scheduled (Status Conference 09/04/2013 03:00 PM)	Deborah Bail
9/3/2013	NOTD	CCMARTJD	Notice Of Taking Deposition	Deborah Bail
9/4/2013	DCHH	CCVILLTL	Hearing result for Status Conference scheduled on 09/04/2013 03:00 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: less than 100	Deborah Bail
	HRVC	CCVILLTL	Hearing result for Jury Trial scheduled on 09/24/2013 09:30 AM: Hearing Vacated 10 days	Deborah Bail
	HRSC	CCVILLTL	Hearing Scheduled (Jury Trial 11/05/2013 09:30 AM) 10 days	Deborah Bail
9/9/2013	NOTS	CCOSBODK	Notice Of Service	Deborah Bail
		DCDOUGLI	AMENDED Notice of Trial Setting and Order Governing Further Proceedings (10 days)	Deborah Bail
9/16/2013	AMEN	CCVIDASL	Amended Notice to Take Video Conference Deposition of Dr Gregory Laurence	Deborah Bail
	NOTD	CCHEATJL	Notice Of Taking Deposition	Deborah Bail
	NOTC	CCHEATJL	Notice Of Intent To Serve Subpoena Duces Tecum	Deborah Bail
9/18/2013	MODQ	CCSWEECE	Motion For (Automatic) Disqualification of Alternative Judge Per the Court Order of September 9, 2013	Deborah Bail
	NOTS	CCOSBODK	Notice Of Service	Deborah Bail
9/20/2013	NOTD	MCBIEHKJ	Notice Of Taking Deposition	Deborah Bail
9/26/2013	AFOS	CCMARTJD	Affidavit Of Service 9.23.13	Deborah Bail
9/30/2013	AMEN	CCSWEECE	Second Amended Notice to Take Video COnference Deposition of Dr Gregory Laurence	Deborah Bail
	NOTD	CCSWEECE	Notice Of Taking Video Conference Deposition Duces Tecum of Susan Kerr	Deborah Bail
10/4/2013	NOTS	CCNELSRF	Notice Of Service	Deborah Bail
10/10/2013	NOTS	CCSWEECE	Notice Of Service of Discovery	Deborah Bail
10/11/2013	MOTN	TCWEGEKE	Plaintiff's Motion for Entry of Protective Order	Deborah Bail
10/15/2013	NOTC	CCHOLMEE	Notice of Reconvened Videotaped and Video Conference Deposition of Charles Garrison MD	Deborah Bail
	NOTC	CCHOLMEE	Amended Notice of Reconvened Videotaped and Video Conference Deposition of Charles Garrison MD	Deborah Bail
10/17/2013	NOTC	CCNELSRF	Notice of Hearing 11/05/13 @ 9:30 pm	Deborah Bail
10/18/2013	NOTS	CCSCOTDL	Notice Of Service	Deborah Bail
10/21/2013	MOTN	CCNELSRF	Def's Motion in Limine	Deborah Bail

Fourth Judicial District Court - Ada County

ROA Report

Case: CV-OC-2012-04792 Current Judge: Deborah Bail

Charles Ballard vs. Brian Calder Kerr, etal.

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
10/21/2013	AFSM	CCNELSRF	Affidavit of Counsel In Support Of Def's Motion in Limine	Deborah Bail
	MEMO	CCNELSRF	Memorandum In Support Of Def's Motion in Limine	Deborah Bail
	NOHG	CCNELSRF	Notice Of Hearing 11/05/13 @ 9:30am	Deborah Bail
10/22/2013	MISC	MCBIEHKJ	Defendants Proposed Jury Instructions and SPecial Verdict Form	Deborah Bail
	MOTN	CCOSBODK	Plaintiffs Consolidated Motions In Limine	Deborah Bail
	AFFD	CCOSBODK	Affidavit Of Counsel	Deborah Bail
	MISC	CCOSBODK	Plaintiffs Proposed Jury Instructions And Special Verdict Form	Deborah Bail
10/29/2013	MISC	CCREIDMA	Plaintiff's Responses to Defendant's Motions In Limine	Deborah Bail
	MISC	CCREIDMA	Plaintiff's Pretrial Exchange of Information Certification	Deborah Bail
	AFFD	CCREIDMA	Affidavit of Counsel In Support of Plaintiff's Responses to Defendant's Motions In Limine	Deborah Bail
	MISC	TCLAFFSD	Certification Of Defense Counsel Per The Amended Notice Of Trial Setting And Order Governing Further Proceedings Dated September 9, 2013	Deborah Bail
	MEMO	TCLAFFSD	Memorandum In Opposition To Plaintiff's Motions In Limine	Deborah Bail
	AFFD	TCLAFFSD	Affidavit Of Counsel In Support Of Memorandum In Opposition To Plaintiff's Motion In Limine	Deborah Bail
10/30/2013	RSPN	CCHEATJL	Plaintiff's Response To Defense Counsel's Misrepresentation To The Court RE Mediation	Deborah Bail
10/31/2013	NOTC	CCHOLMEE	Notice of Filing	Deborah Bail
	EXHI	CCOSBODK	Plaintiffs Exhibit List	Deborah Bail
11/1/2013	REPL	MCBIEHKJ	Reply Memorandum in Support of Motion in Limine	Deborah Bail
11/5/2013	DCHH	CCVILLTL	Hearing result for Jury Trial scheduled on 11/05/2013 09:30 AM: District Court Hearing Hel Court Reporter: Tiffany Fisher Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 1	Deborah Bail
	JTST	CCVILLTL	Jury Trial Started	Deborah Bail
11/6/2013	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Tiffany Fisher Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 2	Deborah Bail
11/7/2013	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Kristi Valcich Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 3	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
11/8/2013	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Roxanne Patchell/Kim Madsen Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 4	Deborah Bail
11/12/2013	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Roxanne Patchell Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 5	Deborah Bail
	MEMO	CCVILLTL	Memorandum Objecting to Plaintiff Recovering for Krystal Bllard's Medical Costs and Burial Benefits and Expenses	Deborah Bail
11/13/2013	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Roxanne Patchell Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 6	Deborah Bail
11/14/2013	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Roxanne Patchell Number of Transcript Pages for this hearing estimated: less than 500 - Jury Trial Day 7	Deborah Bail
12/6/2013	MOTN	TCLAFFSD	Plaintiff's Motion For Sanctions, For Full Enforcement Of Sanctions Previously Imposed, And For Enforcement Of Existing Discovery And Disclosure Deadlines	Deborah Bail
	DECL	TCLAFFSD	Declaration of P Gregory Haddad In Support Of Plaintiff's Motion For Sanctions, For Full Enforcement Of Sanctions Previously Imposed, And For Enforcement Of Existing Discovery And Disclosure Deadlines	Deborah Bail
	MEMO	TCLAFFSD	Memorandum Of Law In Support Of Plaintiff's Motion For Sanctions, For Full Enforcement Of Sanctions Previously Imposed, And For Enforcement Of Existing Discovery And Disclosure Deadlines	Deborah Bail
12/23/2013	OBJC	CCKHAMSA	Objection To Plaintiff's Motion For Sanctions, For Full Enforcement Of Sanctions Previously Imposed, And For Enforcement Of Existing Discovery And Disclosure Deadlines	Deborah Bail
12/24/2013	NOHG	CCSCOTDL	Notice Of Hearing (2-12-14 @ 2PM)	Deborah Bail
12/27/2013	HRSC	CCSCOTDL	Hearing Scheduled (Motion 02/12/2014 02:00 PM) Sanctions	Deborah Bail
1/30/2014	NOHG	TCHEISLA	Notice Of Hearing [entered in error]	Deborah Bail
	STAT	TCHEISLA	STATUS CHANGED: Closed pending clerk actior [entered in error]	Deborah Bail
2/5/2014	MOTN	CCSCOTDL	Defendants Motion for Leave to File Over Length Brief in response to Plaintiffs Motion for Sanctions	Deborah Bail
	AFFD	CCSCOTDL	Affidavit of Counsel in Support of Memorandum in Opposition to Plaintiffs Motion for Sanctions	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
2/5/2014	AFFD	CCSCOTDL	Affidavit of Terrence S Jones in Opposition to Plaintiffs Motion for Sanctions	Deborah Bail
	AFFD	CCSCOTDL	Affidavit of Dr Geoffrey D Stiller	Deborah Bail
	MEMO	CCSCOTDL	Memorandum in Opposition to Plaintiffs Motion for Sanctions	Deborah Bail
2/7/2014	MEMO	CCHEATJL	Memorandum In Opposition To Plaintiff's Motion For Sanctions	Deborah Bail
2/10/2014	MOTN	CCHEATJL	Plaintiff's Motion To Strike Defendants' Second Overlength Memorandum	Deborah Bail
	DECL	CCHEATJL	Declaration Of P Gregory Haddad In Support Of Plaintiff's Reply Memorandum In SUpport Of Motion For Sanctions	Deborah Bail
	MEMO	CCVILLTL	Plaintiff's Reply Memorandum in Support of Motion for Sanctions	Deborah Bail
2/11/2014	EXHI	CCNELSRF	Exhibit "A" to Plf's Motion To Strike Defendants' Second Overlength Memorandum	Deborah Bail
2/12/2014	DCHH	CCVILLTL	Hearing result for Motion scheduled on 02/12/2014 02:00 PM: District Court Hearing Hel Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: less than 100	Deborah Bail
2/18/2014	MEMO	TCLAFFSD	Plaintiff's Memorandum Of Attorney Fees & Costs	Deborah Bail
	DECL	TCLAFFSD	Declaration of P. Gregory Haddad In Support of Plaintiff's Memorandum Of Attorney Fees And Costs	Deborah Bail
2/20/2014	HRSC	CCVILLTL	Hearing Scheduled (Jury Trial 04/08/2014 09:30 AM) 3 weeks	Deborah Bail
2/21/2014		DCDOUGLI	Notice of Trial Setting and Order Governing Further Proceedings	Deborah Bail
2/24/2014	OBJE	CCHOLMEE	Objections to Plaintiffs Memorandum of Attorney Fees and Costs	Deborah Bail
	AFFD	CCHOLMEE	Affidavit of Jeremiah A Quane For Objections to Memorandum of Attorney Fees and Costs	Deborah Bail
	NOHG	CCHOLMEE	Notice Of Hearing 3.12.14@200PM	Deborah Bail
	HRSC	CCHOLMEE	Hearing Scheduled (Objection to Attorney Fees and Costs 03/12/2014 02:00 PM)	Deborah Bail
2/27/2014	MOTN	CCHOLMEE	Motion for First Disqualification of the Honorable Deborah Bail	Deborah Bail
2/28/2014	ORDR	CCVILLTL	Order (Denying Motion for First Disqualification of the Honorable Deborah Bail)	Deborah Bail
3/12/2014	DCHH	CCVILLTL	Hearing result for Objection to Attorney Fees and Costs scheduled on 03/12/2014 02:00 PM: District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: less than 100	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
3/20/2014	APSC	CCTHIEBJ	Appealed To The Supreme Court	Deborah Bail
	NOTA	CCTHIEBJ	NOTICE OF APPEAL	Deborah Bail
3/25/2014	NOTC	CCREIDMA	Plaintiff's Notice of Reliance on Previously Filed Consolidated Motions In Limine and Supplemental Motions in Limine	Deborah Bail
	AFFD	CCREIDMA	Affidavit of Counsel	Deborah Bail
	NOTC	CCREIDMA	Plaintiff's Notice of Reliance on Previously Filed Jury Instructions and Special Verdict Form	Deborah Bail
3/26/2014	MOTN	CCVIDASL	Defendants Motion in Limine	Deborah Bail
	MEMO	CCVIDASL	Memorandum in Support of Defendants Motion in Limine	Deborah Bail
	MISC	CCVIDASL	Defendants Proposed Jury Instuctions and Special Verdict Form	Deborah Bail
3/27/2014	HRSC	CCVILLTL	Hearing Scheduled (Status by Phone 04/02/2014 02:30 PM)	Deborah Bail
3/28/2014	MOTN	CCHOLMEE	Defendants Emergency Motion to Vacate Trial of April 8, 2014	Deborah Bail
	AFFD	CCHOLMEE	Affidavit of Dr Britani Hill	Deborah Bail
	MOTN	CCHOLMEE	Motion to Shorten Time	Deborah Bail
4/1/2014	MISC	CCHEATJL	Certification Of Defense Counsel Per The Amended Notice Of Trial Setting And ORder Governing Further Proceedings Dated February 21 2014	Deborah Bail
	RSPN	CCWEEKKG	Plaintiff's Response to Defendants' Emergency Motion to Vacate Trial	Deborah Bail
	MISC	CCWEEKKG	Plaintiff's Pretrial Exchange of Information Certificate	Deborah Bail
	RSPN	CCWEEKKG	Plaintiff's Oppostition and Response to Defendatns' Motion in Limine	Deborah Bail
	AFFD	CCWEEKKG	Affidavit of Counsel	Deborah Bail
4/2/2014	DCHH	CCVILLTL	Hearing result for Status by Phone scheduled on 04/02/2014 02:30 PM: District Court Hearing Hel Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: less than 100	Deborah Bail
	HRVC	CCVILLTL	Hearing result for Jury Trial scheduled on 04/08/2014 09:30 AM: Hearing Vacated 3 weeks	Deborah Bail
4/8/2014	HRSC	CCVILLTL	Hearing Scheduled (Jury Trial 09/16/2014 09:30 AM) three weeks	Deborah Bail
	NOTC	CCVILLTL	Notice of Re-setting Trial (9/16/14 @ 9:30 am)	Deborah Bail
7/7/2014	REMT	CCTHIEBJ	Remittitur-Dismissed Supreme Court Docket No. 41971	Deborah Bail
8/6/2014	NOTC	CCMURPST	Notice of Change of Address	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
9/11/2014	BREF	CCMARTJD	Brief on Use of Depositions at Trial	Deborah Bail
	NOTC	CCMARTJD	Notice of Filing	Deborah Bail
9/16/2014	DCHH	CCVILLTL	Hearing result for Jury Trial scheduled on 09/16/2014 09:30 AM: District Court Hearing Hel Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: more than 500	Deborah Bail
	JTST	CCVILLTL	Jury Trial Started	Deborah Bail
9/17/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 2 --- more than 500	Deborah Bail
9/18/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 3 --- more than 500	Deborah Bail
9/19/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 4 --- more than 500	Deborah Bail
9/23/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 5 --- more than 500	Deborah Bail
	BREF	CCVILLTL	Plaintiff's Bench Brief Re: Taxes	Deborah Bail
9/24/2014	BREF	CCVILLTL	Plaintiff's Bench Brief Re: Admissibility of Medical Bills	Deborah Bail
	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 6 --- more than 500	Deborah Bail
9/25/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 7 --- more than 500	Deborah Bail
	MEMO	CCVILLTL	Defendant's Bench Memo Re: The Introduction of Air Force Medical Records of Krystal Ballard for Impeachment Purposes	Deborah Bail
9/26/2014	MISC	CCVILLTL	Plaintiff's Request for Curative Jury Instructions to Address Defendants' Violation of Pretrial Ruling	Deborah Bail
	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 8 --- more than 500	Deborah Bail
9/30/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 9 --- more than 500	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
9/30/2014	ORDR	CCVILLTL	Revised Order Re: Unauthorized Recording/Transcribing and Use of Unofficial Tanscripts	Deborah Bail
10/1/2014	MISC	CCVILLTL	Plaintiff's Request for Supplemental Jury Instructions Re: Death Certificate and the Element of Proximate Cause	Deborah Bail
	AFFD	CCVILLTL	Affidavit of Counsel in Support of Defendant's Offer of Proof Re: Records of Dr. Kerr's Experience Performing Liposuction	Deborah Bail
	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 10 --- more than 500	Deborah Bail
	AFFD	CCVILLTL	Affidavit of Terrence S. Jones in Response to the Court's Order Re: Unauthorized Recording and Use of Unofficial Transcripts	Deborah Bail
10/2/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 11 --- more than 500	Deborah Bail
	BREF	CCTHIEKJ	Trial Brief	Deborah Bail
10/3/2014	DCHH	CCVILLTL	District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Jury Trial Day 12 --- more than 500	Deborah Bail
	JRYI	CCVILLTL	Jury Instructions	Deborah Bail
	VERD	CCVILLTL	Special Verdict Form	Deborah Bail
10/15/2014	JDMT	DCKORSJP	Judgment	Deborah Bail
	CDIS	DCKORSJP	Civil Disposition entered for: Kerr, Brian Calder, Defendant; Silk Touch Laser,, Defendant; Ballard, Charles, Plaintiff. Filing date: 10/15/2014	Deborah Bail
	STAT	DCKORSJP	STATUS CHANGED: Closed	Deborah Bail
10/16/2014	APSC	CCTHIEBJ	Appealed To The Supreme Court	Deborah Bail
	NOTA	CCTHIEBJ	NOTICE OF APPEAL	Deborah Bail
10/28/2014	MEMO	TCMEREKV	Plaiintiff's Verified Memorandum Of Costs As A Matter Of Right, Discretionary Costs And Adjusted Previous Award Of Sanctions	Deborah Bail
10/30/2014	HRSC	TCHEISLA	Notice of Hearing, Hearing Scheduled (Hearing Scheduled 11/17/2014 03:00 PM) Stay of Execution	Deborah Bail
	APPL	TCHEISLA	Application for Stay of Execution or Enforcement of the Judgment Entered October 15, 2014	Deborah Bail
11/4/2014	NOTC	CCRADTER	Notice of Plaintiff Non-Opposition to Stay of Execution or Enforcement of Judgment	Deborah Bail

Charles Ballard vs. Brian Calder Kerr, Silk Touch Laser

Date	Code	User		Judge
11/5/2014	ORDR	CCVILLTL	Order on Defendants' Application for Stay or Enforcement of Judgment Entered October 15, 2014	Deborah Bail
11/6/2014	HRSC	CCVILLTL	Hearing Scheduled (Motion 12/03/2014 02:30 PM) for Fees and Costs	Deborah Bail
11/7/2014	NOTH	TCWEGEKE	Notice Of Hearing	Deborah Bail
11/10/2014	MOTN	CCSCOTDL	Defendants Motion to Disallow Plaintiffs Memorandum of Costs	Deborah Bail
11/26/2014	OPPO	CCMARTJD	Opposition to Motion to Disallow Memorandum of Costs	Deborah Bail
12/3/2014	DCHH	CCVILLTL	Hearing result for Motion scheduled on 12/03/2014 02:30 PM: District Court Hearing Hel Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: less than 100	Deborah Bail
2/3/2015	ORDR	CCVILLTL	Order Re: Costs and Fees	Deborah Bail
2/12/2015	OBJT	CCHEATJL	Objection To Plaintiff's Proposed Supplemental Judgment	Deborah Bail
2/13/2015	JDMT	CCVILLTL	Supplemental Judgment (Re: Costs and Fees)	Deborah Bail
3/2/2015	NOTC	TCWEGEKE	(3) Notice of Transcript Lodged - Supreme Court No. 42611	Deborah Bail

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CV OC 1204792 CASE NO. **COMPLAINT AND DEMAND FOR JURY TRIAL**

ORIGINAL

COMES NOW Plaintiff, through his attorneys, and for causes of action against the above-named Defendants, states and alleges as follows:

I. PARTIES AND JURISDICTION

1. Charles Ballard is a former resident of Idaho and a current resident of Florida as an active-duty member of the United States Air Force. He is the surviving spouse of Krystal Melissa Ballard, deceased, who up until the time of her death was also an active-duty member of the United States Air Force.

2. Defendant Brian Calder Kerr, M.D. ("Defendant Kerr") is a licensed medical doctor who resides in Idaho and who practiced medicine in the City of Eagle, County of Ada, State of Idaho, at all relevant times in the Complaint, including on and after July 21, 2010.

3. Defendant Kerr was and is a partner in Defendant Silk Touch Laser, LLP at all relevant times in the Complaint.

4. Defendant Silk Touch Laser, LLP is an Idaho limited liability partnership with its registered address as 252 W. Meadows Ridge Lane, Eagle, Idaho 83616, in the County of Ada, State of Idaho.

5. At all relevant times in the Complaint, Defendant Silk Touch Laser, LLP, has operated an outpatient clinic where it provides cosmetic and plastic surgery services at 3210 E. Chinden Blvd., Suite 113, Boise, Idaho 83616 ("the Silk Touch clinic"). This Defendant has operated its business under its own name and under the trade names, or doing-business-as names, of Silk Touch Med Spa, Silk Touch Med Spa and Laser Center, and Silk Touch Med Spa, Laser and Lipo of Boise. All of these Defendants, trade names, and doing-business-as names, are collectively referred to herein as the "Silk Touch Defendants."

6. At all material times herein, Defendant Kerr was an employee of the Silk Touch Defendants acting within the course and scope of his employment.

7. Plaintiff has complied with Idaho Code § 6-1001, *et seq,* by filing an application for a Prelitigation Screening Panel with the Idaho State Board of Medicine which has returned its Report and Recommendation.

8. The amount in controversy exceeds the sum of $10,000, thereby meeting the minimum jurisdictional limits for filing with this Court.

II. FACTS

9. Plaintiff Charles Ballard is a Staff Sergeant in the United States Air Force and is now stationed in Florida. He was a Staff Sergeant at all times relevant to this Complaint. Prior to being stationed in Florida, Plaintiff was stationed and resided in Idaho with his wife, Krystal Ballard, up until the time of her death.

10. At the time of her death, Krystal Ballard was also a Staff Sergeant in the United States Air Force.

11. At the time of Krystal's death, Charles and Krystal Ballard were married and living together in Mountain Home, Idaho, while both were stationed at the Mountain Home Air Force Base in Mountain Home, Idaho.

12. Leading up to, and on July 21, 2010, Krystal Ballard was 27 years old and in good health.

13. At all times material herein, Defendant Kerr and the Silk Touch Defendants held themselves out to the public as individually and collectively competent providers of cosmetic and plastic surgery services.

14. Prior to the time he began providing cosmetic and plastic surgery services, Defendant Kerr was primarily engaged in providing anesthesiology services to the public.

15. On July 21, 2010, Defendants Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, performed cosmetic surgery on Krystal Ballard at the Silk Touch clinic.

16. The medical care provided by, including but not limited to the sterilization procedures and techniques implemented, used, and performed by, Defendant Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, while providing cosmetic surgery services to Krystal Ballard, fell below the standards of care owed to the patient by physicians and facilities providing cosmetic and plastic surgery services.

17. As a direct and proximate result of this care by these Defendants, including sterilization procedures and techniques falling below applicable standards of care, Krystal Ballard suffered during surgery, and/or developed and continued to suffer from afterward, a life-threatening infection and/or condition, and died.

18. The surgery and post-surgery care and monitoring procedures and techniques implemented, used, and performed by Defendant Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, while providing cosmetic surgery services to Krystal Ballard and monitoring and/or caring for her afterward, fell below the applicable standards of care owed to the patient by physicians and facilities providing surgery and post-surgery cosmetic and plastic surgery services.

19. As a direct and proximate result of these surgery and post-surgery procedures and techniques falling below the applicable standards of care, Krystal Ballard suffered during surgery, and/or developed and continued to suffer from afterward, a life-threatening infection and/or condition, and died.

20. In the early morning hours of July 26, 2010, Krystal Ballard died at St. Alphonsus Regional Medical Center in Boise, Idaho, as a direct and proximate result of the acts and/or omissions of Defendant Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, in providing cosmetic surgery services, surgical monitoring services, and/or post-surgical monitoring services.

III. MEDICAL CAUSATION

21. Plaintiff realleges the allegations contained in all the prior and subsequent paragraphs of this Complaint.

22. The negligence and other wrongful conduct of the Defendants as alleged in this Complaint were a direct and proximate cause of Krystal Ballard's death.

23. The damages Plaintiff suffered and will suffer are a direct and proximate result of each of the Defendants' negligence and other wrongful conduct.

IV. CLAIMS

24. Plaintiff realleges the allegations contained in all the prior and subsequent paragraphs of this Complaint.

25. Each of the Defendants were negligent in the manner in which they treated Krystal Ballard. To a reasonable medical certainty, the care rendered by the Defendants fell below the applicable standard of care in the community in which it was provided.

26. Each of the Defendants were negligent in providing Krystal Ballard medical and cosmetic surgery care and services, surgical care and monitoring services, and/or post-surgical care and monitoring services (including up to the time of her death) that fell below the applicable standard of care in the community in which it was provided.

27. These acts of negligence were a direct and proximate cause of the special and general damages sustained by Plaintiff, which damages are described in the "Damages" section below.

28. Defendant Silk Touch Laser, LLP is responsible under the doctrine of respondeat superior for the acts and omissions of its employees, including Defendant Kerr and its nursing staff and/or others for whom it may be legally liable and for the acts and omissions of the same performed under the trade names, or doing-business-as names, of Silk Touch Med Spa, Silk Touch Med Spa and Laser Center, and Silk Touch Med Spa, Laser and Lipo of Boise.

29. The Defendants' misconduct was willful or reckless pursuant to Idaho Code § 6-1603(4)(a).

V. DAMAGES

30. Plaintiff realleges the allegations contained in all the prior and subsequent paragraphs of this Complaint.

31. As a direct and proximate result of Defendants' negligence, Plaintiff has sustained both economic and non-economic losses, which include but are not limited to, damages in the form of:

(a) The decedent's funeral expenses;

(b) Loss of wages and other benefits of employment which would have been earned by Krystal Ballard and shared with her husband, Plaintiff, during the course of her normal work life expectancy;

(c) The reasonable value attributable to the loss of service, care, comfort and society of Krystal Ballard; and

(d) As a result of Defendants' negligence and other wrongful conduct, Plaintiff has been forced to employ attorneys for the prosecution of this action and Plaintiff is entitled to recover reasonable costs and attorneys' fees pursuant to Idaho Code § 12-121, and Rule 54(d)(1) of the Idaho Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendants as follows:

1. For the recovery of all special and general compensatory damages sustained as a direct and proximate result of the negligence of the Defendants, all in a precise amount to be proven at the time and place of trial of this action, but which in any event exceed the jurisdictional limits of $10,000;

2. For the recovery of all reasonable costs and attorneys' fees pursuant to Idaho law; and

3. For such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues in accordance with Rule 38(b) of the Idaho Rules of Civil Procedure.

DATED this the 16th day of March, 2012.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

DEBORAH A. BAIL

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NO. _____
A.M. 9:25 FILED P.M.
MAR 16 2012
CHRISTOPHER D. RICH, Clerk
By KATHY BEHL
Deputy

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CV OC 1204792 **SUMMONS**

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF: THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: Silk Touch Laser, LLP, c/o Registered Agent Susan Kerr, 252 W. Meadow Ridge Lane, Eagle, ID 83616

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorneys, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 16 day of March, 2012. CHRISTOPHER D. RICH

CLERK OF THE DISTRICT COURT

By _____ Deputy Clerk

DEBORAH A. BAIL

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
Scott McKay (ISB#4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CV OC 1204792 CASE NO. **SUMMONS**

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF: THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: Brian Calder Kerr, M.D., 3210 E. Chinden Boulevard, Suite 113, Eagle, ID 83616

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorneys, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 16 day of March, 2012.

CHRISTOPHER D. RICH
CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
Scott McKay (ISB#4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CV OC 1204792 CASE NO. **MOTION FOR LIMITED ADMISSION OF P. GREGORY HADDAD**

The undersigned local counsel petitions the court for admission of the undersigned applying counsel, pursuant to Idaho Bar Commission Rule 222, for the purpose of the above-captioned matters.

Applying counsel certifies that he is an active member, in good standing, of the bar of West Virginia, that he maintains the regular practice of law at Bailey & Glasser's West Virginia office noted above, and that he is not a resident of the State of Idaho or licensed to practice in Idaho.

Both undersigned counsel certify that a copy of this motion has been served on all other parties to this matter and that a copy of the motion accompanied by the $200 fee, has been provided to the Idaho State Bar.

Local counsel certifies that the above information is true to the best of his knowledge, after reasonable investigation. Local counsel acknowledges that the attendance of an attorney from his firm shall be required at all court proceedings in which applying counsel appears, unless specifically excused by the trial judge.

DATED this 13th day of March, 2012.

BAILEY & GLASSER LLP

P. Gregory Haddad

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Scott McKay

THE WEST VIRGINIA STATE BAR
Certificate of Good Standing

Philip G. Haddad - WVSB ID#5834

This is to certify that, according to the records of the West Virginia State Bar, Philip G. Haddad, of Morgantown, WV, was admitted to practice law by the West Virginia Supreme Court of Appeals on October 02, 1991, and was registered as an active member of The West Virginia State Bar in October, 1991.

It is further certified that the said Philip G. Haddad, according to our membership records, is currently an active member in good standing with The West Virginia State Bar.

Given over my hand and seal of The West Virginia State Bar this day, November 15, 2011.

Cheryl L. Wright
Membership Coordinator
The West Virginia State Bar

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
Scott McKay (ISB#4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CV OC 1204792 CASE NO. **MOTION FOR LIMITED ADMISSION OF JAMES B. PERRINE**

The undersigned local counsel petitions the court for admission of the undersigned applying counsel, pursuant to Idaho Bar Commission Rule 222, for the purpose of the above-captioned matters.

Applying counsel certifies that he is an active member, in good standing, of the bars of Alabama, West Virginia and District of Columbia, that he maintains the regular practice of law at Bailey & Glasser's Alabama office noted above, and that he is not a resident of the State of Idaho or licensed to practice in Idaho.

Both undersigned counsel certify that a copy of this motion has been served on all other parties to this matter and that a copy of the motion accompanied by the $200 fee, has been provided to the Idaho State Bar.

Local counsel certifies that the above information is true to the best of his knowledge, after reasonable investigation. Local counsel acknowledges that the attendance of an attorney from his firm shall be required at all court proceedings in which applying counsel appears, unless specifically excused by the trial judge.

DATED this 7th day of March, 2012.

BAILEY & GLASSER LLP

James B. Perrine

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Scott McKay

THE WEST VIRGINIA STATE BAR
Certificate of Good Standing

James B. Perrine - WVSB ID#7215

This is to certify that, according to the records of the West Virginia State Bar, James B. Perrine, of Montgomery, AL, was admitted to practice law by the West Virginia Supreme Court of Appeals on September 30, 1996, and was registered as an active member of The West Virginia State Bar in September, 1996.

It is further certified that the said James B. Perrine, according to our membership records, is currently an active member in good standing with The West Virginia State Bar.

Given over my hand and seal of The West Virginia State Bar this day, March 13, 2012.

Cheryl L. Wright
Membership Coordinator
The West Virginia State Bar

NO. _____
A.M. _____ FILED P.M. 4:30

MAR 19 2012

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Charles Ballard — Plaintiff(s):

vs.

Brian Calder Kerr, M.D. et al. — Defendant(s):

AFFIDAVIT OF SERVICE

Case Number: CV OC 1204792

For:
Nevin, Benjamin, McKay & Bartlett, LLP
303 W. Bannock
Boise, ID 83702

STATE OF IDAHO)
:ss
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on March 16, 2012 to be served on **SILK TOUCH LASER, LLP**.

I, Antonio Roque, who being duly sworn, depose and say that on Friday, March 16, 2012, at 4:25 PM, I:

SERVED the within named **Silk Touch Laser, LLP** by delivering a true copy of the **Summons; Complaint and Demand for Jury Trial; Motion for Limited Admission of P. Gregory Haddad; Motion for Limited Admission of James B. Perrine** to Susan Kerr, Registered Agent, a person authorized to accept service on behalf of Silk Touch Laser, LLP. Said service was effected at **3210 E. Chinden Blvd., Ste. 113, Eagle, ID 83616**.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Our Reference Number: 116646
Client Reference: David Z. Nevin

Subscribed and sworn before me today
Monday, March 19, 2012

SPENCER K. NEALE NOTARY PUBLIC STATE OF IDAHO

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132

Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on February 12th, 2015

ORIGINAL

Bard 3/20

NO. _____
A.M. _____ FILED P.M. 4:50

MAR 19 2012

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Charles Ballard — Plaintiff(s):

vs.

Brian Calder Kerr, M.D. et al. — Defendant(s):

AFFIDAVIT OF SERVICE

Case Number: CV OC 1204792

For:
Nevin, Benjamin, McKay & Bartlett, LLP
303 W. Bannock
Boise, ID 83702

STATE OF IDAHO)
:ss
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on March 16, 2012 to be served on **BRIAN CALDER KERR, M.D.**

I, Antonio Roque, who being duly sworn, depose and say that on Friday, March 16, 2012, at 4:28 PM, I:

SERVED the within named person(s) by delivering to and leaving with **BRIAN CALDER KERR, M.D.** a true copy of the **Summons; Complaint and Demand for Jury Trial; Motion for Limited Admission of P. Gregory Haddad; Motion for Limited Admission of James B. Perrine** . Said service was effected at **3210 E. Chinden Blvd., Ste. 113, Eagle, ID 83616**.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Our Reference Number: 116647
Client Reference: David Z. Nevin

Subscribed and sworn before me today
Monday, March 19, 2012

SPENCER K. NEALE NOTARY PUBLIC STATE OF IDAHO

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132

Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on February 12th, 2015

ORIGINAL

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CV OC 1204792 **ORDER GRANTING MOTIONS FOR LIMITED ADMISSION**

Pursuant to Motions for Limited Admission, and good cause appearing,

P. Gregory Haddad and James B. Perrine are hereby admitted pursuant to Idaho Bar Commission Rule 222 in the above captioned matter.

DATED this 21st day of March, 2012.

District Judge

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF APPEARANCE

TO: PLAINTIFF AND HIS ATTORNEYS OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned hereby appears as counsel of record for Defendants.

DATED this 2nd day of April, 2012.

CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2012, I served a true and correct copy of the foregoing NOTICE OF APPEARANCE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile (304) 594-9709

James B. Perrine
BAILEY & GLASSER LLP
201 Montgomery Street, Suite 2170
Montgomery, Alabama 36104
Telephone (334) 262-6485
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile (334) 262-0657

_____
Jeremiah A. Quane

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 NOTICE OF SERVICE OF DISCOVERY

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 2nd day of April, 2012, I served a copy of DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF, together with a

SV

copy of this NOTICE, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Montgomery Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

DATED this 2nd day of April, 2012.

CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
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Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

ANSWER

COME NOW the above-entitled Defendants and answer the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I.

Defendants deny each and every allegation of the Complaint not herein specifically and expressly admitted.

II.

Defendants admit that Brian Calder Kerr, M.D. is a licensed physician in the State of Idaho, resident of the State of Idaho, employee of the other Defendants, the existence and status of the Defendants, that Brian Calder Kerr, M.D. provided anesthesiology services, that Brian Calder Kerr, M.D. rendered services to Krystal Ballard before July 21, 2010, on July 21, 2010 and thereafter, the demise of Krystal Ballard and paragraphs 2, 6, 7 and 11 of the Complaint.

THIRD DEFENSE

Plaintiff and Krystal Ballard were guilty of negligent and careless misconduct at the time of and in connection with the manners and damages alleged, which proximately caused and contributed to said events and resultant damages, if any.

FOURTH DEFENSE

The Complaint does not comply with Rule 8(a)(1)(2) and 8(e)(1), Idaho Rules of Civil Procedures.

FIFTH DEFENSE

Plaintiff is not the real party in interest as respects any claim for medical expense, contrary to Rule 17, Idaho Rules of Civil Procedure.

SIXTH DEFENSE

Plaintiff lacks the capacity to recover the Decedent's funeral expenses.

WHEREFORE, Defendants pray that Plaintiff takes nothing in this action, that the Complaint be dismissed and Defendants be awarded their costs of suit and such other and further relief as the Court deems just.

DATED this 16th day of April, 2012.

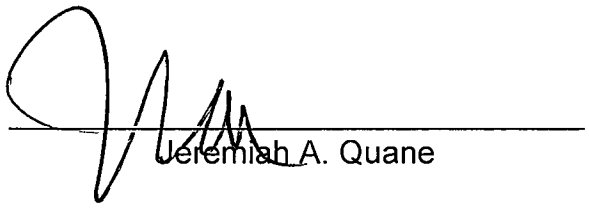
CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2012, I served a true and correct copy of the foregoing ANSWER by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Montgomery Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657



Jeremiah A. Quane

FILED
Wednesday, April 18, 2012 at 01:10 PM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: Linda Sims-Douglas
Linda Sims-Douglas, Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA LASER AND LIPO OF BOISE,

Defendants.

CASE NO. CV-OC-2012-04792

NOTICE OF STATUS CONFERENCE UNDER I.R.C.P. 16(a) & 16(b)

Upon review, the Court has determined that this matter is appropriate for a scheduling order under I.R.C.P. 16(b).

You are hereby notified that the aforementioned case is set for **Status Conference**..... **Wednesday, May 09, 2012 @ 03:30 PM** in the *chambers* of this Court at the Ada County Courthouse, Boise, Idaho. A scheduling order under I.R.C.P. 16(b) may issue following this conference.

All parties must appear at this time in person or by counsel. Counsel must be the handling attorney, or be fully familiar with the case, and have authority to bind his/her client and law firm on all matters set forth in I.R.C.P. 16(a) and 16(b).

In lieu of this status conference, if all parties agree on all matters set forth on the attached stipulation for scheduling and planning, the stipulation may be completed, signed and filed before the date set for the status conference.

Dated Wednesday, April 18, 2012.

Deborah A. Bail

DEBORAH A. BAIL
District Judge

cc: P° / D°

David Z. Nevin (ISB#2280), dnevin@nbmlaw.com
Scott McKay (ISB#4309), smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
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BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

ORIGINAL

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Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of *Plaintiff's Response to Defendants' First Set of Interrogatories*, together with a copy of this *Notice of Service of Discovery*, has been served upon counsel indicated on the certificate of service below.

DATED, this 2nd day of May, 2012.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, a true and correct copy of the foregoing ***Notice of Service of Discovery*** was served upon the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

Bail
Tara
5-7-12
pc

NO. _____ FILED
A.M. _____ P.M. 4:38

MAY 0 4 2012

CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA LASER AND LIPO OF BOISE,

Defendant.

CASE NO. CV-OC-2012-04792

STIPULATION FOR SCHEDULING AND PLANNING

The parties hereby stipulate to the following scheduling deadlines:

1. The last day to file written discovery (Interrogatories and request for production of documents) shall be no later than 90 days prior to trial.

2. The plaintiff shall disclose all expert witnesses to be used at trial no later than 180 days prior to trial.

3. The defendants shall disclose all expert witnesses to be used at trial no later than 120 days prior to trial.

4. The last day for the taking of any discovery depositions shall be no later than 60 days prior to trial.

5. The last day to file amendments to join any additional parties shall be no later than 180 days prior to trial.

SUMMARY JUDGMENT MOTIONS MUST BE FILED NO LATER THAN 90 DAYS PRIOR TO TRIAL. NO HEARING ON ANY SUMMARY JUDGMENT WILL BE PERMITTED IN THE 75-DAY PERIOD PRIOR TO TRIAL. IT IS ADVISABLE TO SCHEDULE YOUR MOTION AS SOON AS FEASIBLE.

* Parties estimate the case will take 10 days to try. Case is to be tried as a:

( ) Court Trial (X) 12 Person Jury Trial ( ) 6 Person Jury Trial

ORIGINAL

* Parties' preference for trial dates: **(Please confer and complete. Do not attach "unavailable dates".)**

NOTE: Trial settings will be 12-14 months from the date of your status conference. If you have a need for an earlier date, you must attend the status conference.

(a) Week of Tuesday, **September 10**, 2013

(b) Week of Tuesday, **September 17**, 2013

(c) Week of Tuesday, **September 24**, 2013

Court's clerk will confirm dates with counsel if preferences cannot be met.

The parties reserve the right to amend this stipulation by agreement of all parties, subject to Court approval; each party reserves the right to seek amendment hereof by Court order, and to request further status conferences for such purpose, in accordance with I.R.C.P. 16(a and 16(b).

Appearances:

DATED this 4th day of May, 2012.

David Z. Nevin
Scott S. McKay
Attorneys at Law
Post Office Box 2772
Boise ID 83701-2772

DATED this 4 day of May, 2012.

Jeremiah A. Quane
Attorney at Law
Post Office Box 519
Boise ID 83701-0519

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV-OC-2012-04792

NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS

This case is set for Jury Trial to commence on the **Tuesday, September 24, 2013 at 09:30 AM** and continue for ten (10) days.

IT IS HEREBY FURTHER ORDERED:

1. All pretrial motions, with the exception of Motions in Limine, shall be heard and completed at least twenty-eight (28) days before the trial date. ***A Judge's copy of all motions and memoranda in support thereof should be filed directly with chambers. *Motions in Limine shall be heard on the morning of trial.***

a. The last day to file written discovery (Interrogatories and request for production of documents) shall be no later than ninety (90) days prior to trial.

b. The plaintiff shall disclose all expert witnesses to be used at trial by no later than one hundred eighty (180) days prior to trial.

c. The defendants shall disclose all expert witnesses to be used at trial by no later than one hundred twenty (120) days prior to trial.

d. The last day for the taking of any discovery depositions shall be no later than sixty (60) days prior to trial.

e. The last day to file amendments to join any additional parties shall be no later than one hundred eighty (180) days prior to trial.

f. **<u>**MOTIONS FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINETY (90) DAYS PRIOR TO TRIAL.</u>

<u>NO HEARING ON ANY SUMMARY JUDGMENT WILL BE PERMITTED IN THE SEVENTY-FIVE (75) DAY PERIOD PRIOR TO TRIAL, REGARDLESS OF WHEN THE MOTION IS FILED.</u>

<u>IT IS ADVISABLE TO SCHEDULE YOUR MOTION FOR HEARING AS SOON AS FEASIBLE.</u>

*ALL WITNESSES ARE TO BE IDENTIFIED BY NAME AND ADDRESS

2. Not later than fourteen (14) days before the trial date, counsel for all parties to the action shall hold a conference for exchange of information and discussion of matters specified by I.R.C.P. 16(a) and 16(b).

3. Not later than seven (7) days before trial: (a) each attorney shall certify to the Court in writing that such Exchange of Information Conference has taken place and furnish with such certification a list of the names of persons disclosed as possible witnesses pursuant to Rule 16(a)(4), and a descriptive list of all exhibits proposed to be offered in evidence, reciting which exhibits counsel have agreed may be received in evidence without objection and those to which no objection will be made on grounds other than irrelevancy or immateriality; or (b) in lieu thereof, all counsel may join in submitting a written stipulation in conformance with Rule 16(b).

4. Any objection to the date of this trial must be made by any party within fifteen (15) days from the date of this notice.

5. All exhibit lists must be submitted to the Court five (5) days prior to trial.

6. All requested jury instructions must be submitted to the Court, *both hard copy and e-mailed to* lsimsdouglas@adaweb.net fourteen (14) days prior to trial.

7. This Order shall control the subsequent course of the action unless modified for good cause shown to prevent manifest injustice.

8. The Court may impose appropriate sanctions for violation of this order, which may include assignment of the trial date to another case.

9. Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case if the assigned judge is unavailable. The following is a list of potential alternate judges:

Hon. G. D. Carey	Justice Gerald Schroeder
Hon. Dennis Goff	Hon. Kathryn A. Sticklen
Hon. Daniel C. Hurlbutt, Jr.	Justice Linda Copple Trout
Hon. James Judd	Hon. Darla Williamson
Hon. Peter McDermott	Hon. Barry Wood
Hon. Duff McKee	Hon. W. H. Woodland
Hon. Daniel Meehl	
Hon. George R. Reinhart, III	**All Sitting Fourth District Judges**

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this notice.

DATED Wednesday, May 16, 2012,

Deborah A. Bail

DEBORAH A. BAIL
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on Wednesday, May 16, 2012, I mailed (served) a true and correct copy of the within instrument to:

David Z. Nevin
Scott S. McKay
Attorneys at Law
Post Office Box 2772
Boise ID 83701-2772

Jeremiah A. Quane
Attorney at Law
Post Office Box 519
Boise ID 83701-0519

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MOTION FOR FIRST (AUTOMATIC) DISQUALIFICATION OF ALTERNATE JUDGE

COME NOW Defendants, by and through their counsel of record, Carey Perkins LLP, and pursuant to Idaho Rule of Civil Procedure 40(d)(1), respectfully moves this Court to grant an automatic disqualification of the Honorable Darla Williamson from presiding over the above-entitled matter as an alternate judge.

DATED this 17th day of May, 2012.

CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2012, I served a true and correct copy of the foregoing MOTION FOR FIRST (AUTOMATIC) DISQUALIFICATION OF ALTERNATE JUDGE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
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James B. Perrine
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104
Telephone (334) 262-6485
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
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[ ] Facsimile (334) 262-0657

_____
Jeremiah A. Quane

Jeremiah A. Quane, ISB No. 977
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Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 ORDER FOR FIRST (AUTOMATIC) DISQUALIFICATION OF ALTERNATE JUDGE

Based upon the foregoing Motion and pursuant to Idaho Rule of Civil Procedure 40(d)(1), the Honorable Darla Williamson is ordered disqualified from presiding in the above-entitled matter.

DATED this 18th day of May, 2012.

DISTRICT JUDGE

Deborah A. Bail

Honorable Deborah A. Bail

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2012, I served a true and correct copy of the foregoing ORDER FOR FIRST (AUTOMATIC) DISQUALIFICATION OF ALTERNATE JUDGE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657
Jeremiah A. Quane CAREY PERKINS LLP Sixteenth Floor, U.S. Bank Plaza 101 South Capitol Boulevard P.O. Box 519 Boise, Idaho 83701 Telephone (208) 345-8600 *Attorneys for Defendants*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8600

Jana Thomas
Clerk

DISTRICT COURT JUDICIAL DISTRICT OF THE STATE - OF - IDAHO IN AND FOR ADA COUNTY

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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303 W. Bannock
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James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO DEFENDANTS

ORIGINAL

NOTICE IS HEREBY GIVEN that on the 6th day of June, 2012, the **Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admissions to Defendants Brian Calder Kerr, M.D.; Silk Touch Laser, LLP, an Idaho Limited Liability Partnership; and Silk Touch Laser, LLP, an Idaho Limited Liability Partnership, d/b/a Silk Touch Med Spa, and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser, and Lipo of Boise**, along with a true and correct copy of this ***Notice of Service***, were served upon counsel for the Defendants as follows:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

☐ U.S. Mail (postage prepaid)
X Hand Delivery
☐ Facsimile
☐ Overnight Mail

NEVIN, BENJAMIN, MCKAY & BARTLETT, LLP

By _____
David Nevin
Scott McKay

CERTIFICATE OF SERVICE

I hereby certify that on June 6th, 2012, I served a true and correct copy of the foregoing ***Notice of Service of Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendants*** by delivering the same to the following via:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

☐ U.S. Mail (postage prepaid)
X Hand Delivery
☐ Facsimile
☐ Overnight Mail

NEVIN, BENJAMIN, McKAY & BARTLETT, LLP

By _____
Scott McKay

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
Scott McKay (ISB#4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
T: (208) 343-1000; F: (208) 345-8274

P. Grégory Haddad ghaddad@baileyglasser.com
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James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CVOC12-04792 **NOTICE OF SERVICE OF SUBPOENA**

ORIGINAL

Pursuant to Rule 45(b)(2) of Idaho Rules of Civil Procedure, Plaintiff, through his attorneys, gives notice to the Defendants that he will cause a Subpoena Duces Tecum in the form attached as Exhibit A, to be served on Sprint Nextel Corporate Security after July 3, 2012.

DATED this 26th day of June, 2012.

Respectfully submitted,

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

By _____
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2012, I served a true and correct copy of the foregoing to Plaintiff by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD

Plaintiff,

Case No. CV OC 1204792

SUBPOENA

BRIAN CALDER KERR, M.D. SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited partnership, d/b/a SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

The State of Idaho to:

Sprint Nextel Corporate Security
Subpoena Compliance
6485 Sprint Parkway
Overland Park, Kansas 66251
Facsimile 816-600-3111

YOU ARE COMMANDED

[ ] to appear in the Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[ ] to permit inspection of the following premises at the date and time specified below.

[X] to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.

To produce a complete set of all phone records, including but not limited to, toll records, the content, date, and time of all SMS and text messages, email records, for Krystal Ballard, fka Krystal Ashton, from July 1 – July 31, 2010, for phone/account number 917-549-6924

PLACE DATE AND TIME

Nevin, Benjamin, McKay & Bartlett LLP
303 West Bannock
Boise, ID 83702
Facsimile 208-345-8274

July 31, 2012

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above the you may be held in contempt of court and that the

aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this_____ day of _____, 2012

By order of the court.
Clerk

_____
Deputy

(court seal)

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY RESPONSES

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 29th day of June, 2012, I served a copy of:

1) DEFENDANTS' OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES;

2) DEFENDANTS' ANSWERS AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS; and

3) DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION,

together with a copy of this NOTICE, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Montgomery Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

DATED this 29th day of June, 2012.

CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
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BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

559123

ORIGINAL

COMES NOW Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rule 37(a)(2) of the Idaho Rules of Civil Procedure, and moves this Court to compel Defendants' answers to Plaintiff's first set of interrogatories. This Motion is supported by a memorandum of law and an affidavit of counsel, both of which have been contemporaneously filed herewith.

On June 6, 2012, Plaintiff served twenty-three interrogatories, among other discovery requests, upon Defendants. Defendants asserted an objection to Plaintiff's interrogatories and refused to answer any of them on the grounds that the number of interrogatories exceed forty -- the number allowed under Rule 33(a)(3) of the Idaho Rules of Civil Procedure. Plaintiff made numerous good faith attempts to resolve this discovery dispute and avoid the Court's involvement, but to no avail. Despite Plaintiff's best efforts to reach an amicable resolution, Defendants continue to refuse to answer any of Plaintiff's interrogatories.

Plaintiff now has no alternative but to respectfully move the Court to compel Defendants to answer Plaintiff's interrogatories. Pursuant to Rule 37(a)(4) of the Idaho Rules of Civil Procedure, Plaintiff also seeks reasonable expenses incurred in obtaining the order, including attorney's fees.

Dated this 24th day of August, 2012.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

559123

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2012, I served a true and correct copy of the foregoing ***Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories*** by hand delivering the same to the following:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL

559406

AFFIDAVIT OF PHILIP GREGORY HADDAD

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, TO WIT:

I, Philip Gregory Haddad, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am one of the attorneys representing Plaintiff in this litigation.

2. On June 6, 2012, Plaintiff served on Defendants' counsel his First Set of Interrogatories, Requests for Production of Documents and Requests for Admission, a true and accurate copy of which is attached hereto at **Exhibit A**.

3. On June 29, 2012, Defendants served their objection in response to Plaintiff's interrogatories, a true and accurate copy of which is attached hereto at **Exhibit B**.

4. On July 6, 2012, Plaintiff's counsel sent a letter via facsimile to Defendants' counsel, a true and accurate copy of which is attached hereto at **Exhibit C**.

5. Plaintiff's counsel sent another letter by facsimile to Defendants' counsel on July 25, 2012, a true and accurate copy of which is attached hereto at **Exhibit D**.

6. On July 26, 2012, Defendants' counsel faxed a letter to Plaintiff's counsel, a true and accurate copy of which is attached hereto at **Exhibit E**.

7. Plaintiff's counsel faxed a letter to Defendants' counsel on August 6, 2012, a true and accurate copy of which is attached hereto at **Exhibit F**.

8. On August 9, 2012, Defendants' counsel faxed a response letter to Plaintiff's counsel (a true and accurate copy of which is attached hereto at **Exhibit G**.

9. Plaintiff has yet to receive answers to his interrogatories.

10. Plaintiff has in good faith conferred or attempted to confer with the Defendants in an effort to secure Defendants' answers to Plaintiff's interrogatories without court action.

And further affiant saith not.

STATE OF West Virginia **;**
COUNTY OF Monongalia **, to-wit:**

Taken, subscribed and sworn to before me this 24th day of August, 2012.

My Commission expires: Nov. 7, 2021.

OFFICIAL SEAL
TAMMY LIVENGOOD
NOTARY PUBLIC
STATE OF WEST VIRGINIA
260 Windy Lane
Bruceton Mills, WV 26525
My Commission Expires Nov. 7, 2021

Tammy Livengood
Notary

559406

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2012, I served a true and correct copy of the foregoing ***Affidavit of Counsel*** by hand delivering the same to the following:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

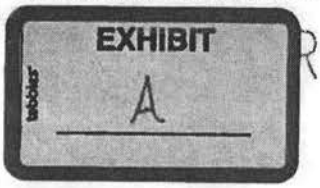
vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO DEFENDANTS BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, AN IDAHO LIMITED LIABILITY PARTNERSHIP; AND SILK TOUCH LASER, LLP, AN IDAHO LIMITED LIABILITY PARTNERSHIP, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, AND LIPO OF BOISE



ORIGINAL

PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION TO DEFENDANTS BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, AND SILK TOUCH LASER, LLP d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, AND LIPO OF BOISE

DEFINITIONS

A. "Document" means originals or any exact copies of written, recorded, transcribed, punched, filmed, taped, or graphic matter, however and by whomever prepared, produced, reproduced, disseminated or made, including but not limited to, any memoranda, intraoffice or interoffice communications, letters, studies, reports, summaries, articles, releases, notes, records of conversation, minutes, statements, comments, speeches, testimony, notebooks, drafts, data sheets, work sheets, records, statistics, charts, contracts, diaries, bills, accounts, graphics or oral records, presentations of any kind (including, without limitations, photographs, plats, charts, graphs, microfiche, microfilm, videotape recording and motion pictures), tapes, data processing sheets or cards, computer or word processing disks, or other written, printed, typed, aural, or recorded material in the possession, custody or control of you or your counsel. The term "document" also means all copies or reproductions of all the foregoing items upon which notation in writing, print, or otherwise has been made that do not appear as originals. To the extent the data processing cards, magnetic tapes, or other computer-related materials are produced, produce all programs, instructions, and other similarly related information necessary to read, comprehend and otherwise utilize said data processing cards, magnetic tapes, or other computer-related materials.

B. "Individual" or "person" means any natural person, including, without limitations, an officer, director, employee, agent, representative, distributor, supplier, independent contractor, license or franchise, and it includes any corporation, sole proprietorship, partnership, joint venture,

group, government agency and agent, firm or other business enterprise or legal entity, which is not a natural person, and means both singular and plural.

C. "Oral," when used in conjunction with a term connecting information refers to any spoken expression, exchange, or transmission of thoughts, messages, information, or the like, at any time or place, and under any circumstances whatsoever.

D. "Define," when used with the reference to a phrase or term, means (a) state the meaning of the phrase or term; and (b) identify each person known by you to have personal knowledge regarding the meaning of such phrase or term upon whose testimony you presently intend to rely at trial.

E. "Describe" means to explain fully by reference to underlying facts rather than conclusion of fact or law.

F. "Identify," when used with reference to a natural person, means to state his or her (a) full name; (b) present business and/or residence address and telephone numbers; (c) present business affiliation, address, title or position; (d) if different from (c), the group, origination or business the person was representing at any time relevant to the answer to a specific interrogatory; and (e) home address. If this information is not known, furnish such information as was last known.

G. "Identify," when used with reference to a business entity, means to state its (a) full name; (b) form of organization (e.g., corporation, partnership); (c) place of incorporation; and (d) address of its principle place of business. If this information is not known, furnish such information as was last known.

H. "Identify," when used with reference to an act, action, activity, omission or event, means to state (a) the identity of each person who participated in such act, action, activity,

omission, or event; (b) the date and place of such act, action, activity, omission, or event in detail; and (c) the identity of each person having knowledge or the act, action, activity, omission, or event.

I. "Identify," when used in reference to a document, means to state (a) the type of document or some other means of identifying it (e.g., letter, memorandum, report, etc.); (b) its subject matter; (c) the identity of its author; (d) the identity of each addressee or recipient; (e) the identity of each person to whom copies were sent and each person by whom copies were received; (f) its title and date; and (g) its present location and the identity of its custodian (if any such document was, but is no longer in the possession of or subject to the control of you or your counsel, state what and when disposition was made of it.

J. "Identify," when used with reference to a conversation, oral communication, discussion, oral statement or interview, means; (a) state the date upon which it took place; (b) identify each person who participated in it, witnessed it and/or overheard it; (c) state what was said by each person, including the issues and matters discusses; and (d) identify each document which describes or relates to it.

K. "Communications(s)" and/or "communicate" shall mean all occasions on which information was conveyed from one person or entity to another, either: (a) through a document; or (b) verbally, either in person or by telephone (including phone messages or alerts); or (c) by means of any other mechanical or electronic device.

L. "Complaint" refers to any communication from anyone expressing negative views or suggestions for improvements, irrespective of whether the concern raised in the communication was investigated or verified (by you) or at your direction.

M. "RELEVANT TIME PERIOD" means July 13, 2010 to present.

N. In construing or interpreting these interrogatories, all words in the plural may be read in the singular, and vice versa whichever reading which results in the provision of the larger amount of information or documents being the correct reading.

O. In construing or interpreting these interrogatories, all words of a conjunctive meaning (e.g., "and") may be read in the disjunctive meaning (e.g. "or"), and vice versa, or both, whichever reading which results in the provision of the larger amount of information or documents being the correct reading.

P. "Documents and Things to be Produced", means original documents and things if they exist and all non-identical copies. If such originals do not exist or are not in the possession or control of the Defendant, it means any additional copy of said originals and all non-identical copies thereof.

Q. "You" and/or "yours" means Dr. Brian Calder Kerr, M.D., Silk Touch Laser, LLP, and Silk Touch Laser, LLP d/b/a Silk Touch Med Spa, and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser, and Lipo of Boise.

GENERAL PROVISIONS

Pursuant to Rule 33 of the Idaho Rules of Civil Procedure, the interrogatories set forth below are to be answered within thirty (30) days of service, fully and separately in writing, under oath, and in accordance with the above cited rule. Answers to these interrogatories must include not only information in your personal knowledge and possession, but also any and all information available to you, including information in the possession of any of your agents, attorneys or employees. If a claim of privilege is made as to any such information, you must specify the basis for the claim of privilege and describe the information claimed to be privileged.

If any document identified in an answer to an Interrogatory was, but is no longer in your possession, custody or control, or was known to you but is no longer in existence, describe what disposition was made of it or what became of it. Your answer must be based not only on documents in your personal possession, but also on any documents available to you, including documents in the possession of your agents, attorneys, accountants or employees. No document requested to be identified or produced herein can be destroyed or disposed of by virtue of a record retention program or for any other reason.

These interrogatories are continuing and your responses to them must be supplemented to the maximum extent authorized by law and the applicable rules.

INTERROGATORIES

INTERROGATORY NO. 1: Please identify the person(s) responding to these interrogatories and requests, their date(s) of birth, and addresses for the past five years.

Answer:

INTERROGATORY NO. 2: Please provide the employment history for the last ten years of Dr. Brian Calder Kerr and any agent, servant, or employee who had any interaction or communication with Krystal Ballard. Please include with this answer the employer name, the job title and duties; the dates of such employment; the reason for leaving employment; and the salary or wages for each employment.

Answer:

INTERROGATORY NO. 3: State the name and addresses of each person whom you intend to call as an expert witness at trial, the subject matter on which each expert is expected

to testify, the substance of the facts and opinions of each expert, a summary of the grounds for each opinion of each expert, and a summary of each expert's qualifications.

Answer:

INTERROGATORY NO. 4: Please state in detail the legal and factual basis for any claim or defense by you that someone other than you are liable for the death of Krystal Ballard and the Plaintiff's damages stemming from the same.

Answer:

INTERROGATORY NO. 5: Please identify the manufacturer, model, and serial number of all equipment or machinery used in Krystal Ballard's procedure.

Answer:

INTERROGATORY NO. 6: Please state with specificity the education, training and experience which qualified Dr. Brian Calder Kerr to perform the cosmetic procedure at issue and produce a copy of all training material, certificates or licenses documenting his experience performing cosmetic procedures such as the one performed on Krystal Ballard.

Answer:

INTERROGATORY NO. 7: Please identify all hospitals or Joint Commission accredited facilities at which Dr. Brian Calder Kerr has privileges to perform the cosmetic procedures performed on Krystal Ballard.

Answer:

INTERROGATORY NO. 8: Please identify any individual employed by or acting on behalf of you who currently has authority and/or access to perform any type of cosmetic procedure using the Cynosure Smartlipo Machine; any individual who had this authority/access from January 1, 2005 through July 21, 2010 to perform such procedures and produce all documents to support this answer.

Answer:

INTERROGATORY NO. 9: Does Silk Touch Laser, LLP have any policies procedures, bylaws or standards to assess and credential agents, servants or employees to perform computer cosmetic procedures. If yes, please describe each one and produce all documents regarding the same.

Answer:

INTERROGATORY NO. 10: Please state the date of the first cosmetic procedure performed by Dr. Brian Calder Kerr, and specifically the first Smart Lipo procedure and first fat transfer procedure; the location each procedure was performed and all education and training Dr. Brian Calder Kerr had received to perform the procedures.

Answer:

INTERROGATORY NO. 11: For the equipment identified in response to Interrogatory No. 5, did the manufacturer of the equipment provide any training, seminars, workshops, in services, etc. (collectively, "training") which Dr. Brian Calder Kerr or agents,

servants or employees of Silk Touch Laser, LLP attended. For each training, please list the date of each training, the individuals who attended each training, the person and/or entity which provided the training, and a description of the matters discussed during the training.

Answer:

INTERROGATORY NO. 12: Please identify all facilities at which you currently hold privileges to practice medicine.

Answer:

INTERROGATORY NO. 13: Please provide the name and address(s) of any third party entity or organization that performs any kind of inspection, evaluation, or screening of Silk Touch Laser, LLP.

Answer:

INTERROGATORY NO. 14: Please provide the name and address(es) of any third party entity or organization that inspects the sterilization practices and procedures at Silk Touch Laser, LLP, including, but not limited to the equipment and instruments used in the procedures performed on Krystal Ballard.

Answer:

INTERROGATORY NO. 15: Please identify the manufacturer, model number and serial number of all equipment used to sterilize the equipment used in Krystal Ballard's procedure,

including but not limited to the hand piece, cannulas and the fiber, and produce the sterilization logs, as well as a copy of any services or repairs on the equipment.

Answer:

INTERROGATORY NO. 16: Please identify any and all communication between Dr. Brian Calder Kerr and Krystal and/or Charles Ballard which occurred after the procedures were performed on Krystal Ballard. For each communication, please identify the type or nature of the communication (e.g., phone call, email, text message), provide the phone number and/or email address of the phone and/or email account that was used to make the communication, provide the substance of each communication as verbatim as you can, identify each recording, message or memorialization of each communication, and produce all recordings, messages, and memorialization's of each communication.

Answer:

INTERROGATORY NO. 17: Please list all persons in the room with Dr. Brian Calder Kerr and Krystal Ballard while procedures were being performed on Krystal Ballard and each individual who made contact with and/or inserted any instrument or equipment into Krystal Ballard during the procedures.

Answer:

INTERROGATORY NO. 18: Please state whether Dr. Brian C. Kerr or Silk Touch Laser, LLP, has ever been cited, sanctioned or fined by any governmental, regulatory, or licensing agency.

Answer:

INTERROGATORY NO. 19: List any and all inspections and/or investigations conducted by a federal, state of local agency, or any other independent organization in which Dr. Brian C. Kerr, Silk Touch Laser, LLP, and/or any employee, agent or independent contractor was found to be in violation of any federal, state or local statute or regulation from 2005 to present. If the inspection or the investigation was conducted by an independent organization, state the organizational standard that was alleged to violated, from 2005 to present. For each, state the name of the agency conducting the inspection and /or investigation; the date of the inspection and /or investigation; the findings of the inspections and/or investigations; all actions taken by you to rectify any alleged deficiencies and the ultimate disposition of the matter.

Answer:

INTERROGATORY NO. 20: Identify each witness known to you to have information and relevant materials to the claims presented in this action or to any defense asserted thereto, and for each person please give a brief summary of each such witness's expected trial testimony.

Answer:

INTERROGATORY NO. 21: State the liability coverage, policy number, insurance company, maximum amount of liability coverage for each policy including the amount per person, the amount of all persons and the content of any insurance agreement you have available to satisfy

part or all of any judgment which may be entered in this action, or to indemnify or reimburse for payments made to satisfy a judgment.

Answer:

INTERROGATORY NO. 22: Please identify and describe each procedure, policy, and/or protocol for sterilization of each individual and/or piece of equipment which participated in or was used during the procedure on Krystal Ballard.

Answer:

INTERROGATORY NO. 23: Please describe any training, seminars, workshops, in services, etc. (collectively, "training") which Dr. Brian Calder Kerr or agents, servants or employees of Silk Touch Laser, LLP attended for each procedure, policy, and/or protocol for sterilization identified and described in Interrogatory No. 22. For each training, please list the date of each training, the individuals who attended each training, the person and/or entity which provided the training, and a description of the matters discussed during the training.

Answer:

REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Idaho Rules of Civil Procedure, the Requests for Admissions set forth below are to be answered within thirty (30) days of service, fully and separately in writing, under oath, and in accordance with the above cited rule.

1. Admit that you performed a liposuction procedure on Krystal Ballard with a Cynosure Smartlipo Machine.

RESPONSE:

2. Admit that Krystal Ballard's procedure was performed by Dr. Brian Calder Kerr.

RESPONSE:

3. Admit that Krystal Ballard's death resulted from bacteria which entered into her body during the procedure performed by Dr. Brian Calder Kerr.

RESPONSE:

4. Admit that Krystal Ballard's death was caused by the negligence of Dr. Brian Calder Kerr and /or other agents, servants, and employees of Silk Touch Laser, LLP.

RESPONSE:

5. Admit that Dr. Brian Calder Kerr has no professional training and/or certification qualifying him to perform the procedures performed on Krystal Ballard.

RESPONSE:

6. Admit that prior to the purchase of the Cynosure Smartlipo Machine that Dr. Brian Calder Kerr, had no previous experience with performing liposuction procedures.

RESPONSE:

7. Admit that each document produced pursuant to these discovery requests,is authentic under Idaho Rule of Evidence.

RESPONSE:

REQUESTS FOR PRODUCTION

Pursuant to Rule 34 and other applicable provisions of the Idaho Rules of Civil Procedure, you are requested to produce and serve upon counsel for the Plaintiff, Charles Ballard, within thirty (30) days of service of this request the following:

REQUEST NO. 1: All documents identified or referred to in answering any of the foregoing interrogatories.

Response:

REQUEST NO. 2: Each document about which Dr. Brian Calder Kerr has in his possession, custody, and control pertaining to the equipment used during Krystal Ballard's procedures.

Response:

REQUEST NO. 3: The curriculum vitae or resume of each expert you intend to call as an expert witness at trial.

Response:

REQUEST NO. 4: All reports provided to you by any witness (expert or lay) that you have received in relation to this case.

Response:

REQUEST NO. 5: All warnings or other disclosure information given to any patients considering a liposuction or fat transfer.

Response:

REQUEST NO. 6: All photographs or videotapes taken of Krystal Ballard before, during and after the Smartlipo procedure on July 21, 2010.

Response:

REQUEST NO. 7: All invoices, purchase orders, and receipts regarding any and all repairs and manufacturing of the equipment used during Krystal Ballard's procedure.

Response:

REQUEST NO. 8: Produce each and every document or tangible thing which you intend to utilize as an exhibit and/or demonstrative aid at the trial of this matter.

Response:

REQUEST NO. 9: Any and all medical and billing records of Krystal Ballard.

Response:

REQUEST NO. 10: Produce a copy of any and all citations issued to or against you or any of your employees or agents, by any governmental or regulatory agency.

Response:

REQUEST NO. 11: Produce all maintenance, ownership, operation and other records in your possession relating to, in any way, the equipment used during Krystal Ballard's procedure.

Response:

REQUEST NO. 12: All manuals, including clinical and service manuals, regarding the equipment used on Krystal Ballard's surgery.

Response:

REQUEST NO. 13: Any and all written agreements made between you and Krystal Ballard.

Response:

REQUEST NO. 14: A copy of Dr. Brian Calder Kerr's curriculum vitae.

Response:

REQUEST NO. 15: A complete copy of every liability, excess and/or umbrella insurance policy that could provide coverage for the claims asserted in the Complaint.

Response:

REQUEST NO. 16: All proposals, memoranda, communications or any other documents concerning any review or inspection of Silk Touch Laser, LLP, conducted by federal, state or local agency, or any quasi-governmental organization, non-for-profit organization during the past ten years.

Response:

REQUEST NO. 17: All documents including, but not limited to, any written material, film, video, recording, book, or policy and procedure that was provided to any employee for purposes of training, demonstrating, describing or instructing employees on the proper use, maintenance, functionality, and sterilization of the equipment used during Krystal Ballard's procedure.

Response:

DATED this 6th day of June, 2012.

NEVIN, BENJAMIN, MCKAY & BARTLETT, LLP

By _____
David Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2012, I served a true and correct copy of the foregoing ***Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Defendants, Brian Calder Kerr, M.D; Silk Touch Laser, LLP an Idaho limited liability partnership; and Silk Touch Laser, LLP, an Idaho limited liability partnership, d/b/a Silk Touch Med Spa, and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser, and Lipo of Boise*** by delivering the same to the following via:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

☐ U.S. Mail (postage prepaid)
X Hand Delivery
☐ Facsimile
☐ Overnight Mail

NEVIN, BENJAMIN, McKAY & BARTLETT, LLP

By _____
Scott McKay

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

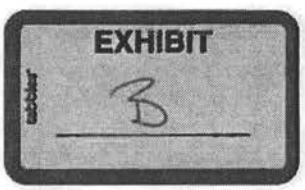
BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendants object to the Plaintiff's First Set of Interrogatories on the grounds that the number of interrogatories, including sub-parts of interrogatories exceed the number of interrogatories allowed by Rule 33(a)(3), I.R.C.P.



DATED this 29th day of June, 2012.

CAREY PERKINS LLP

/s/

By_____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2012, I served a true and correct copy of the foregoing DEFENDANTS' OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

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[ ] Overnight Mail
[ ] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

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James B. Perrine
BAILEY & GLASSER LLP
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Montgomery, Alabama 36104
Telephone (334) 262-6485
Attorneys for Plaintiff

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[ ] Facsimile (334) 262-0657

/s/

_____
Jeremiah A. Quane

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

July 6, 2012

Mr. Jeremiah A. Quane
P.O. Box 519
Boise, ID 83701-0519
Facsimile: (208) 345-8660

VIA FIRST CLASS MAIL AND FACSIMILE

Re: Charles Ballard v. Brian Kerr, M.D., et al, Case No. CV OC 1204792

Dear Mr. Quane,

You objected to Plaintiff's First Set of Interrogatories on the grounds that the number of interrogatories exceeds the number allowed by Rule 33(a)(3), I.R.C.P. We believe such an objection and refusal to answer the discovery on that basis is meritless and made in bad faith. Plaintiff propounded twenty-three (23) interrogatories – a number far fewer than the 40 interrogatories allowed by Rule 33. Defendant has not identified any basis for how Plaintiff's Interrogatories might exceed 40 separate interrogatories and has thus not even made a half-hearted attempt to formulate a meritorious objection.

Of course, no objection to Plaintiff's Interrogatories based on excessiveness could have merit. "[S]ubparts directed at eliciting details concerning a common theme should be considered a single question." Charles A. Wright, et al, Federal Practice and Procedure, § 2168.1 (3d ed. 2002). See Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 664 (D. Kan. 2004) (finding that subparts relating to a common theme were not separate interrogatories). Each of Plaintiff's Interrogatories pertains to a common theme and counts as a single interrogatory. Further, "recipients of interrogatories are not entitled to object based on a selective count of the various clauses contained in the requests." Richardson v. State of Montana, 130 P.3d 634, 644 (Mont. 2006) (concluding that the State's objection to interrogatories on excessiveness grounds "was without merit"); 27 C.J.S. Discovery § 83 (citing Richardson). Accordingly, Defendant cannot object to Plaintiff's Interrogatories because an interrogatory may have more than one clause. See Richardson, 130 P.3d at 644 ("common sense dictates that one sentence containing three clauses does not constitute three separate interrogatories").

Rule 33 is given a "liberal interpretation." Smith v. Big Lost River Irrigation District, 83 Idaho 374, 383 (Idaho 1961). Plaintiff has made a good faith attempt to

EXHIBIT
C

comply with the permissible number of interrogatories under Rule 33 and is confident that the Court will compel Defendant to answer Plaintiff's Interrogatories.

Prior to seeking the Court's involvement, we ask that you meet and confer with us about your objection to Plaintiff's Interrogatories. Prior to our discussing this matter, we ask that within seven (7) days of this letter, you provide a detailed basis for its excessiveness objection and a date and time in the next two weeks that you are available to discuss Defendant's objection. If we do not hear from you within seven (7) days, then Plaintiff will have no alternative but to move to compel Defendant's response to Plaintiff's Interrogatories. You can reach me at the number above or contact my law partner, J.B. Perrine, at (334) 262-6485.

Sincerely,

P. Gregory Haddad

P. Gregory Haddad
PGH/bb

cc: Scott McKay (*via email*)

****
*** FAX TX REPORT ***
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TRANSMISSION OK

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BAILEY&GLASSER LLP

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Internet www.baileyglasser.com
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2855 Cranberry Square
Morgantown, WV 26508

FACSIMILE TRANSMITTAL SHEET

TO: Jeremiah Quane
COMPANY:
208-345-8660
FAX NUMBER:

FROM: Beely
DATE: 7-6-12
TOTAL NO. OF PAGES INCLUDING COVER: 3
SENDER'S REFERENCE NUMBER:

PHONE NUMBER:

RE: Charles Ballard v Brandt et al
YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

BAILEY&GLASSER LLP

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2855 Cranberry Square
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July 25, 2012

Mr. Jeremiah A. Quane
P.O. Box 519
Boise, ID 83701-0519
Facsimile: (208) 345-8660

VIA US MAIL AND FACSIMILE

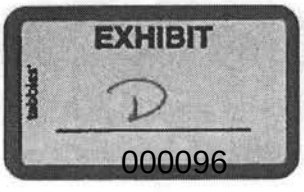
Re: Charles Ballard v. Brian Kerr, M.D., et al, Case No. CV OC 1204792

Dear Mr. Quane,

By letter dated July 6, 2012 we requested you provide us a written response as to the legal basis for your objections to our first set of discovery based on the alleged excessive number of interrogatories. We have yet to receive a written response, although acknowledge your office did call mine about setting up a call to discuss. I was in trial the week of July 9 and following went on a vacation the week of the 16th. I understand you may have been out of the office as well, but notwithstanding that fact, we have not received any written response as requested in our letter. This letter would precede any telephone conversations in an attempt to resolve this discovery dispute. I am somewhat pessimistic that we can resolve the dispute short of court intervention, but always like to be able to represent to the court our efforts prior to filing a motion to compel. I recognize there are attorneys whose litigation strategy is to delay the discovery process through meritless objections. Having not litigated any matters with you previously, I am willing to give everyone the benefit of the doubt, but find your objections without legal foundation.

Given the fact over two weeks has passed since our letter of July 6, I am requesting yet again written response setting forth the legal basis for your calculation that our interrogatories exceed those permitted. I will need the response by Friday, July 27 to avoid our having to file a motion to compel. If we do not receive the response by close of business on Friday, I will assume you stand by your objection as stated in your discovery responses and we will proceed on that basis. If you wish to reconsider your objection and respond to the discovery requests as propounded, then we will be happy to give you an additional two weeks to file responses.

Be assured that I always prefer to litigate cases amicably. However, having an obligation to my client, I will aggressively deal with any attempt to derail what should be an open and free flow of information as part of the discovery process.



Sincerely,

P. Gregory Haddad

P. Gregory Haddad
PGH/bb

cc: Scott McKay (*via email*)

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

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PSWD/SUBADDRESS	
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PGS.	3
RESULT	OK

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FACSIMILE TRANSMITTAL SHEET

TO: Jeremiah Quane
COMPANY:

FROM: Becky
DATE: 7/25/12

FAX NUMBER: 208-345-8660
PHONE NUMBER:

TOTAL NO. OF PAGES INCLUDING COVER: 3
SENDER'S REFERENCE NUMBER:

RE: Charles Ballard v Brian Kerr M.D. et al
YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

FACSIMILE TRANSMISSION

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July 26, 2012

TO: **P. Gregory Haddad**
BAILEY & GLASSER LLP
Morgantown, West Virginia
Fax No. **304-594-9709**
Phone No. 304-594-0087

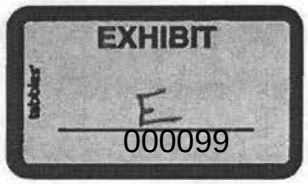
FROM: **Jeremiah A. Quane**

Re: Case Name *Ballard v. Kerr*

Our File No. 1107/25-938

Comments: Please see the attached letter of today's date.

Including the cover sheet, this facsimile contains 5 pages.



CAREY PERKINS LLP

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MARISA S. CRECELIUS
KEVIN A. GRIFFITHS
TERRENCE S. JONES
DAVID W. KNOTTS
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BRUCE R. McALLISTER
MATTHEW F. McCOLL
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DAVID S. PERKINS
CARSTEN A. PETERSON
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WITH ATTORNEYS ADMITTED TO PRACTICE LAW IN CALIFORNIA, IDAHO, OREGON, UTAH, WASHINGTON AND WYOMING

*ADMITTED TO PRACTICE IN IDAHO AND WYOMING

July 26, 2012

VIA FACSIMILE ONLY
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

This is the first opportunity I have had to respond to your letter of July 6 due to my commitments in cases in eastern Idaho, although my assistant telephoned your office July 16 and informed the person who answered the phone that I was unavailable until today or yesterday.

I would like to offer you my comments regarding your letter of July 6. I understand the position you have taken in regard to my objections to the interrogatories on the grounds that they exceed the number allowed by our rule of civil procedure. My objection to the interrogatories stated the grounds and this is all that is required for such an objection. In your letter, you state that I have not even made a half-hearted attempt to formulate a meritorious objection. Since your letter states your position on the number of interrogatories, your statement in the letter has no bearing upon the issue and it makes no difference what you assume I did or did not do in formulating the objections. In fact, your statement is false and you had no basis to even make such a statement. I consider this to be an irrelevant comment that is meant to be derogatory of me.

In your letter, you arbitrarily and unilaterally give me seven days to provide a detailed basis for my objections and if I do not respond within seven days, you will file a motion to compel. This deadline does not take into consideration my availability to respond and, of course, it is made irrespective of my availability. Most experienced lawyers would

have stated that they would like to have my response as soon as I am available to give a response. Since this is apparently your policy, there will be in, all likelihood, situations in this case where I will be forced to adhere to your policy, such as the scheduling of matters and court appearances.

I have another specific instance where you and your local counsel arbitrarily selected July 31 for the date for the subpoena of records of Sprint Nextel Corporate Security. The subpoena I received specifies July 31, office of your local counsel, but a time is not listed, even though the form of the subpoena calls for a place, date and time. No one contacted me to see if I was available and I am not, which is not the way things are done in Boise. Because this seems to be the way you and local counsel practice, I will take the liberty of scheduling matters, including the deposition of your client on a date, time and place I choose, without obtaining your availability.

Your letter of July 25 also demands my reaction. In that letter, you state that there are attorneys whose litigation strategy is to delay the litigation process through meritless objections, although you say you are willing to give everyone the benefit of the doubt. This statement has no bearing whatsoever on the objections I have asserted and your position on the objections. I fail to understand why you included this statement unless it was meant to disparage me.

In your letter of July 25 you also arbitrarily set a deadline of July 27. I will not be in my office July 27 because I must travel to another city on business. It is not the custom in Boise to impose such unilateral and arbitrary deadlines, which give no difference to the opposing attorney's availability.

I would also like to state that threats from an attorney serve no purpose or worthwhile function. You have stated your position on the number of interrogatories, which is fine, but the threats you assert are irrelevant and do not serve as a means of reaching an agreement on answering the interrogatories. In fact, they have the opposite effect.

Rule 33(a)(3), I.R.C.P. reads in relevant part:

> "No party shall serve upon any other single party to an action more than forty (40) interrogatories, in which sub-parts of interrogatories shall count as separate interrogatories. . .".

The key to the interpretation of this Rule is whether the other parts of the interrogatory, in addition to the primary interrogatory require answers on specific issues that are designated. Looking at Interrogatory No. 1, it asks for the identity of the person or persons responding to these Interrogatories and Requests. This is one Interrogatory if only Dr. Kerr is identified. The other parts of the Interrogatory specify two distinct and separate subjects that are in addition to the identity of Dr. Kerr, namely their date(s) of birth

and addresses for the past five years. These two parts require answers for each that are different from each other and are not embodied in the identity of Dr. Kerr. As respects Dr. Kerr, this constitutes three interrogatories. If more than Dr. Kerr is identified in responding to the interrogatories, such as one person, this is three more interrogatories, or a total of six. If there are three people who responded to the Interrogatory in addition to Dr. Kerr, this is nine more interrogatories.

The same analysis of Interrogatory No. 2 applies, although No. 2 is far more extensive than No. 1. The Interrogatory asks for the employment history for the last ten years of Dr. Kerr and any agent, servant, or employee who had any interaction or communication with Krystal Ballard. In addition to this, there are six specific questions to answer, each of which require separate answers that are different and distinct for one another. They are: 1) employer name; 2) job title; 3) job duties, 4) dates of employment; 5) reason for leaving employment; and 6) salary or wages for each employment. This is a total of six separate interrogatories for Dr. Kerr. Add to this other agents and employees of Dr. Kerr who had any interaction or communication with Krystal Ballard, and the number of interrogatories is increased dramatically by a multiplication of six for each employee or agent.

Interrogatory No. 3 contains five separate subjects that require answers and each of them is distinct and separate from the others.

Interrogatory No. 8 is actually two separate interrogatories, despite the fact that they are designated as Interrogatory No. 8.

Interrogatory No. 10 contains three separate subjects or categories to answer, each of which are distinct and different from one another.

Interrogatory No. 11 refers to Dr. Kerr a nd the agents, servants and employees of Silk Touch Laser. It then has four separate subjects that require answers by Dr. Kerr and the employees of Silk Touch Laser.

Interrogatory No. 16 specifies four specific subjects or categories that require answers, each of which are different from the others, despite the fact that the Interrogatory is directed to Dr. Kerr and Krystal Ballard and Charles Ballard.

Interrogatory No. 19 applies to Dr. Kerr, Silk Touch Laser and/or any employee of either which involves separate answers for each. In addition to this, the Interrogatory specifies six subjects that require answers by each person and entity to whom the Interrogatory is directed. Each subject is different from the others.

Interrogatory No. 20 is actually two separate interrogatories, even though they are listed as one interrogatory. The Interrogatory asks the identity of each witness and for each witness a brief summary of their expected trial testimony.

Interrogatory No. 23 is directed to Dr. Kerr, and agents, servants and employees of Silk Touch Laser. It then designates four separate categories that require answers, each of which are distinct and different from the others.

Several of the interrogatories request the production of documents, data and tangible items. Rule 33 for interrogatories does not require or pertain to the production of such material.

When I prepared the objections to the interrogatories, I conducted an analysis of each one in the fashion and way I have set forth in this letter. I did not, as you put it, even made a half-hearted attempt to formulate a meritorious objection. In my opinion, my chances of prevailing on my objections are at the least equal to your chances of prevailing on your position. Even so, I think we must make every effort to reach an accord.

According to our Rules, if you file a motion to compel answers, you must certify that you have tried to resolve our dispute without court action. Your letter of July 6 simply provides that you are right and I am wrong and that the court will compel answers to the interrogatories. For a starting point on our efforts to reconcile our differences, I suggest that you submit a revised set of interrogatories that come close to meeting the Rule on 40 interrogatories, which I can then consider and hopefully agree to answer, even if they slightly exceed 40 in number. I think that our Rules and practices require you to give some respect or recognition to my position as well as yours, and in an effort to reach an agreement. Your position that I am wrong and you are right is not compatible with this requirement and practice.

Very truly yours,

Jeremiah A. Quane

JAQ/kb

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

August 6, 2012

ghaddad@baileyglasser.com

VIA US MAIL AND FACSIMILE
Mr. Jeremiah A. Quane
P.O. Box 519
Boise, ID 83701-0519
Facsimile: (208) 345-8660

Re: Charles Ballard v. Brian Kerr, M.D., et al, Case No. CV OC 1204792

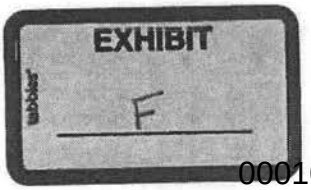
Dear Mr. Quane,

I am in receipt of your letter faxed to me July 26, 2012 and thank you for your response. While undoubtedly given the tenor of your letter we will be at loggerheads with respect to reaching a resolution concerning the objections made based on what you perceive to be an excessive number of interrogatories, I nonetheless think it best to try to resolve these issues short of court intervention. If not, then I want to be able to represent to the Court that every effort has been made to resolve this dispute.

First, Rule 33 of the Idaho Rules of Civil Procedure indicate that "no party shall serve upon any other single party to any action, more than forty (40) interrogatories, in which subparts of interrogatories shall count as separate interrogatories..." As you can see from the interrogatories, they were directed both to Silk Touch as well as Dr. Kerr individually. Because your "math" and mine may differ, I will identify which interrogatories are directed at Dr. Kerr and which at Silk Touch so I can place your mind at ease with respect to the number of interrogatories we served on your respective clients. I will also withdraw certain interrogatories as indicated below. This is being done solely to avoid the need to waste the Court's time on a discovery dispute, not that I believe your objection is valid. Further, while we disagree as to how you have calculated the number of interrogatories, we are calculating the number based on your math only as a means of resolving this dispute without court intervention.

Interrogatory No. 1

We would request that you provide an answer as to the person or persons responding to these interrogatories and requests. You need not provide dates of birth or addresses for these individuals. This would account for arguably no more than 1 interrogatory to each of your clients based on your "math."



Interrogatory No 2

Interrogatory No. 2 is directed to both Dr. Kerr individually as well as Silk Touch. We withdraw the reason for leaving employment and salary/wage information. This would amount to three interrogatories directed at Dr. Kerr and three interrogatories directed at Silk Touch Spa based upon your "math."

Interrogatory No. 3

This interrogatory would be directed at each of your clients. Assuming your math is correct, this would involve six interrogatories.

Interrogatory No. 4

Interrogatory No. 4 is directed to both of your clients and it is a single interrogatory to each.

Interrogatory No. 5

This interrogatory is directed to Silk Touch and is a single interrogatory. Attempting to suggest that producing information regarding manufacturer, model and serial number would be separate interrogatories is absurd.

Interrogatory No. 6

This is both an interrogatory and request for production. As for the interrogatory, Dr. Kerr can speak to his education, training and experience and it is a single interrogatory. I have never had it suggested that education, training and experience are three separate and distinct as those terms are used interchangeably, and are typically reflected in a CV.

Interrogatory No. 7

This is a single interrogatory directed at Dr. Kerr.

Interrogatory No. 8

Withdraw the interrogatory.

Interrogatory No. 9

This is a single interrogatory directed at Silk Touch.

Interrogatory No. 10

According to your math, this would be four interrogatories directed at Dr. Kerr.

Interrogatory No. 11

This interrogatory would be five interrogatories directed at each of your clients, according to your math.

Interrogatory No. 12

This is a single interrogatory directed at Dr. Kerr.

Interrogatory No. 13

This would be arguably, pursuant to your math, two interrogatories directed at Silk Touch since it requests names and addresses.

Interrogatory No. 14

We will withdraw Interrogatory No. 14 as it would be encompassed by Interrogatory No. 13.

Interrogatory No. 15

This encompasses both an interrogatory and request for production. As to the interrogatory, it is a single interrogatory directed at Silk Touch.

Interrogatory No. 16

I think you would be hard-pressed to argue that trying to account for all communications would be more than a single interrogatory even though you have to identify the manner in which you communicated. This is directed at Dr. Kerr.

Interrogatory No. 17

This would be two interrogatories directed at both Dr. Kerr and Silk Touch based on your math. One asking who was in the room and the second who made contact or inserted any instruments during the procedure.

Interrogatory No. 18

Interrogatory No. 18 is directed exclusively to Silk Touch and is a single interrogatory.

Interrogatory No. 19

This would be exclusively directed at Silk Touch and it has five subparts basically asking for information concerning inspections. According to your math, this would be five interrogatories directed at Silk Touch.

Interrogatory No. 20

Interrogatory No. 20 is directed to both Dr. Kerr and Silk Touch, and your math would have it at two interrogatories.

Interrogatory No. 21

Interrogatory No. 21 is essentially asking for what is on a Dec sheet and would be directed at both of your clients. Not even for sake of argument would I consider that to be separate interrogatories, but rather one toward each.

Interrogatory No. 22

Interrogatory No. 22 is directed at Silk Touch and Dr. Kerr and would be two interrogatories to each, one how they sterilized themselves and second, how they sterilized equipment.

Interrogatory No. 23

This interrogatory would be directed to both your clients and it would be five interrogatories according to your math.

Having totaled this out, I account for 39 interrogatories directed at Silk Touch and 36 interrogatories directed at Dr. Kerr. Hopefully, we can agree to move this along rather than delaying discovery. Please respond to whether you will agree to respond to the discovery requests based on the modifications and clarifications set forth in this letter by Friday, August 10, 2012. Otherwise, we will move the court to compel responses.

In any event, irrespective of our ability to work out our differences as to these discovery requests, we would request dates on which Dr. Kerr can be deposed. While the deposition may not occur until late August or early September, I would like to have some dates within the next two weeks to consider.

Thank you for your attention to this matter. If we do not hear from you, we will assume you continue to take issue and stand by your objections. We will then file a motion to compel.

Sincerely,

P. Gregory Haddad
PGH/tjl

cc: Scott McKay (*via email*)

553996

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

JOB NO.	4109
DESTINATION ADDRESS	12083458660
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	08/06 15:41
USAGE T	01'16
PGS.	5
RESULT	OK

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FACSIMILE TRANSMITTAL SHEET

TO: Mr. Jeremiah A. Quane	FROM: P. Gregory Haddad
COMPANY:	DATE: AUGUST 6, 2012
FAX NUMBER: (208) 345-8660	TOTAL NO. OF PAGES INCLUDING COVER:
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: Charles Ballard v. Brian Kerr, M.D.	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

FACSIMILE TRANSMISSION

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Sixteenth Floor
U.S. Bank Plaza
P.O. Box 519
Boise, Idaho 83701-0519
Telephone (208) 345-8600
Fax (208) 345-8660

August 9, 2012

TO: **P. Gregory Haddad**
BAILEY & GLASSER LLP
Morgantown, West Virginia
Fax No. 304-594-9709
Phone No. 304-594-0087

FROM: **Jeremiah A. Quane**

Re: Case Name *Ballard v. Kerr*

Our File No. 1107/25-938

Comments: Please see the attached letter of today's date.

Including the cover sheet, this facsimile contains 3 pages.

EXHIBIT
G
000109

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WITH ATTORNEYS ADMITTED TO PRACTICE LAW IN CALIFORNIA, IDAHO, OREGON, UTAH, WASHINGTON AND WYOMING

*ADMITTED TO PRACTICE IN IDAHO AND WYOMING

E. B. SMITH (1896-1975)
JEREMY D. BROWN
LESLIE S. BROWN
DONALD F. CAREY*
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KEVIN A. GRIFFITHS
TERRENCE S. JONES
DAVID W. KNOTTS
AUBREY D. LYON
BRUCE R. McALLISTER
MATTHEW F. McCOLL
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CARSTEN A. PETERSON
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JEREMIAH A. QUANE
DINA L. SALLAK
RICHARD L. STUBBS
ERICA J. WHITE
TRACY L. WRIGHT
AMY G. ZAVIDOW

August 9, 2012

VIA FACSIMILE ONLY
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

Your interrogatories are addressed separately to four Defendants being Dr. Kerr, Silk Touch Laser, LLP, Silk Touch MedSpa and Laser Center, and Silk Touch MedSpa, Laser, and Lipo of Boise and each Defendant is requested to answer the full set of the Interrogatories. The format, style and description of the interrogatories does not separate or identify which of the interrogatories any one Defendant is requested to answer. Section Q, page 5, of the interrogatories states "you and/or "yours" means Dr. Kerr, Silk Touch Laser, LLP, Silk Touch MedSpa and Laser Center, and Silk Touch MedSpa, Laser, and Lipo of Boise. I fail to understand your logic and contention in your letter of August 6 that some of the interrogatories are directed only to a particular Defendant, such as your reference to numbers 5, 7, 9, 12, 13, 15, 18 and 19. You then go on to state that you account for 39 interrogatories directed at Silk Touch Laser, LLP and 36 interrogatories directed at Dr. Kerr. Your statements are simply not in conformity with the style, description and format of the interrogatories.

It is impossible to figure out which of the interrogatories are directed to whom, despite the explanation in your letter. There is no reason not to send separate sets of interrogatories directed to a particular Defendant. If we end up in Court over this, we should and must have a clear and concise record for the Judge to assess and your letter of August 6 does not fulfill this need. I need interrogatories directed to a particular

Defendant instead of the method you have employed. As a solution, I strongly recommend you do this and we can then go forward and hopefully agree.

You again, in your letter of August 6, impose an arbitrary, unilateral deadline of August 10 for me to respond, without knowing if I am alive or in China. This is not the way things are done in Boise, even if you do it this way in West Virginia. You also threaten to move the Court to compel responses if I do not respond by August 10. Again, you do not take into account my availability to respond by August 10, but nevertheless, I am responding before August 10. Threats get you nothing.

You have asked for dates for the deposition of Dr. Kerr within the next two weeks of your letter with the suggestion that the deposition may not occur until late August or early September. I take it from this that you want dates in this time frame. Here again, you unilaterally impose a time frame for the deposition, which is very narrow in scope. I will tell you that my business makes it impossible to have the deposition in August and early September, much less the availability of Dr. Kerr. With this in mind, I will get you dates for our availability, but I am putting you on notice that they will not be in the time frame you demand. At the best, I am looking at October because I am booked solid in most of September, especially the later half.

Very truly yours,

Jeremiah A. Quane

JAQ/kb

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

COMES NOW Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rule 37(a)(2) of the Idaho Rules of Civil Procedure, and provides this Memorandum of Law in Support of Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories. A motion and affidavit of counsel has been contemporaneously filed herewith.

I. Factual Background

On March 16, 2012, Plaintiff filed the Complaint. In the Complaint, Plaintiff alleges, *inter alia*, that Defendants negligently performed cosmetic surgery upon, and negligently provided post-operative care to, Krystal Ballard, causing her death on July 26, 2010. (Compl. ¶¶ 18-20.)

On June 6, 2012, Plaintiff served on Defendants' counsel his First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (attached to Affidavit of Counsel at **Exhibit A**).

On June 29, 2012, Defendants responded to Plaintiff's interrogatories with a single sentence objection: "Defendants object to the Plaintiff's First Set of Interrogatories on the grounds that the number of interrogatories, including sub-parts of interrogatories[,] exceed the number of interrogatories allowed by [Rule 33(a)(3) of the Idaho Rules of Civil Procedure]." (Defs.' Obj. to Pl.'s First Set of Interrogs. 1 (attached to Affidavit of Counsel at **Exhibit B**).) Defendants provided no explanation for, nor asked to speak to Plaintiff's counsel about, their objection.

On July 6, 2012, Plaintiff's counsel sent a letter via facsimile to Defendants' counsel (attached to Affidavit of Counsel at **Exhibit C**), and requested a written explanation as to why Defendants believed Plaintiff's twenty-three interrogatories exceeded the forty interrogatory

limit. In an attempt to avoid the Court's involvement, Plaintiff's counsel also requested a phone call with Defendants' counsel to follow Defendants' written response.

On July 16, 2012, an assistant from Defendants' counsel's office telephoned Plaintiff's counsel to advise that Defendants' counsel would be unavailable until the latter part of the month. On July 25, 2012, having received no written, legal basis for Defendants' objection, Plaintiff's counsel sent another letter by facsimile (attached to Affidavit of Counsel at **Exhibit D**), which again requested a written justification for Defendants' objection to Plaintiff's interrogatories. The next day, Defendants' counsel faxed a letter (attached to Affidavit of Counsel at **Exhibit E**), which sets forth an extraordinarily narrow reading of Rule 33(a)(3) with respect to counting interrogatories. For example, according to Defendants, Plaintiff's Interrogatory No. 1, which seeks the identity of the person providing answers, including that person's date of birth and addresses for the past five years, must be counted as three interrogatories. Likewise, Defendants assert that Plaintiff's Interrogatory No. 6, which calls upon Defendant Kerr to state with specificity the education, training, and experience that qualified him to perform the cosmetic procedure at issue, must be counted as three interrogatories. Defendants further assert that the total of all subparts to a particular interrogatory must be multiplied by the number of individuals called upon to respond to same. Defendants apply this reasoning to Plaintiff's Interrogatory Nos. 2, 3, 8, 10, 11, 16, 19, 20, and 23.

By letter dated, and sent by facsimile to Defendants' counsel, on August 6, 2012 (attached to Affidavit of Counsel at **Exhibit F**), Plaintiff's counsel, having applied Defendants' method of computation to each and every one of Plaintiff's interrogatories, limited the scope of particular interrogatories, expressly assigned particular interrogatories to specific Defendants,

and withdrew some interrogatories entirely. Using Defendants' narrow (and incorrect) construction of Rule 33, Plaintiff propounded thirty-six interrogatories upon Defendant Kerr and thirty-nine interrogatories upon the Silk Touch Defendants.

Three days later, on August 9, 2012, Defendants' counsel faxed a response letter (attached to Affidavit of Counsel at **Exhibit G**) to Plaintiff's counsel. By this letter, Defendants' counsel expressed incredulity regarding Plaintiff's counsel's application of Defendants' counsel's methodology to address Defendants' objection and resolve the discovery dispute.

Defendants have not answered any of Plaintiff's interrogatories. Accordingly, Plaintiff now has no alternative but to ask the Court to compel full, good-faith responses to Plaintiff's interrogatories.

II. Argument

Rule 33(a)(3) provides as follows:

> No party shall serve upon any other single party to an action more than forty (40) interrogatories, in which subparts of interrogatories shall count as separate interrogatories, without first obtaining a stipulation of such party to additional interrogatories or obtaining an order of the court upon a showing of good cause granting leave to serve a specific number of additional interrogatories.

Idaho R. Civ. P. 33(a)(3). Though the Court has much discretion in addressing the scope of interrogatories in the face of objections, it is well-established that "[Rule 33] should be accorded a liberal interpretation" in effectuating its purpose: "to afford parties information regarding facts involved in the issues in suit to enable the proposing party to prepare for trial and to reduce the possibility of surprise in the trial." *Smith v. Big Lost River Irr. Dist.*, 83 Idaho 374, 383, 364 P.2d 146, 151 (1961).

And while liberal interpretation of discovery rules is certainly justified, this in no way precludes application of common sense. While addressing a similar discovery dispute, the Montana Supreme Court found that "[w]hile [Rule 33(a) of the Montana Rules of Civil Procedure] does not define the term 'subpart,' common sense dictates that one sentence containing three clauses does not constitute three separate interrogatories." *Richardson v. Montana*, 331 Mont. 231, 243, 130 P.3d 634, 644 (2006). This is especially true when subparts are drafted to elicit information pertaining to a common theme. Charles A. Wright et al., Federal Practice and Procedure, § 2168.1 (3d ed. 2002) ("Subparts directed at eliciting details concerning a common theme should be considered a single question."); *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664-665 (D. Kan. 2004) (finding that subparts relating to a common theme are not separate interrogatories). For this reason, "recipients of interrogatories are not entitled to object based on a selective count of the various clauses contained in the requests." *Richardson*, 331 Mont. at 233-234, 130 P.3d at 644.

Plaintiff filed this action in March. He propounded discovery requests upon Defendants on June 6, 2012. On August 6, 2012, Plaintiff, in great deference to Defendants' interpretation of Rule 33, made a good faith effort to resolve the dispute and to preclude the Court's involvement. Plaintiff's efforts have been met only with recalcitrance. Therefore, in an effort to move this case more efficiently toward disposition, Plaintiff asks the Court to compel Defendants to fully and completely answer his interrogatories. Pursuant to Rule 37(a)(4) of the Idaho Rules of Civil Procedure, Plaintiff also seeks reasonable expenses incurred in obtaining the order, including attorney's fees.

Dated this 24th day of August, 2012.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2012, I served a true and correct copy of the foregoing ***Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories*** by hand delivering the same to the following:

Jeremiah A. Quane
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16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CVOC12-04792 **NOTICE OF HEARING**

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff gives notice to the Defendants that he will call for hearing his Motion to Compel on September 12, 2012, at 2:30 p.m. before the Honorable Deborah A. Bail.

DATED this 27th day of August, 2012.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2012, I served a true and correct copy of the foregoing ***Notice of Hearing*** by hand delivering the same to the following:

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P.O. Box 519
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Scott McKay

Bart Tank 9/6/12 KW

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Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL FOR THE DEFENDANTS AND CERTIFICATION PER RULE 37(a)(2), I.R.C.P.

STATE OF IDAHO)
: ss.
County of Ada)

I, Jeremiah A. Quane, having been first duly sworn upon oath, deposes and says:

W

1. I am the attorney of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. Attached hereto, marked **Exhibit A**, is a true and correct copy of a letter from counsel for the Plaintiff dated August 6, 2012.

3. Attached hereto, marked **Exhibit B**, is a true and correct copy of a letter from counsel for the Defendants dated August 9, 2012.

4. Attached hereto, marked **Exhibit C**, is a true and correct copy of a letter from counsel for the Defendants dated August 29, 2012.

5. Attached hereto, marked **Exhibit D**, is a true and correct copy of a letter from counsel for the Defendants dated July 26, 2012.

6. Exhibits D, B and C were sent to counsel for the Plaintiff via facsimile on the respective dates of each letter.

7. Counsel for the Plaintiff has never responded to Exhibits B and C by any means or in any form.

8. Notwithstanding Exhibits B and C, counsel for the Plaintiff filed the Motion to Compel Defendants' answers to Plaintiff's first set of interrogatories.

9. Although not required by Rule 37(a)(2), I.R.C.P, counsel for the Defendants has in good faith conferred and attempted to confer with Plaintiff's counsel in an effort to resolve the issues regarding answers to Plaintiff's interrogatories without court action, as set forth in Exhibits B and C.

10. The failure of Plaintiff's counsel to respond to Exhibits B and C, but instead filing the motion to compel answers to interrogatories, does not constitute a good-

faith attempt to resolve or arrive at a mutually agreeable means of providing answers to interrogatories so as to avoid court action.

11. Taking into account Exhibits A, B, D and C in combination, it is Affiant's opinion and position that the discovery dispute between the parties can and should be resolved without court intervention on Plaintiff's motion to compel answers to interrogatories.

12. Although the affidavit of Plaintiff's counsel, Mr. Haddad, in paragraph 10 states that Plaintiff has in good faith conferred or attempted to confer with the Defendants in an effort to secure Defendants' answers to Plaintiff's interrogatories without court action, this statement is not supported by the content of Exhibits A, B and C and in particular the fact that Mr. Haddad has never responded to Exhibits B and C, which are an effort on the part of defense counsel to resolve the dispute and avoid court action.

13. It is the position of defense counsel that the affidavit of Mr. Haddad is not a valid certification under Rule 37(a)(2), I.R.C.P., which provides that the motion to compel answers to interrogatories must include a certification.

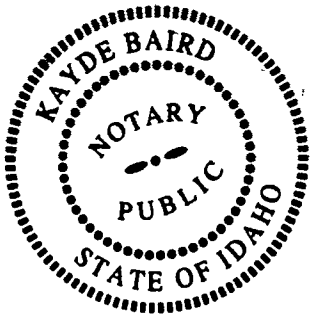
14. It is the position of defense counsel that without a valid certification by Mr. Haddad, the Plaintiff's motion to compel answers to the interrogatories is not subject to adjudication by the Court.

15. It is the position and opinion of defense counsel that Plaintiff's interrogatories, addressed separately to each of the four Defendants in the case, exceed the number of interrogatories allowed by Rule 33(a)(3), I.R.C.P. and that Plaintiff's counsel did not obtain a stipulation from defense counsel or an order of the Court to serve a specific number of additional interrogatories.

FURTHER your Affiant saith naught.

Jeremiah A. Quane

SUBSCRIBED AND SWORN to before me this 5th day of September, 2012.



Notary Public for Idaho
Residing at Boise, Idaho
My commission expires 9/18/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2012, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL FOR THE DEFENDANTS AND CERTIFICATION PER RULE 37(a)(2), I.R.C.P. by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657

Jeremiah A. Quane

Exhibit A

BAILEY&GLASSER LLP

Lawyers
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Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

August 6, 2012

ghaddad@baileyglasser.com

VIA US MAIL AND FACSIMILE
Mr. Jeremiah A. Quane
P.O. Box 519
Boise, ID 83701-0519
Facsimile: (208) 345-8660

Re: Charles Ballard v. Brian Kerr, M.D., et al, Case No. CV OC 1204792

Dear Mr. Quane,

I am in receipt of your letter faxed to me July 26, 2012 and thank you for your response. While undoubtedly given the tenor of your letter we will be at loggerheads with respect to reaching a resolution concerning the objections made based on what you perceive to be an excessive number of interrogatories, I nonetheless think it best to try to resolve these issues short of court intervention. If not, then I want to be able to represent to the Court that every effort has been made to resolve this dispute.

First, Rule 33 of the Idaho Rules of Civil Procedure indicate that "no party shall serve upon any other single party to any action, more than forty (40) interrogatories, in which subparts of interrogatories shall count as separate interrogatories..." As you can see from the interrogatories, they were directed both to Silk Touch as well as Dr. Kerr individually. Because your "math" and mine may differ, I will identify which interrogatories are directed at Dr. Kerr and which at Silk Touch so I can place your mind at ease with respect to the number of interrogatories we served on your respective clients. I will also withdraw certain interrogatories as indicated below. This is being done solely to avoid the need to waste the Court's time on a discovery dispute, not that I believe your objection is valid. Further, while we disagree as to how you have calculated the number of interrogatories, we are calculating the number based on your math only as a means of resolving this dispute without court intervention.

Interrogatory No. 1

We would request that you provide an answer as to the person or persons responding to these interrogatories and requests. You need not provide dates of birth or addresses for these individuals. This would account for arguably no more than 1 interrogatory to each of your clients based on your "math."

Interrogatory No 2

Interrogatory No. 2 is directed to both Dr. Kerr individually as well as Silk Touch. We withdraw the reason for leaving employment and salary/wage information. This would amount to three interrogatories directed at Dr. Kerr and three interrogatories directed at Silk Touch Spa based upon your "math."

Interrogatory No. 3

This interrogatory would be directed at each of your clients. Assuming your math is correct, this would involve six interrogatories.

Interrogatory No. 4

Interrogatory No. 4 is directed to both of your clients and it is a single interrogatory to each.

Interrogatory No. 5

This interrogatory is directed to Silk Touch and is a single interrogatory. Attempting to suggest that producing information regarding manufacturer, model and serial number would be separate interrogatories is absurd.

Interrogatory No. 6

This is both an interrogatory and request for production. As for the interrogatory, Dr. Kerr can speak to his education, training and experience and it is a single interrogatory. I have never had it suggested that education, training and experience are three separate and distinct as those terms are used interchangeably, and are typically reflected in a CV.

Interrogatory No. 7

This is a single interrogatory directed at Dr. Kerr.

Interrogatory No. 8

Withdraw the interrogatory.

Interrogatory No. 9

This is a single interrogatory directed at Silk Touch.

Interrogatory No. 10

According to your math, this would be four interrogatories directed at Dr. Kerr.

Interrogatory No. 11

This interrogatory would be five interrogatories directed at each of your clients, according to your math.

Interrogatory No. 12

This is a single interrogatory directed at Dr. Kerr.

Interrogatory No. 13

This would be arguably, pursuant to your math, two interrogatories directed at Silk Touch since it requests names and addresses.

Interrogatory No. 14

We will withdraw Interrogatory No. 14 as it would be encompassed by Interrogatory No. 13.

Interrogatory No. 15

This encompasses both an interrogatory and request for production. As to the interrogatory, it is a single interrogatory directed at Silk Touch.

Interrogatory No. 16

I think you would be hard-pressed to argue that trying to account for all communications would be more than a single interrogatory even though you have to identify the manner in which you communicated. This is directed at Dr. Kerr.

Interrogatory No. 17

This would be two interrogatories directed at both Dr. Kerr and Silk Touch based on your math. One asking who was in the room and the second who made contact or inserted any instruments during the procedure.

Interrogatory No. 18

Interrogatory No. 18 is directed exclusively to Silk Touch and is a single interrogatory.

Interrogatory No. 19

This would be exclusively directed at Silk Touch and it has five subparts basically asking for information concerning inspections. According to your math, this would be five interrogatories directed at Silk Touch.

Interrogatory No. 20

Interrogatory No. 20 is directed to both Dr. Kerr and Silk Touch, and your math would have it at two interrogatories.

Interrogatory No. 21

Interrogatory No. 21 is essentially asking for what is on a Dec sheet and would be directed at both of your clients. Not even for sake of argument would I consider that to be separate interrogatories, but rather one toward each.

Interrogatory No. 22

Interrogatory No. 22 is directed at Silk Touch and Dr. Kerr and would be two interrogatories to each, one how they sterilized themselves and second, how they sterilized equipment.

Interrogatory No. 23

This interrogatory would be directed to both your clients and it would be five interrogatories according to your math.

Having totaled this out, I account for 39 interrogatories directed at Silk Touch and 36 interrogatories directed at Dr. Kerr. Hopefully, we can agree to move this along rather than delaying discovery. Please respond to whether you will agree to respond to the discovery requests based on the modifications and clarifications set forth in this letter by Friday, August 10, 2012. Otherwise, we will move the court to compel responses.

In any event, irrespective of our ability to work out our differences as to these discovery requests, we would request dates on which Dr. Kerr can be deposed. While the deposition may not occur until late August or early September, I would like to have some dates within the next two weeks to consider.

Thank you for your attention to this matter. If we do not hear from you, we will assume you continue to take issue and stand by your objections. We will then file a motion to compel.

Sincerely,

P. Gregory Haddad
PGH/tjl

cc: Scott McKay (*via email*)

553996

Exhibit B

CAREY PERKINS LLP

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August 9, 2012

VIA FACSIMILE ONLY
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

Your interrogatories are addressed separately to four Defendants being Dr. Kerr, Silk Touch Laser, LLP, Silk Touch MedSpa and Laser Center, and Silk Touch MedSpa, Laser, and Lipo of Boise and each Defendant is requested to answer the full set of the interrogatories. The format, style and description of the interrogatories does not separate or identify which of the interrogatories any one Defendant is requested to answer. Section Q, page 5, of the interrogatories states "you and/or "yours" means Dr. Kerr, Silk Touch Laser, LLP, Silk Touch MedSpa and Laser Center, and Silk Touch MedSpa, Laser, and Lipo of Boise. I fail to understand your logic and contention in your letter of August 6 that some of the interrogatories are directed only to a particular Defendant, such as your reference to numbers 5, 7, 9, 12, 13, 15, 18 and 19. You then go on to state that you account for 39 interrogatories directed at Silk Touch Laser, LLP and 36 interrogatories directed at Dr. Kerr. Your statements are simply not in conformity with the style, description and format of the interrogatories.

It is impossible to figure out which of the interrogatories are directed to whom, despite the explanation in your letter. There is no reason not to send separate sets of interrogatories directed to a particular Defendant. If we end up in Court over this, we should and must have a clear and concise record for the Judge to assess and your letter of August 6 does not fulfill this need. I need interrogatories directed to a particular

Defendant instead of the method you have employed. As a solution, I strongly recommend you do this and we can then go forward and hopefully agree.

You again, in your letter of August 6, impose an arbitrary, unilateral deadline of August 10 for me to respond, without knowing if I am alive or in China. This is not the way things are done in Boise, even if you do it this way in West Virginia. You also threaten to move the Court to compel responses if I do not respond by August 10. Again, you do not take into account my availability to respond by August 10, but nevertheless, I am responding before August 10. Threats get you nothing.

You have asked for dates for the deposition of Dr. Kerr within the next two weeks of your letter with the suggestion that the deposition may not occur until late August or early September. I take it from this that you want dates in this time frame. Here again, you unilaterally impose a time frame for the deposition, which is very narrow in scope. I will tell you that my business makes it impossible to have the deposition in August and early September, much less the availability of Dr. Kerr. With this in mind, I will get you dates for our availability, but I am putting you on notice that they will not be in the time frame you demand. At the best, I am looking at October because I am booked solid in most of September, especially the later half.

Very truly yours,

Jeremiah A. Quane

JAQ/kb

Exhibit C

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August 29, 2012

VIA FACSIMILE ONLY
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

I am disappointed that you did not respond to my letter of August 9 (Exhibit G to your affidavit), but instead filed your motion to compel answers to your interrogatories and scheduled the hearing on the motion September 12. Before I go on in this letter, I want you to know that I have a deposition scheduled September 12 that makes it impossible for me to attend the hearing on September 12, and this deposition has been scheduled for over one month of my client in an Ada County case. I was not contacted to see if I was available on the 12th and if this date remains, I will not be able to attend the hearing. I leave this to you.

I do not believe we have exhausted our negotiations toward a resolution of our differences, based on your letter of August 6 and my letter of August 9, which I think we are obligated to do, in lieu of your motion to compel. To reiterate, your First Set of Interrogatories are directed, in their entirety to each Defendant in the case (four) and according to the style and format of the interrogatories, each Defendant is required to answer the full set of the interrogatories. I addressed this point in my letter of August 9, in which I stated that the interrogatories do not separate or identify which of the interrogatories any one Defendant is requested to answer. Your letter of August 6 contains several matters that appear to be conducive of the possible resolution of our respective positions, as does my letter of August 9. In your letter of August 6, you withdrew some of the interrogatories and specify that Interrogatory Nos. 5, 9, 13, 15, 18 and 19 are directed

only to Silk Touch and that by my math, there are 39 interrogatories directed at Silk Touch and 36 directed at Dr. Kerr. You then go on to say that you would like my response and agreement to answer the interrogatories based on the modifications and clarifications set forth in your letter of August 6. In my letter to you of August 9, in response to your letter of August 6, I proposed what I believe to be a suitable and reasonable way to resolve our differences, so as to conform to to the points you set forth in your letter of August 6, by suggesting that you submit separate sets of interrogatories to a particular Defendant. If you would do this, along the lines described in your letter of August 6, it is likely that we can agree and avoid court intervention, which is not too late to do. From my perspective, the problem is that your interrogatories are still the interrogatories in dispute, despite your letter of August 6. Your letter of August 6 does not change the existing interrogatories, such as the withdrawal of some and the specification of those that are directed to Dr. Kerr and Silk Touch. To me, this would be an easy and uncomplicated task on your part and it would rectify and resolve our differences. You would by this means, simply incorporate the points set forth in your letter of August 6 in the form of substitute interrogatories addressed to Dr. Kerr and Silk Touch, with the deletion of the interrogatories you withdraw in your letter of August 6. I assume your motion to compel is a flat rejection of this proposal on my part and the reason why I am disappointed by your not responding to my letter of August 9. My proposal is not to be considered a retreat from my objection to your interrogatories, but made in the spirit of compromise and to avoid a court hearing, which I am sure the Judge would like to avoid.

Dr. Kerr is available to be deposed in my office at 1:30 p.m. on October 10 through 12 and October 23 through 26. Would you please select one of these dates, if any of them are available to you, as soon as possible in order for Dr. Kerr to make his arrangements?

Very truly yours,

Jeremiah A. Quane

JAQ/kb

Exhibit D

CAREY PERKINS LLP

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July 26, 2012

VIA FACSIMILE ONLY
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

This is the first opportunity I have had to respond to your letter of July 6 due to my commitments in cases in eastern Idaho, although my assistant telephoned your office July 16 and informed the person who answered the phone that I was unavailable until today or yesterday.

I would like to offer you my comments regarding your letter of July 6. I understand the position you have taken in regard to my objections to the interrogatories on the grounds that they exceed the number allowed by our rule of civil procedure. My objection to the interrogatories stated the grounds and this is all that is required for such an objection. In your letter, you state that I have not even made a half-hearted attempt to formulate a meritorious objection. Since your letter states your position on the number of interrogatories, your statement in the letter has no bearing upon the issue and it makes no difference what you assume I did or did not do in formulating the objections. In fact, your statement is false and you had no basis to even make such a statement. I consider this to be an irrelevant comment that is meant to be derogatory of me.

In your letter, you arbitrarily and unilaterally give me seven days to provide a detailed basis for my objections and if I do not respond within seven days, you will file a motion to compel. This deadline does not take into consideration my availability to respond and, of course, it is made irrespective of my availability. Most experienced lawyers would

have stated that they would like to have my response as soon as I am available to give a response. Since this is apparently your policy, there will be in, all likelihood, situations in this case where I will be forced to adhere to your policy, such as the scheduling of matters and court appearances.

I have another specific instance where you and your local counsel arbitrarily selected July 31 for the date for the subpoena of records of Sprint Nextel Corporate Security. The subpoena I received specifies July 31, office of your local counsel, but a time is not listed, even though the form of the subpoena calls for a place, date and time. No one contacted me to see if I was available and I am not, which is not the way things are done in Boise. Because this seems to be the way you and local counsel practice, I will take the liberty of scheduling matters, including the deposition of your client on a date, time and place I choose, without obtaining your availability.

Your letter of July 25 also demands my reaction. In that letter, you state that there are attorneys whose litigation strategy is to delay the litigation process through meritless objections, although you say you are willing to give everyone the benefit of the doubt. This statement has no bearing whatsoever on the objections I have asserted and your position on the objections. I fail to understand why you included this statement unless it was meant to disparage me.

In your letter of July 25 you also arbitrarily set a deadline of July 27. I will not be in my office July 27 because I must travel to another city on business. It is not the custom in Boise to impose such unilateral and arbitrary deadlines, which give no difference to the opposing attorney's availability.

I would also like to state that threats from an attorney serve no purpose or worthwhile function. You have stated your position on the number of interrogatories, which is fine, but the threats you assert are irrelevant and do not serve as a means of reaching an agreement on answering the interrogatories. In fact, they have the opposite effect.

Rule 33(a)(3), I.R.C.P. reads in relevant part:

> "No party shall serve upon any other single party to an action more than forty (40) interrogatories, in which sub-parts of interrogatories shall count as separate interrogatories. . .".

The key to the interpretation of this Rule is whether the other parts of the interrogatory, in addition to the primary interrogatory require answers on specific issues that are designated. Looking at Interrogatory No. 1, it asks for the identity of the person or persons responding to these Interrogatories and Requests. This is one Interrogatory if only Dr. Kerr is identified. The other parts of the Interrogatory specify two distinct and separate subjects that are in addition to the identity of Dr. Kerr, namely their date(s) of birth

and addresses for the past five years. These two parts require answers for each that are different from each other and are not embodied in the identity of Dr. Kerr. As respects Dr. Kerr, this constitutes three interrogatories. If more than Dr. Kerr is identified in responding to the interrogatories, such as one person, this is three more interrogatories, or a total of six. If there are three people who responded to the Interrogatory in addition to Dr. Kerr, this is nine more interrogatories.

The same analysis of Interrogatory No. 2 applies, although No. 2 is far more extensive than No. 1. The Interrogatory asks for the employment history for the last ten years of Dr. Kerr and any agent, servant, or employee who had any interaction or communication with Krystal Ballard. In addition to this, there are six specific questions to answer, each of which require separate answers that are different and distinct for one another. They are: 1) employer name; 2) job title; 3) job duties, 4) dates of employment; 5) reason for leaving employment; and 6) salary or wages for each employment. This is a total of six separate interrogatories for Dr. Kerr. Add to this other agents and employees of Dr. Kerr who had any interaction or communication with Krystal Ballard, and the number of interrogatories is increased dramatically by a multiplication of six for each employee or agent.

Interrogatory No. 3 contains five separate subjects that require answers and each of them is distinct and separate from the others.

Interrogatory No. 8 is actually two separate interrogatories, despite the fact that they are designated as Interrogatory No. 8.

Interrogatory No. 10 contains three separate subjects or categories to answer, each of which are distinct and different from one another.

Interrogatory No. 11 refers to Dr. Kerr a nd the agents, servants and employees of Silk Touch Laser. It then has four separate subjects that require answers by Dr. Kerr and the employees of Silk Touch Laser.

Interrogatory No. 16 specifies four specific subjects or categories that require answers, each of which are different from the others, despite the fact that the Interrogatory is directed to Dr. Kerr and Krystal Ballard and Charles Ballard.

Interrogatory No. 19 applies to Dr. Kerr, Silk Touch Laser and/or any employee of either which involves separate answers for each. In addition to this, the Interrogatory specifies six subjects that require answers by each person and entity to whom the Interrogatory is directed. Each subject is different from the others.

Interrogatory No. 20 is actually two separate interrogatories, even though they are listed as one interrogatory. The Interrogatory asks the identity of each witness and for each witness a brief summary of their expected trial testimony.

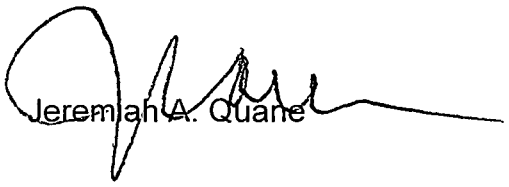
Interrogatory No. 23 is directed to Dr. Kerr, and agents, servants and employees of Silk Touch Laser. It then designates four separate categories that require answers, each of which are distinct and different from the others.

Several of the interrogatories request the production of documents, data and tangible items. Rule 33 for interrogatories does not require or pertain to the production of such material.

When I prepared the objections to the interrogatories, I conducted an analysis of each one in the fashion and way I have set forth in this letter. I did not, as you put it, even made a half-hearted attempt to formulate a meritorious objection. In my opinion, my chances of prevailing on my objections are at the least equal to your chances of prevailing on your position. Even so, I think we must make every effort to reach an accord.

According to our Rules, if you file a motion to compel answers, you must certify that you have tried to resolve our dispute without court action. Your letter of July 6 simply provides that you are right and I am wrong and that the court will compel answers to the interrogatories. For a starting point on our efforts to reconcile our differences, I suggest that you submit a revised set of interrogatories that come close to meeting the Rule on 40 interrogatories, which I can then consider and hopefully agree to answer, even if they slightly exceed 40 in number. I think that our Rules and practices require you to give some respect or recognition to my position as well as yours, and in an effort to reach an agreement. Your position that I am wrong and you are right is not compatible with this requirement and practice.

Very truly yours,



Jeremiah A. Quane

JAQ/kb

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Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' LEGAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND PROPOSAL

This matter is before the Court on Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories, supported by Plaintiff's memorandum of law and the affidavit, with exhibits, of Plaintiff's counsel Philip Haddad and opposed by this

Legal Memorandum and Proposal and the Affidavit of Counsel for the Defendants, Jeremiah A. Quane, with exhibits. Defendants' position is threefold:

1. The Interrogatories exceed the number allowed by Rule 33(a)(3), I.R.C.P.

2. Plaintiff's Motion does not include a valid certification as required by Rule 37(a)(2), I.R.C.P., and is therefor not subject to an adjudication by the court.

3. The refusal or failure of counsel for the Plaintiff to continue negotiations that are reflected in Exhibits A, B, and C to the Affidavit of Jeremiah A. Quane, which in all likelihood, would resolve the issues regarding Answers to Interrogatories and render Plaintiff's Motion moot.

I.
PROPOSAL

The Plaintiff's Interrogatories are directed separately in their entirety to Dr. Kerr, Silk Touch Laser, L.L.P., and two other entity Defendants, and each Defendant is requested to answer the full set of the Interrogatories. The style, format and description of the Interrogatories do not separate or identify which of the Interrogatories any one Defendant is asked to answer, i.e., every Interrogatory must be answered in full by each Defendant, irrespective of the answers provided by any other Defendant. This point was discussed in Exhibits B and C to the Affidavit of Jeremiah A. Quane. Exhibit A to the Affidavit of Jeremiah A. Quane sets forth the Plaintiffs' response to Exhibit D of the Affidavit of Jeremiah A. Quane, and contains several modifications and changes to Plaintiff's Interrogatories, as follows:

1. Complete withdrawal of Interrogatory numbers 8 and 14.

2. Withdrawal of portions of Interrogatory numbers 1 and 2.

3. The designation of Interrogatories to both Dr. Kerr and Silk Touch, being numbers 1, 2, 3, 4, 11, 17, 20, 21, 22, and 23.

4. The designation of Interrogatories to only Dr. Kerr, being numbers 6, 7, 10, 12, and 16.

5. The designation of Interrogatories to only Silk Touch, being numbers 5, 9, 13, 15, 18, and 19.

Exhibits B and C to the Affidavit of Jeremiah A. Quane set forth solutions and approaches to the dispute that embrace and incorporate the foregoing matters as expressed in Exhibit A to the Affidavit of Jeremiah A. Quane. The solutions and approaches simply ask that the Plaintiff serve substitute separate sets of Interrogatories to a particular Defendant that conform to the matters outlined in Exhibit A to the Affidavit of Jeremiah A. Quane. If this was to be done, the discovery dispute would be resolved without the need for a Court hearing on the Motion to Compel and doing so by Plaintiff's counsel would be an easy and uncomplicated undertaking. It is the position and request of defense counsel that the Court enter an Order for the Plaintiff's submission of substitute Interrogatories as set forth above as a means of facilitating the resolution of this discovery dispute. If the Court will do this, there will be no reason for the Court to decide the issue on the number of Interrogatories, and the issue on the adequacy of the certification of Plaintiff's counsel required by Rule 37(a)(2), I.R.C.P. This proposal by defense counsel

is made in the spirit of compromise and to avoid a Court hearing on Plaintiff's Motion to Compel.

II.
CALCULATION OF THE NUMBER OF INTERROGATORIES PER RULE 33(A)(3), I.R.C.P.

The Rule provides in part that "no party shall serve upon any other single party to an action more than forty (40) interrogatories, in which sub-parts of interrogatories shall count as separate interrogatories." There must be a reason why the Rule mandates that sub-parts of interrogatories shall count as separate interrogatories. The Plaintiff's Interrogatories do not specify sub-parts specifically, but not doing so does not exclude the existence of sub-parts. The Plaintiff's Legal Memorandum is replete with references to a common theme and therefor sub-parts concerning a common theme are considered a single question or interrogatory. If this is the case, the limitation on the number of interrogatories per Rule 33(a)(3) could and would be rendered nugatory and inapplicable. A simple and analogous scenario could be devised for an interrogatory that in effect would nullify the limitation of Rule 33(a)(3), such as an interrogatory that specifies the common theme "did you witness the motor vehicle accident between A and B, and if you did, set forth and describe facts and events that are specifically specified in the interrogatory." By this means, an unlimited number of parts associated with the common theme could be used in the interrogatory and void the limitations of Rule 33(a)(3). In looking at Plaintiff's Interrogatory No. 11, this situation is exemplified. This Interrogatory contains four parts consisting of a list of date and each training, the individuals who attended each training, the person and/or entity which provided the training, and a description of the matters

discussed during the training. These are sub-parts that require different and separate answers by Dr. Kerr and Silk Touch Laser.

A sub-part by definition must relate to some other aspect or provision of an interrogatory, otherwise that term would not have been used in Rule 33(a)(3). A key to the interpretation of Rule 33(a)(3), in which sub-parts of interrogatories shall count as separate interrogatories, is whether the other parts of the interrogatory, in addition to the primary or initial part of the interrogatory, require answers on specific issues or matters that are designated and Plaintiff's Interrogatory numbers 1, 2, 3, 9, 10, 11, 14, 15, 16, 17, 19, 20, and 23 do just this. Interrogatory number 8 is actually two separate Interrogatories that are denoted as one Interrogatory. To the best of undersigned counsel's knowledge, there are no Idaho Supreme Court decisions that define sub-part or the meaning of sub-parts as that term is used in Rule 33(a)(3). The same is true as respects Idaho Court of Appeals decisions.

Plaintiff cites to the Idaho case, ***Smith v. Big Lost River Irr. Dist.,*** 83 Idaho 374, 383, 364 P.2d 146, 151 (1961). ***Smith,*** it should be noted, was a case which preceded the current rule, 33 (a)(3). The ***Smith*** Court makes no mention of how the number of interrogatories, or sub-parts, is to be calculated. In fact, ***Smith***, relies in part on a federal case in which the trial court was sustained on its ruling that a party was not obligated to answer certain interrogatives. See ***Newall v. Phillips Petroleum Co.,*** 144 F.2d 338, 1944 U.S. App LEXIS 4268 *8. There, the Plaintiffs had served 352 discovery requests. The 10th Circuit Affirmed the trial court's decision to sustain the objections to the requests, which the Court found onerous and cumulative.

It was these very abuses of the discovery process that led the federal courts to limit the number of interrogatories in 1993. The Federal Rules Advisory Committee noted "Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable." Charles A Wright et al., Federal Practice and Procedure, p.213.

When making its rule change, though, the federal rule, as well as the Montana state rule (see below), were changed to read that the number of interrogatives which may be served should include "discrete sub-parts," only, in the count. See F.R.C.P. 33(a)(1) and Mont.R.Civ.P 33.

The following cases are pertinent on the subject of counting sub-parts. ***Valdez v. Ford Motor Co.,*** 134 F.R.D. 296, 298 (D. Nev. 1991) (holding that local rule limiting interrogatories to "40 including subparts" "requires that every part of an interrogatory be counted and subject to the limitation of 40 . . . even when a subpart relates to the main interrogatory."). In ***Aetna Casualty and Surety Co. v. W.W. Grainger, Inc.***, 170 F.R.D. 454, 454 (E.D. Wis 1997), the court rejected the contention that subparts need not be counted if they are a logical extension of or directly related to a basic interrogatory. The use of the word "discrete" gets at the heart of the distinction in the cases cited by Plaintiff and to the heart of the matter at bar. Idaho's rule, pointedly, unlike the federal rule does not use the term "discrete subparts." Montana's rule does. Thus, when Plaintiff cites to a Montana Supreme Court case for support, the support is misplaced. See ***Richardson v. Montana,*** 130 P.3d 243 (Mont. 2006). There, the Court distinguish the various "clauses" contained within the questions posed by the State from "sub-parts" ***Id.,*** 130 P.3d

at 244. Idaho's Rules' drafters have made a clear choice of the approach set out in ***Aetna*** and ***Valdez***. Subparts, not discrete subparts, are to be counted as individual interrogatories. To find otherwise would make the Idaho rule meaningless. Plaintiffs could, as they have done here, pick a theme, and then ask numerous questions relating to that theme, and call it one interrogatory.

III.
CERTIFICATION REQUIRED BY RULE 37(a)(2), I.R.C.P.

The Plaintiff's Motion to Compel must include a certification that the Plaintiff has in good faith conferred or attempted to confer with defense counsel in an effort to secure the resolution of the discovery dispute without court action. Rule 37(a)(2), I.R.C.P. In the absence of a valid and accurate certification, the Plaintiff's Motion to Compel is not ripe for a decision of the Court.

The Affidavit of Jeremiah A. Quane sets forth the facts and events that support the conclusion that there is not an adequate certification as required by Rule 37(a)(2), primarily because Plaintiffs' counsel has not seen fit to respond to Exhibits B and C, which constitute, in effect, a departure from good faith efforts to resolve the dispute. Since Plaintiff's counsel has not provided a reason or explanation in regard to the proposals contained in Exhibits B and C, it is clear that he no longer wants to continue with negotiation or efforts to reach an agreement, despite his comments in Exhibit A that read "Having totaled this out, I account for 39 Interrogatories directed at Silk Touch and 36 Interrogatories directed at Dr. Kerr. Hopefully, we can agree to move this along rather than delaying discovery. Please respond to whether you will agree to respond to the discovery requests based on the modifications and clarifications set forth in this letter by Friday,

August 10, 2012. Otherwise we will move the Court to compel responses." Exhibit B, dated August 9, 2012 and Exhibit C, dated August 29, 2012 are defense counsel's responses. They essentially specify agreement to Exhibit A, subject to the condition that separate sets of Interrogatories be submitted to Dr. Kerr and Silk Touch that delete the Interrogatories withdrawn in Exhibit A. Exhibits B and C also describe the reasons for the proposal of separate Interrogatories to Dr. Kerr and Silk Touch. It is indeed puzzling and difficult to understand why Plaintiff's counsel has not responded to the proposals in Exhibits B and C which fact is not conducive of reaching a solution of the parties' differences.

IV.
CONCLUSION

The Defendants respectfully urge the Court to enter an Order for the Plaintiff's submission of substitute Interrogatories, an Order denying the Plaintiff's Motion to Compel Answers to Interrogatories, and an award of costs and attorney fees to the Defendants for opposing Plaintiff's Motion to Compel.

DATED this 5th day of September, 2012.

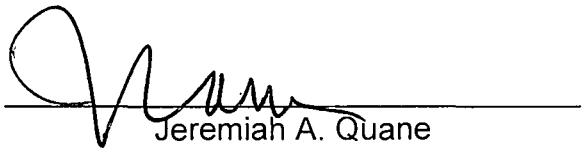
CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2012, I served a true and correct copy of the foregoing DEFENDANTS' LEGAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND PROPOSAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657



Jeremiah A. Quane

Time	Speaker	Note
01:28:35 PM		CVOC12-4792 Ballard v Kerr Motion to Compel
01:28:52 PM	Scott McKay	on behalf of the Plaintiff
01:28:56 PM	Jeremiah Quane	on behalf of the Defendant
02:32:15 PM	Judge	Calls case
02:32:42 PM	S. McKay	Argues Motion to Compel - still has not received answers to interrogatories
02:37:01 PM	J. Quane	Argues in opposition of Motion to Compel
02:57:24 PM	S. McKay	Responds
03:00:55 PM	Judge	Grants the Motion to Compel. Permits the Defense to answer separately for Dr. Kerr and Silk Touch Med Spa
03:02:10 PM		Response must be made within 14 days. Mr. McKay will submit an appropriate order
03:03:05 PM	Judge	Grants the Motion for fees.

Bail-
Tara
KT
9.17.12

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Montgomery, AL 36104
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL

559406

ORIGINAL

1

AFFIDAVIT OF P. GREGORY HADDAD

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, TO WIT:

I, P. Gregory Haddad, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am one of the attorneys representing Plaintiff in this litigation.

2. Plaintiff's attorneys fees and expenses associated with procuring Defendants' Answers to Plaintiff's First Set of Interrogatories total $7,151.36.

3. Plaintiff's attorneys fees related to Bailey & Glasser's efforts to procure Defendants' Answers to Plaintiff's First Set of Interrogatories are $5,244.00.

4. A true and accurate itemization of Bailey & Glasser's fees is attached hereto at **Exhibit A**.

5. Plaintiff's attorneys fees related to the efforts of Nevin, Benjamin, McKay & Bartlett to procure Defendants' Answers to Plaintiff's First Set of Interrogatories are $1,858.00.

6. A true and accurate itemization of Nevin, Benjamin, McKay & Bartlett's fees is attached hereto at **Exhibit B**.

7. Plaintiff's legal expenses related to the procurement of Defendants' Answers to Plaintiff's First Set of Interrogatories are $49.36.

8. A true and accurate itemization of the aforementioned expenses is attached hereto at **Exhibit C**.

9. Plaintiff provides these itemizations without waiving his attorney-client privilege or the protections afforded pursuant to the work product doctrine.

10. Plaintiff, through his counsel, endeavored to keep the aforementioned fees and expenses reasonable by engaging paralegals to perform work, by filing no reply, and by engaging local counsel to argue the Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories.

And further affiant saith not.

P. Gregory Haddad

STATE OF West Virginia ;
COUNTY OF Monongalia , **to-wit:**

Taken, subscribed and sworn to before me this 14th day of September, 2012.

My Commission expires: Nov. 7, 2021.

Tammy Livengood
Notary

OFFICIAL SEAL
TAMMY LIVENGOOD
NOTARY PUBLIC
STATE OF WEST VIRGINIA
260 Windy Lane
Bruceton Mills, WV 26525
My Commission Expires Nov. 7, 2021

559406

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2012, I served a true and correct copy of the foregoing ***Affidavit of Counsel*** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

559406

EXHIBIT A

Ballard, Charles Estate of Krystal BALL001 000001003362

Date	Employee	Hours	Rate	Amount	Description
07/03/2012	Perrine, J. B.	0.10	325.00	$32.50	Review Responses to discovery requests by Defendants.
07/05/2012	Perrine, J. B.	2.10	325.00	$682.50	Prepare letter to Defendant's counsel re: meet and confer about Defendant's objection on excessiveness grounds to Plaintiff's interrogatories. Monitor email traffic re: same.
07/06/2012	Bombard, Rebecca D.	0.50	95.00	$47.50	Finalizing Letter to Mr. Quane Regarding Objections to Discovery Requests.
07/09/2012	Bombard, Rebecca D.	0.10	95.00	$9.50	Receipt Phone Call From Jerry Quane's Office In Response to Letter From PGH.
07/25/2012	Perrine, J. B.	0.10	325.00	$32.50	Review letter to Quane re: responses to Plaintiff's Interrogatories.
07/25/2012	Perrine, J. B.	0.10	325.00	$32.50	Review letter to Quane re: responses to Plaintiff's Interrogatories.
07/25/2012	Bombard, Rebecca D.	0.30	95.00	$28.50	Draft Letter to Mr. Quane.
07/26/2012	Bombard, Rebecca D.	0.20	95.00	$19.00	Draft Letter to David Nevine Enclosing Letter That Was Sent to Mr. Quane.
07/26/2012	Bombard, Rebecca D.	0.10	95.00	$9.50	Receipt and Review of Letter From Jerimiah Quane In Response to Objections to Interrogatories.
07/31/2012	Haddad, Philip Greg	0.40	325.00	$130.00	Draft letter to defense counsel re discovery responses.
08/20/2012	Perrine, J. B.	0.10	325.00	$32.50	Organize Motion to Compel re: IROGS.
08/21/2012	McAllister, Brian J.	1.90	225.00	$427.50	Reviewed case documents in preparation for drafting of Plaintiff's Motion to Compel Defendants' Answers to Interrogatories
08/21/2012	McAllister, Brian J.	0.10	225.00	$22.50	Communicated with PGH re: Motion to Compel Defendants' Answer to Plaintiff's Interrogatories
08/21/2012	McAllister, Brian J.	1.20	225.00	$270.00	Legal research & brief writing - Drafted Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's Interrogatories
08/21/2012	McAllister, Brian J.	0.80	225.00	$180.00	Legal research & brief writing - Researched Idaho Rules of Civil Procedure in preparation for drafting Plaintiff's Motion to Compel Defendants' Answers to Interrogatories
08/22/2012	McAllister, Brian J.	0.20	225.00	$45.00	Communicate (in firm) - Emailed PGH, JBP, and MF re: Motion to Compel and supporting Memorandum of Law
08/22/2012	McAllister, Brian J.	0.10	225.00	$22.50	Communicate (outside counsel) - Communicated with local counsel's office in re: Affidavit in support of Motion to Compel
08/22/2012	McAllister, Brian J.	5.00	225.00	$1,125.00	Legal research & brief writing - Drafted Plaintiff's Motion to Compel and supporting Memorandum of Law
08/23/2012	McAllister, Brian J.	3.20	225.00	$720.00	Legal research & brief writing - Revised and edited Memorandum of Law in Support of Motion to Compel
08/23/2012	McAllister, Brian J.	0.20	225.00	$45.00	Drafted Affidavit of Counsel in support of Motion to Compel Legal research & brief writing
08/23/2012	McAllister, Brian J.	0.30	225.00	$67.50	Legal research & brief writing - Revised and edited Motion to Compel
08/23/2012	McAllister, Brian J.	1.20	225.00	$270.00	Legal research & brief writing - Legal Research related to Rule 33 of Idaho Rules of Civil Procedure
08/23/2012	McAllister, Brian J.	0.30	225.00	$67.50	Communicate (in firm) - Conferred by email with JBP re: revisions to Motion to Compel, Memorandum of Law
08/23/2012	McAllister, Brian J.	0.20	225.00	$45.00	Communicate (outside counsel) - Conferred with local counsel's office by phone and email re: Motion to Compel and supporting documents
08/23/2012	Perrine, J. B.	0.70	325.00	$227.50	Review and revise Motion to Compel and Memo of Law.
08/24/2012	McAllister, Brian J.	2.00	225.00	$450.00	Legal research & brief writing - Finalized Motion to Compel and Memorandum of Law for filing
08/24/2012	McAllister, Brian J.	0.50	225.00	$112.50	Legal research & brief writing - Drafted Affidavit of Counsel
08/24/2012	McAllister, Brian J.	0.10	225.00	$22.50	Communicate (in firm) - Conferred with PGH re: Affidavit of Counsel
08/24/2012	McAllister, Brian J.	0.10	225.00	$22.50	Communicate (outside counsel) - Communicated with local counsel re: final revisions to Motion to Compel, Memorandum of Law, and Affidavit of Counsel

09/10/2012	McAllister, Brian J.	0.20	225.00	$45.00	Conferred with PGH re: Motion to Compel Answers to Plaintiff's Interrogatories

$5,244.00

EXHIBIT B

Nickname	Ballard, Charles | 1126		
Full Name	Mr. Charles Ballard		
Address			
Phone 1		Phone 2	
Phone 3		Phone 4	
In Ref To			
Fees Arrg.	By billing value on each slip		
Expense Arrg.	By billing value on each slip		
Tax Profile	Exempt		
Last bill			
Last charge	9/13/2012		
Last payment		Amount	$0.00

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
8/24/2012 59755	SM preparation Review and preparation of case email (various); conferences with legal assistant regarding tasks and filing; telephone conversation with co-counsel; review pleadings and coordinate filing regarding motion to compel	265.00	1.40	371.00	Billable
8/24/2012 60018	DP legal assist. Proofread, format and finalize motion, memo and affidavit in support of motion to compel including exhibits; telephone conversation with court staff regarding hearing date; coordinate filing, service and copies to co-counsel	65.00	2.70	175.50	Billable
8/27/2012 60019	DP legal assist. Telephone conversation with Judge's clerk; prepare notice of hearing on motion to compel	65.00	0.20	13.00	Billable
9/6/2012 59936	SM preparation Review defendants' opposition to motion to compel	265.00	0.40	106.00	Billable
9/10/2012 59995	SM preparation Review IRCP regarding briefing; prepare email to co-counsel regarding same; telephone conversation with attorney Greg Haddad regarding hearing on motion to compel; review issues regarding hearing	265.00	0.70	185.50	Billable
9/12/2012 60015	SM preparation Prepare for hearing on motion to compel discovery including review of pleadings and cases cited therein, review of discovery requests and prior correspondence, further research and outline of argument; attend hearing and argue motion; prepare email update to co-counsel; review email regarding same; conference with David Nevin regarding status; email to assistant regarding order	265.00	3.20	848.00	Billable
9/13/2012 60016	SM preparation Review email from attorney Brian McAllister regarding submission of	265.00	0.60	159.00	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
	order and supporting documentation; telephone conversation with same; prepare order and letter to Court				
TOTAL	Billable Fees		9.20	$1,858.00	

Total of billable expense slips $0.00

Calculation of Fees and Costs

	Amount	Total
Fees Bill Arrangement: Slips By billing value on each slip.		
Total of billable time slips	$1,858.00	
Total of Fees (Time Charges)		$1,858.00
Total of Costs (Expense Charges)		$0.00
Total new charges		$1,858.00
New Balance Current	$1,858.00	
Total New Balance		$1,858.00

Professional Summary

Professional	Rate	Hours	Charges	Slip V
DP	65.00	2.90	$188.50	$188.50	0.00
SM	265.00	6.30	$1,669.50	$1,669.50	0.00

EXHIBIT C

ExpCode	UnitMult	DateDat	Units	Amount	Description
BALL001	Ballard, Charles				
000001003362	Estate of Krystal Ballard				
07/25/2012	E108	1.00	1.00	$0.45	Postage.
08/06/2012	E108	1.00	1.00	$0.45	Postage.
08/24/2012	E101	53.00	0.25	$13.25	Photocopies (53 x.25)
09/07/2012	C124	0.00	1.00	$12.42	Legal Research for August 2012.
09/12/2012	C150	0.00	1.00	$22.79	FedEx; Shipment to Scott McKay on 8/24/12.
				$49.36	

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND PLAINTIFF'S CLAIM FOR EXPENSES AND ATTORNEY FEES

I.
OBJECTIONS TO THE PROPOSED ORDER

Plaintiff's Motion to Compel was based entirely and exclusively on the Defendants' objection to Plaintiff's Interrogatories on the grounds that the number of

Interrogatories, including sub-parts, exceed the number of Interrogatories allowed by Rule 33(a)(3), I.R.C.P.

Plaintiff's Memorandum in Support of the Motion to Compel was directed at the Defendant's objection that the number of Interrogatories exceed the number allowed by Rule 33(a)(3). The Defendants' Opposing Legal Memorandum section on calculation of the number of interrogatories per Rule 33(a)(3) addressed the same issue. The other two sections of Defendants' Legal Memorandum comprised a proposal and the certification of Plaintiff's counsel per Rule 37(a)(2), I.R.C.P.

Oral argument on the Plaintiff's Motion to Compel was basically directed at the issue framed by the Plaintiff's Motion and the Defendants' objection. Plaintiff's Motion, supporting Memorandum, and Defendants' Legal Memorandum in Opposition did not pertain to or involve any issue regarding Defendants' right to assert objections to specific interrogatories in the event the Court should grant the Plaintiffs' Motion and overrule the Defendant's objection. Plaintiff's proposed Order contains the provision that Defendants are ordered to answer the Interrogatories without objection. The without objection part of the Order was not present to the Court for adjudication, if this part means the right of the Defendants to assert objections to specific interrogatories when the Defendants provide answers to the interrogatories. When the Defendants provide their answers to the interrogatories and if objections are asserted to any specific interrogatory, the validity or invalidity of any objection will be ripe for adjudication by the Court at that time.

The proposed Order also contains the provision that the Defendants answer the Interrogatories within 14 days of the hearing. At the hearing, the Court said that the

Defendants will answer the Interrogatories within 14 days, but the Court did not say when the 14 day period would start to run. Absent this, the Order should state when the 14 day period begins, taking into account Rule 6(a), I.R.C.P. that provides in part: "In computing any period of time prescribed or allowed by . . . order of court . . . the day of the act, event . . . after which the designated period of time begins to run is not to be included." The Plaintiff's proposed Order is not in compliance with Rule 6(a).

At the hearing, the Court said that the Defendants, when answering the Plaintiff's Interrogatories, can designate which of the Interrogatories apply to any particular Defendant and provide answers accordingly. The proposed Order does not contain this provision. The first full paragraph of the proposed Order is in conformity with the sole issue framed by the arguments of counsel, Plaintiff's Motion, and Defendants' opposition. Defendants propose that the second paragraph or sentence of the Order be deleted entirely and the date for answering the Interrogatories be incorporated, which the Defendants believe should be the date that an Order is entered by the Court, as opposed to the date of the hearing. The last part of the proposed Order and the Defendants objection is addressed below.

II.
CLAIM FOR EXPENSES AND ATTORNEY FEES

Shortly after the Court announced its ruling on the Plaintiff's Motion to Compel, counsel for the Plaintiff informed the Court that a claim for expenses and attorney fees had been asserted and the Court immediately replied that a claim would be granted. No hearing was conducted on this claim and there were no briefs or documents filed by either parties on this subject, except for the fact that a claim was asserted in the Motion to

Compel that reads: "Pursuant to Rule 37(a)(4), of the Idaho Rules of Civil Procedure, Plaintiff also seeks reasonable expenses incurred in obtaining the Order, including attorney's fees."

Rule 37(a)(4) reads in pertinent part:

> "Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

With no disrespect intended, the Court did not provide opportunity for hearing or make a finding on whether the opposition to the Motion was substantially justified or that other circumstances make an award of expenses unjust. Just because a claim is asserted by the prevailing party does not automatically mean that an award is proper or warranted. The Rule also provides that expenses and attorney's fees be reasonable.

It is the Defendants' position that their objection to the Plaintiff's Interrogatories was substantially justified and that the circumstances were such that an award of expenses is unjust. The following points, arguments and authorities are outlined and discussed for consideration by the Court in regard to the Defendants' position.

1. Rule 33(a)(3) itself provides for counting sub-parts of interrogatories as separate interrogatories and there are no Idaho Appellate Court decisions that have holdings that invalidate or make Defendants' objections invalid. Likewise, there are no Idaho Appellate Court decisions that define the meaning of Rule 33(a)(3) or the meaning

of sub-parts and their application and interpretation. Thus, the Defendants' position on the number of interrogatories, including sub-parts, was not contrary to any Idaho Appellate Court decisions.

2. Defense counsel's letter of July 26, 2012 to Plaintiff's attorney, Exhibit D to the Affidavit of Jeremiah A. Quane, sets forth in detail the basis and means by which defense counsel arrived at his count of the numbers of Interrogatories. This count was made and arrived at in a careful and considered manner and was not made to impede or restrict discovery or frivolous in nature. It was an honest attempt by defense counsel to inform Plaintiff's attorney of the bassi for the objection and methodology of gauging the number of Interrogatories. In the letter of Plaintiff's attorney to defense counsel dated August 6, 2012, Exhibit A to the Affidavit of Jeremiah A. Quane, he identified which Interrogatories are directed to Dr. Kerr and which to Silk Touch, although he disagreed with defense counsel's count. There was also disagreement on whether the entirety of the Interrogatories were directed to each Defendant to answer, even though the Interrogatories were addressed to each Defendant and that Rule 33 provides that no party shall serve upon any other single party more than 40 interrogatories. In the same letter, Plaintiff's attorney also stated that by defense counsel's count, 39 Interrogatories are directed to Silk Touch and 36 Interrogatories directed to Dr. Kerr, for a total of 75 Interrogatories. The total count of 75 is based on the position that both Silk Touch and Dr. Kerr must each answer the full set of the Interrogatories, which was a reasonable conclusion by defense counsel, taking into account Rule 33 and the manner in which the Interrogatories were stated and formulated for each Defendant.

3. In Defense counsel's Legal Memorandum, two Federal cases are cited that fully support the position of defense counsel and they are on point and relevant. None of the cases cited in Plaintiff's Memorandum are relevant or do they constitute precedent for the Plaintiff's position and Motion. In fact, the decision in the case of ***Swackhammer v. Sprint Corp.*** cited in Plaintiff's Memorandum contains a holding that supports the Defendants' position. Therefor, the Court has not been provided with legal authority or precedent in the briefing that was filed that supports the Plaintiff's position, whereas the Defendants provided authority and precedent that supports their position. The Plaintiff did not file a reply memorandum to the Legal Memorandum filed by the Defendants. At oral argument, Plaintiff's attorney referred to a Nevada decision of a Federal Magistrate and told the Court that it invalidated or overruled the case of ***Valdez v. Ford Motor Co.***, cited in Defendants' Legal Memorandum. Since this case, believed to be ***Ginn v. Gemini*** (137 F.R.D. 320, 1991), was not cited in advance of the hearing by Plaintiff's attorney in any manner or by a memorandum, defense counsel had no way to respond to it or challenge the interpretation of the case by Plaintiff's attorney.

After the hearing, defense counsel read the full decision of the case and represents to the Court that it did not overrule the ***Valdez*** case or invalidate the holding of the ***Valdez*** case. It simply disagreed with the decision in ***Valdez*** and therefor in the Federal Court of Nevada, according to two Federal magistrates, there is a difference of opinion on the calculation of sub-parts of Interrogatories. When the Defendants' position is supported by relevant on point court decisions and precedent, albeit from other

jurisdictions in the absence of controlling Idaho court appellate decisions, it is difficult to understand or believe that the Defendants' objection was not substantially justified.

4. As mentioned above, at the hearing the Court stated that the Defendants, when answering the Plaintiff's Interrogatories, can designate which of the Interrogatories apply to any particular Defendant and provide answers accordingly. In Plaintiff attorney's letter of August 6, 2012, Exhibit A, the Interrogatories for Dr. Kerr and Silk Touch are specified by number and defense counsel is asked to respond based on the modifications and clarifications in the letter. In defense counsel's letters of August 9, 2012 (Exhibit B to the Affidavit of Jeremiah A. Quane) and August 29, 2012 (Exhibit C to the Affidavit of Jeremiah A. Quane) defense counsel agreed to answer the Interrogatories for Dr. Kerr and Silk Touch as specified in the letter of Plaintiff's attorney dated August 6, 2012 (Exhibit A), except for a request that substitute separate Interrogatories be served on Silk Touch and Dr. Kerr, which would essentially resolve the dispute. The remark of the Court at the hearing, described in this paragraph, is basically tantamount to the method for the Defendants to answer the Interrogatories as proposed in the letters of Plaintiff's attorney and defense counsel, with the one exception that the Plaintiff need not serve substitute separate Interrogatories to Dr. Kerr and Silk Touch. In effect, the Court fashioned a procedure by virtue of which the Defendants could specify the Interrogatories to answer for each Dr. Kerr and Silk Touch without requiring separate substitute Interrogatories. The Defendants agreed in advance of the hearing to answer the Plaintiff's Interrogatories if they were separately diercted to Dr. Kerr and Silk Touch, advocated by Plaintiff's attorney in his

letter of August 6, 2012, when combined with the subject statement of the Court at the hearing, constitute circumstances that make an award unjust.

5. The Defendants duly considered and relied upon the case of ***Valdez v. Ford Motor Company***, 134 F.R.D. 296, Nevada 1991 when the objection to the plaintiff's interrogatories was asserted, in addition to other court decisions. In the ***Valdez*** case, the court stated:

> Local Rule 190-1(c) provides in relevant part that "the total number of interrogatories propounded to each party by any other party pursuant to Fed. R. Civ. P. 33 shall be limited to 40 including suparts." The plain meaning of the language in the rule is clear and unambiguous. Local Rule 190-1(c) requires that every part of an interrogatory be counted and subject to the limitation of 40.

The court in ***Valdez*** also stated:

> The procedure for interpreting a local rule should parallel the process used in the construction of statutes. "In construing a statute, this court first looks to the plan meaning of the language in question." *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990). "The plain meaning governs . . . . unless such plain meaning would lead to absurd results." *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987).

In addition to these statements the court in ***Valdez*** went on to say:

> 2. All *propounded* interrogatories and *subparts* should be counted by the parties. If the parties disagree on the count, they should use the count that produces the greatest number of interrogatories. This interpretation will avoid litigation over the routine tabulation of interrogatories and subparts in a propounded set of interrogatories.

Valdez has not been overruled and it has been cited with approval in other cases, albeit there are cases that do not follow ***Valdez***. Counsel for the Defendants shepardized the

Valdez decision and found nothing that would invalidate his reliance on Valdez or establish a reason not to object to the Plaintiff's Interrogatories. This research helped convince defense counsel that the objection to Plaintiff's Interrogatories was substantially justified. The fact that this Court granted the Plaintiff's Motion to Compel does not prove or establish that the Defendants' objection was without substantial justification such as to allow an award of expenses and attorney fees.

6. Defense counsel tried to continue with efforts to reach an agreement with Plaintiff's attorney and avoid a Court appearance. His letter to Plaintiff's attorney dated August 9, 2012 (Exhibit B to Affidavit of Jeremiah A. Quane) was unanswered and obviously ignored by Plaintiff's attorney. Again by letter dated August 29, 2012 (Exhibit C), further attempt was made and this letter was also ignored by Plaintiff's attorney. The letter of August 29, 2012 contained the following statement: "I do not believe we have exhausted our negotiations toward a resolution of our differences, based on your letter of August 6 and my letter of August 9, which I think we are obligated to do, in lieu of your motion to compel." Had Plaintiff's attorney responded to these letters, instead of ignoring them, it is very likely an agreement would have been reached and the Motion to Compel would have become moot and unnecessary. The conduct of Plaintiff's attorney was not the exercise of good faith on his part whereas defense counsel diligently tried to reach an agreement in the exercise of good faith.

Rule 37(a)(4), is confined to reasonable expenses and attorney fees incurred in obtaining the Order on the Plaintiff's Motion to Compel. This provision of the Rule covers Plaitniff's preparation of the Motion to Compel, preparation of the supporting

documentation for the Motion, and the Court appearance for the hearing on the Motion. The supporting documentation in this case consists of the Memorandum and the Affidavit, with Exhibits, of Plaintiff's counsel. The proposed Order of Plaintiff's attorney provides for an award of reasonable expenses and attorney fees in obtaining the Order as specifically stated in Rule 37(a)(4).

Plaintiff's Motion to Compel contains the same language and is a one page document, excluding the caption of the first page. The body of the motion is confined to one and only one issue - Defendants' objection to Plaintiff's Interrogatories on the grounds that the number of Interrogatories exceed forty, the number allowed under Rule 33(a)(3), I.R.C.P. The Motion and the legal issue it embodies is uncomplicated, straightforward and clearly defined and does not involve complex, sophisticated, and multiple legal concepts. No depositions have been taken in the case. The Affidavit of Plaintiff's attorney that accompanied the motion merely referred to and incorporated the Interrogatories to the Defendants, Defendants' objection, five letters exchanged between Plaintiff's attorney, and defense counsel that were prepared and sent before the Mmotion was filed and the sentences that the Plaintiff has yet to receive answers to the Interrogatories and that Plaintiff has in good faith conferred or attempted to confer with the Defendants in an effort to secure Defendants' answers to Plaintiff's Interrogatories without court action. The Plaintiff's supporting Memorandum for the Motion consists of four pages, excluding the first caption page, the signature page, and the certificate of service. The Memorandum cites to Rule 33(a)(3), three cases and Federal Practice and Procedure which are identical to the citations and references in Plaintiff attorney's letter to defense counsel dated July 6,

2012 (Exhibit C to the Affidavit of Plaintiff's counsel P. Gregory Haddad). The citations in the letter of July 6, 2012 were obviously identified and researched sometime before or on July 6, 2012, which was at least 50 days before the Motion to Compel was filed on August 24, 2012. The Memorandum of Plaintiff also contains discussions of each letter exchanged between defense counsel and Plaintiff's attorney, referred to in the Affidavit of Plaintiff's attorney as Exhibits C, D, E, F and G, and a reference to a telephone call from defense counsel's office to Plaintiff's attorney, all of which predated the filing of the Motion to Compel. In essence, everything that was done by Plaintiff's attorney had been done before the Motion to Compel was filed. It is the position of the Defendants that the activities and legal work performed by counsel for the Plaintiff before the Motion to Compel was filed was undertaken and devoted to the attempted resolution of the Defendants' objection to the Interrogatories and the reconciliation of the differences between Plaintiff's attorney and defense counsel so as to avoid the necessity of filing the Motion to Compel. In fact, several of the letters of Plaintiff's attorney state this very thing. Rule 37(a)(4), speaks to reasonable expenses and attorney fees incurred in obtaining the Order and nothing other than that. Although Plaintiff's Motion, Affidavit and Memorandum borrow from and incorporate the legal work performed before the Motion to Compel was filed, this activity and legal work was performed for reasons other than expenses and fees incurred in obtaining the Order on the Motion to Compel.

The proposed Order of Plaintiff's attorney states that Plaintiff be awarded reasonable expenses in obtaining the Order including attorney fees and a reference to the Affidavit of Plaintiff's attorney that sets forth the expenses and attorney fees. The Affidavit

of Plaintiff's attorney, P. Gregory Haddad, states that Plaintiff's attorney fees and expenses associated with procuring Defendants' answers to Plaintiff's First Set of Interrogatories is $5,244.00 for his law firm and attorney fees related to the efforts of Nevin, Benjamin, McKay, and Bartlett to procure Defendants' Answers to Plaintiff's First Set of Interrogatories is $1,858.00, for a total combination of $7,151.36 that includes expenses of $49.36. In combination the two Plaintiff's law firms had four attorneys working on the case starting on July 3, 2012 according to the billing records attached to the Affidavit of P. Gregory Haddad, one paralegal and one legal assistant. The four attorneys, per the billing records, are P. Gregory Haddad, James Perrine, Brian McAllister and Scott McKay. The paralegal is Rebecca Bombard and the legal assistant is identified with the initials D.P.

The hourly rates for Mr. Haddad and Mr. Perrine is $325.00. The hourly rate for Mr. McAllister is $225.00. The hourly rate for Mr. McKay is $265.00. The hourly rate for Mr. McKay's legal assistant D.P. is $65.00. The hourly rate for paralegal Rebecca Bombard is $95.00. The total time for Mr. McAllister that pertains to the Motion to Compel, research, and the supporting documents for the Motion is 18.3 hours. Mr. Haddad had no time for the Motion except for a letter to defense counsel dated July 31, 2012 in the billing record. Defendants provided answers to Plaintiff's Requests for Admissions and Responses to Plaintiff's Requests for Production of Documents and the entry of Mr. Perrine of July 3, 2012 refers to his review of them. The billing record of Mr. Haddad's firm for the period July 5, 2012 through July 26, 2012 for Mr. Perrine and Rebecca Bombard pertains to the letters that were generated and a phone call from defense counsel. Mr. Perrine had one entry of August 20, 2012 of 0.10 time that related to the Motion to Compel. Several

entries in the billing of Mr. Haddad's firm related to conferences and communications among and between several different individuals. The billing record of Mr. McKay of August 24, 2012, 1.40 in time, relates to conferences with his legal assistant, telephone conversation with co-counsel, preparation of case email and coordinate filing for Motion to Compel. The time of Mr. McKay's legal assistant D.P. totals 2.9 hours in connection with the Motion to Compel. Mr. McKay's time that is reflected for the Motion to Compel is 4.30 hours. His time on September 13, 2012, 0.60 hours, relates to a letter from Mr. McAllister, and a telephone conversation with him and preparation of the Order on the Motion to Compel and letter to the Court. The billing of Mr. McKay reflects several conversations and communications between and among various individuals just like the billing of Mr. Haddad's firm does. Between Mr. McKay, Mr. Perrine, Mr. McAllister, and legal assistant D.P., a total of 25.6 hours is recorded for the Motion to Compel, Court appearance, and the documentation and research for the Motion.

There is considerable time that involves unnecessary and wasted duplication of work among attorneys and D.P. The research for and citations in the Plaintiff's Memorandum for the Motion was actually performed on or before July 6, 2012 (see Exhibit C to the Affidavit of Mr. Haddad) in connection with the efforts and negotiations of counsel to try and reach an agreement for the Answers to the Interrogatories and avoid court intervention which is required by Rule 37(a)(2), certification.

The Court hearing on the Motion lasted about ½ hour, give or take a few minutes either way. Mr. McKay's billing record for September 10, 2012 and September 12, 2012 show total time of 3.90 hours to prepare for the hearing and attendance at the

hearing, that includes a telephone conversation with Mr. Haddad in regard to the hearing and a confernce with David Nevin.

Counsel for the Plaintiff can spend all the time they want, charge whatever hourly rate they choose and have as many attorneys and paralegals work on the case as they want, but this is not the standard or basis for the issue at hand, which is the amount, if any, to be assessed against the Defendants. Rule 37(a)(4) calls for reasonable expenses and attorney fees, not what Plaintiff's counsel accumulates or charges. The customary and standard fees and legal work required on a project is that which prevails in the District Court of Ada County and other surrounding district courts. Hourly rates and the time devoted to a particular legal topic or issue that prevails in West Virginia (locale of Mr. Haddad and Mr. McAllister) is not applicable. Furthermore, the hourly rates of Mr. Haddad, Mr. McAllister, and Mr. Perrine are not in line with the customary, usual and standard hourly rates that prevail in Ada County for the type and nature of the motion to compel and legal work done in tort cases of any type. The same is true of Mr. McKay. Their hourly rates are substantially higher than the accepted, customary and usual rates that prevail in Ada County and the Court should approve the hourly rates established in Ada County, if the Court does enter an award against the Defendants. The same is true as respects the time reasonably required and necessitated for the Motion to Compel. Frankly, in the opinion of defense counsel, the amount claimed for attorney fees is unbelievable, preposterous and totally out of line. In the opinion of defense counsel, the reasonable time required to prepare the Motion to Compel, supporting Memorandum and Affidavit of Plaintiff's counsel and attendance at Court for the hearing on the Motion should not exceed

four to five hours at the most, and the hourly rate to be applied should conform to the customary and established rates in Ada County, which is described and set forth in the Affidavit of Jeremiah A. Quane. Defendants respectfully urge the Court to consider the factors and matters set forth in Rule 54(e)(3), I.R.C.P.

III.
CONCLUSION

The objection to the proposed Order of Plaintiff's attorney be granted and the Order modified by deleting the portions that follow the first paragraph and adding the provisions that the Defendants respond to the Plaintiff's Interrogatories, as allowed by the Idaho Rules of Civil Procedure, within 14 days of the entry of an order in conformity with the time computation of Rule 6(a), I.R.C.P, and that the Plaintiff's request for expenses and attorney fees is denied. Alternatively, if the Court grants the Plaintiff's request for attorney fees and expenses, a reasonable amount be awarded for the actual expenses and attorney fees incurred in obtaining the order as opposed to the amount set forth in the Affidavit of P. Gregory Haddad and the billing records attached to the Affidavit. Defendants pray that the Court not enter the proposed order of Plaintiff's attorney until the issues raised in these objections have been decided by the Court and that the time period for the Defendants to answer the interrogatories be set, as a preliminary order, within 14 days after the Court enters its final order. A hearing is requested.

Respectfully submitted.

DATED this 18th day of September, 2012.

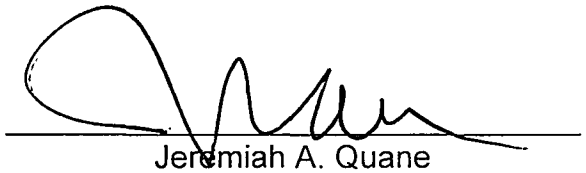
CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2012, I served a true and correct copy of the foregoing OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND PLAINTIFF'S CLAIM FOR EXPENSES AND ATTORNEY FEES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657



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Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF JEREMIAH A. QUANE FOR OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER ON PLAINTIFF'S MOTION TO COMPEL AND PLAINTIFF'S CLAIM FOR EXPENSES AND ATTORNEY FEES

STATE OF IDAHO)
: ss.
County of Ada)

I, Jeremiah A. Quane, having been first duly sworn upon oath, deposes and says:

1. I am the attorney of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. I have handled hundreds of civil tort cases that involved numerous and varying legal issues, including discovery issues, some of which involved disputes regarding answers to interrogatories. Of these civil tort cases, many were medical malpractice cases. I have handled and/or tried civil tort and medical malpractice cases in all but 8 of the 44 counties in the State of Idaho and the Federal District Court of Idaho. Of these cases, a great number of them were in the District Court of Ada County.

3. Based on my experience, I am familiar with and have knowledge of the attorney fee hourly rates customarily and usually charged by attorneys in civil tort and medical malpractice cases that include cases in the District Court of Ada County and its surrounding counties. I have acquired this knowledge by means of discussing hourly rates with attorneys, reviewing billing statements of attorneys and claims asserted by attorneys in connection with litigated cases and decisions of courts for the assessment of attorney fees. I have testified as an expert witness in the District Court of Ada County on the subject of reasonable and customary attorney fee hourly rates and observed other attorneys doing the same. In these cases, the presiding judge accepted me as a qualified expert witness.

4. I am qualified to render the opinions stated in this Affidavit.

5. The customary, usual and accepted hourly rates for attorneys in the Fourth and other Judicial Districts of the State of Idaho in civil tort and malpractice cases is in the range of $150 to $190, and $190 is the outer or highest rate.

6. In my opinion, these are the ranges for the assessment of attorney fees in connection with the Plaintiff's motion to compel answers to interrogatories.

7. My experience and acquired knowledge set forth above, covers, applies and relates to the attorney time necessary and reasonably required to perform legal services for varying subjects and I believe that I am qualified to render an opinion on the time that was customarily reasonably necessary and required of Plaintiff's attorney to obtain the order on the Plaintiff's motion to compel answers to the interrogatories.

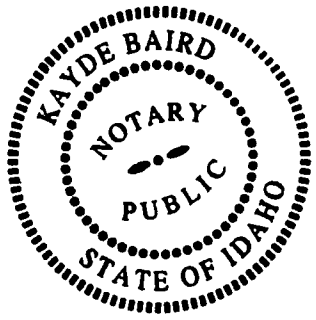
8. To obtain the order on the Plaintiff's motion to compel, specified in Rule 37(a)(4), I.R.C.P., the reasonable attorney time and activity consisted of the preparation of the motion, supporting memorandum and affidavit of Plaintiff's attorney and attendance at Court for the hearing on the motion. The reasonable time required for this, in order to be consistent with the customary, usual standards that are applicable, is in the range of four to five hours, at the most.

9. The Plaintiff's motion was uncomplicated, straight forward, involved a single issue that required minimal research and analysis and factual foundation, and limited time in Court for the hearing on the motion. These factors are consistent with and adequate for the time reasonably required to obtain the Court order on the motion.

FURTHER your Affiant saith naught.

Jeremiah A. Quane

SUBSCRIBED AND SWORN to before me this 18th day of September, 2012.



Notary Public for Idaho
Residing at Boise, Idaho
My commission expires 9/18/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2012, I served a true and correct copy of the foregoing AFFIDAVIT OF JEREMIAH A. QUANE FOR OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER ON PLAINTIFF'S MOTION TO COMPEL AND PLAINTIFF'S CLAIM FOR EXPENSES AND ATTORNEY FEES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' OBJECTION TO PLAINTIFF'S PROPOSED ORDER AND CLAIM FOR FEES AND EXPENSES RELATED TO PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

ORIGINAL

COMES NOW Plaintiff, Charles Ballard, by and through his attorneys, and responds in opposition to Defendants' objection to Plaintiff's proposed order and claim for fees and expenses related to Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories. To avoid belaboring these issues, many of which have already been decided by the Court, Plaintiff's response is brief and should not be interpreted as conceding the various points Defendants now attempt to reargue.

On the afternoon of September 12, 2012, the Court heard arguments related to Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories. After the presentation of arguments, the Court, quite properly, overruled Defendants' objection to Plaintiff's First Set of Interrogatories and granted Plaintiff's motion. The Court ordered Defendants to respond to Plaintiff's First Set of Interrogatories within 14 days, and granted Plaintiff's request for expenses, including attorney fees, as provided in Rule 37(a)(4) of the Idaho Rules of Civil Procedure.

On September 14, 2012, Plaintiff's counsel submitted a proposed order to the Court, as well as to Defendants. The proposed order was accompanied by an Affidavit of Counsel, by which Plaintiff set forth the expenses, including attorney fees, related to the procurement of Defendants' Answers to Plaintiff's First Set of Interrogatories. On September 18, Defendants filed objections to Plaintiff's proposed order, as well as to Plaintiff's fees and expenses.

The Plaintiff's proposed order reflects the Court's rulings of September 12, 2012. Defendants take issue with that Order because they now wish to assert additional objections which they failed to timely assert in response to the first set of interrogatories; that is not a valid basis for the Court to withhold entry of the Order. Defendants asserted only one objection to Plaintiff's First Set of Interrogatories during the standard answer period. *See* Defs.' Objections

to Plaintiff's First Set of Interrogatories, attached as Exhibit B to the Affidavit of Counsel filed on August 24, 2012. Specifically, Defendants asserted that the number of interrogatories, including subparts, exceeded the number permitted by Rule 33(a)(3) of the Idaho Rules of Civil Procedure. No other objections were stated by Defendants either individually or collectively to these interrogatories. Accordingly, because Rule 33(a)(2) states that "[t]he party upon whom the interrogatories have been served shall serve the original of the answers, **and the objections, if any,** within 30 days after the service," (emphasis added), Defendants have waived any further objection to these interrogatories, and any objections they now raise would be untimely.[1] Given Defendants' approach to discovery to date, allowing such objections would invariably lead to delays and additional disputes. In any event, the Court was correct to overrule Defendants' sole objection to the interrogatories and should now order Defendants to answer Plaintiff's First Set of Interrogatories without objection.

Moreover, by their objection to Plaintiff's fees and expenses, Defendants claim that Plaintiff's *pro hac vice* and local attorneys charge rates well in excess of the prevailing rates in Ada County. As evidenced by the decision appended hereto, the Unites States District Court for the District of Idaho disagrees with Defendants' conclusion. Exhibit A, *LaPeter v. Canada Life*

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[1] While the undersigned has not located any Idaho appellate cases discussing waiver for failure to timely state objections, numerous other jurisdictions have so held. *See, e.g. Drew v. Hagy*, 134 Ga. App. 852, 216 S.E.2d 676, 677 (1975) (failure to file timely objections to interrogatories is a waiver of the right to object); *Leach v. Superior Court*, 111 Cal. App. 3d 902, 903, 169 Cal. Rptr. 42, 43 (Ct. App. 1980) (same); Wright and Miller, Federal Practice and Procedure, § 2173 (same): *Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) ("A failure to timely object to interrogatories waives any objection, unless an extension of time is granted or good cause is shown for the delay."); *Garrity v. Kemper Motor Sales*, 280 Minn. 202, 206, 159 N.W.2d 103, 106-07 (1968) (holding that "because no objections to the interrogatories were made within the time specified by the rules, all objections except those related to privilege, work product, and experts' conclusions were waived."); *Golding v. Taylor*, 19 N.C. App. 245, 248, 198 S.E.2d 478, 480 (1973) (not finding a waiver because defendant asserted right against self-incrimination in not responding but noting "ordinarily, in the absence of an extension of time, failure to object to interrogatories within the time fixed by the rule is a waiver of any objection.").

Ins. Of Amer., No. 1:06-CV-00121-BLW, 2007 WL 4287489, at *1-2 (Dec. 4, 2007) (finding hourly rates consistent with those at issue here to be "within the Boise community standard").[2] Therefore, the hourly rates of Plaintiff's counsel are consistent with the Boise community standard and reasonable, as is the time expended by Plaintiff's counsel in obtaining this order compelling discovery.[3]

Defendants' objections are an attempt to reargue the issues presented by oral argument on September 12, 2012. Additionally, the filing of Defendants' objections is a transparent attempt to avoid their discovery obligations to Plaintiff.

The Court's rulings of September 12, 2012, were proper: Defendants' Answers to Plaintiff's First Set of Interrogatories are due, without objection, in fourteen days (thus, on September 26, 2012), and Plaintiff is entitled to reasonable expenses, including attorney fees, which are properly set forth in the Affidavit of Counsel filed on September 14, 2012. Accordingly, Defendants' objections should be overruled.

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[2] Pursuant to Idaho Rule of Evidence 201, Plaintiff respectfully requests that the Court take judicial notice of this decision.

[3] By virtue of the objections necessitating the instant response, Plaintiff has now expended additional time in seeking the order compelling discovery. Accordingly, it would be appropriate for the Court to enter the submitted Order, award expenses, including attorney fees, as reflected in Plaintiff's prior submission, and permit Plaintiff to augment his prior submission to include these additional fees.

Dated this 20th day of September, 2012.

Respectfully Submitted,
BAILEY & GLASSER LLP

By _____

for P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2012, I served a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' OBJECTION TO PLAINTIFF'S PROPOSED ORDER AND CLAIM FOR FEES AND EXPENSES RELATED TO PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** by delivering the same to the following via facsimile:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519
208-345-8660

Scott McKay

2007 WL 4287489
Only the Westlaw citation is currently available.
United States District Court,
D. Idaho.

Alfred R. LaPETER and Sharon R. LaPeter, as Trustees of the LaPeter 1985 Living Trust, Plaintiffs,
v.
CANADA LIFE INSURANCE OF AMERICA, Defendant.

No. CV-06-121-S-BLW. | Dec. 4, 2007.

Attorneys and Law Firms

William A. Morrow, Jill S. Holinka, Kevin Eugene Dinius, White Peterson, Nampa, ID, for Plaintiffs.

Robert A. Faucher, B. Newal Squyres, Kevin C. Braley, Holland & Hart LLP, Boise, ID, for Defendant.

Opinion

MEMORANDUM DECISION AND ORDER

B. LYNN WINMILL, Chief Judge.

INTRODUCTION

***1** The Court has before it Canada Life Insurance Company of America's ("Canada Life") Motion for Attorney Fees and Costs (Docket No. 94), Plaintiffs' Motion to Strike Second Declaration of Robert A. Faucher (Docket No. 105), and Plaintiffs' Motion to Consolidate Cases (Docket No. 108).

ANALYSIS

I. Motion for Attorney Fees and Costs

Idaho law governs the award of attorney fees in this matter because federal courts follow state law as to attorney fee awards in diversity actions. *See Interform Co. v. Mitchell,* 575 F.2d 1270, 1280 (9th Cir.1978) (applying Idaho law). Pursuant to Idaho Code § 12-120(3), the prevailing party is entitled to an award of attorney fees when a commercial transaction is the gravamen of the lawsuit. *See Erickson v. Flynn,* 64 P.3d 959 (Idaho Ct.App.2002).

"The determination of whether a litigant is the prevailing party is committed to the discretion of the trial court." *Sanders v. Lankford,* 1 P.3d 823, 826 (Idaho Ct.App.2000); see also I.R.C.P. 54(d)(1)(B). In Idaho, governing legal standards on the prevailing party issue are provided by IRCP 54(d)(1)(B). "[T]here are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues." *Id.*

There is no dispute that this case involved a commercial transaction for purposes of Idaho Code § 12-120(3). Moreover, based on the Court's final Judgment in this matter, Canada Life is clearly the prevailing party. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. *See Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.,* 117 P.3d 130, 133 (Idaho 2005). Canada Life avoided liability in this matter when the Court granted summary judgment in its favor on all of Plaintiffs' remaining claims.

A. Amount of Attorney Fees and Costs

Plaintiffs contend that Canada Life's requested attorney fees should be reduced because their hourly rates are too high and the time expended was excessive.

1. Hourly Rates

The Court must determine a reasonable hourly rate by considering the experience, skill and reputation of the attorneys requesting fees. *See Schwarz v. Secretary of Health and Human Services,* 73 F.3d 895, 906 (9th Cir.1995). "A district court should calculate this reasonable hourly rate according to the prevailing market rates in the relevant community, which typically is the community in which the district court sits." *Id.* (internal quotations and citations omitted). The relevant community in this case is Boise, Idaho, where this Court sits.

Here, Plaintiffs specifically object to the rates charged by Newal Squyres and Bob Foucher, who charged $350.00 and $335.00/$355.00 respectively for their time. This Court is intimately familiar with the hourly rates charged in the Boise market because the Court deals with motions for attorney fees on a constant basis. Canada Life correctly points out that this Court recently awarded fees to a party based on typical hourly rates charged by Canada Life's attorneys at Holland & Hart.

Canada Life has also provided the Court with Mr. Faucher's declaration, which establishes the credentials and billing rates for the Holland & Hart professionals who worked on this matter. (See Faucher Declaration, pp. 2-3). It has also been this Court's experience that attorneys at regional firms, such as Holland & Hart, charge hourly rates at or near, but not above, the high end of acceptable rates for the Boise area.

*2 Based on the Court's knowledge of typical attorney rates in the Boise area, coupled with Mr. Faucher's affidavit, the Court finds that the rates charged by Canada Life's professionals are within the Boise community standard, with the exception of Mr. Faucher's rate. Mr. Faucher's hourly rate is near, and even exceeds for some tasks, Mr. Squyres' hourly rate, even though Mr. Squyres has practiced for over 30 years, but Mr. Faucher has practiced for less than 20 years. (See Faucher Declaration, pp. 2-3). Although Mr. Faucher indicates that he represents lending institutions throughout the country, he has not persuaded the Court that his rate should exceed that of his colleague who has practiced for over 30 years. Accordingly, the Court will reduce Mr. Faucher's rate to $300.00 per hour. [1]

2. Number of Hours Charged

Plaintiffs also contend that the number of hours claimed by Canada Life are excessive. Plaintiffs essentially contend that Canada Life's attorneys spent too much time researching, drafting, editing and finalizing briefs, and too much time preparing for oral argument. Plaintiffs contend that any fee award should be reduced by at least 30 percent.

The Court recalls that the briefs were well organized and well researched, and that counsel's oral argument was persuasive. It has been the Court's experience that the more concise briefs, and more persuasive arguments, require the most preparation. The high quality of the work, coupled with the Court's decision to grant summary judgment in favor of Canada Life, and against Plaintiffs, reveals that the significant effort spent on the briefs and preparation for oral argument in this case was warranted. Additionally, the high quality work done at the front end of this case saved the parties the additional expense of trying this matter.

Moreover, Canada Life's attorneys sufficiently itemized their fees by describing the services performed. (Faucher Declaration, Ex. A). Accordingly, the Court does not find that the number of hours charged by Canada Life's attorneys were excessive.

3. Declaration Related to Mr. LaPeter's Conviction

Plaintiffs argue that Canada Life's attorney fees should be reduced as a sanction for Canada Life's filing of a declaration attaching documentation of Mr. LaPeter's felony convictions. Plaintiffs suggest that Canada Life introduced Mr. LaPeter's criminal convictions into the record as an attempt to intimidate Mr. LaPeter and blacken Mr. LaPeter's reputation in they eyes of the Court. Plaintiffs also ask the Court to strike that declaration.

Based on the record, it is clear that Plaintiffs, not Canada Life, introduced Mr. LaPeter's criminal history into this litigation. Plaintiffs first disclosed Mr. LaPeter's criminal record to the Court in Mr. LaPeter's affidavit filed in December 2006 in support of Plaintiffs' motion for a protective order. (See Docket nos. 21-22). Thus, it was not improper for Canada Life to address the issue or to file the records with the Court. Accordingly, there is no reason to sanction Canada Life. Likewise, there is no reason to strike Mr. Faucher's declaration.

4. Non-Taxable Costs

*3 Canada Life requests its non-taxable costs pursuant to IRCP 54(d)(1)(D). Plaintiffs do not dispute application of IRCP 54(d)(1)(D), but argue that Canada Life has not fulfilled the rule's requirement that the costs were necessary and exceptional. Rule 54(d)(1)(D) states that additional, non-taxable, costs "may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." IRCP 54(d)(1)(D). Discretionary costs may include costs related to long distance telephone calls, photocopying, faxes, travel expenses, and expert witnesses. *See Hayden Lake Fire Protection Dist. v. Alcorn,* 109 P.3d 161, 168 (Idaho 2005). The Court must make express findings as to why a party's discretionary costs should or should not be allowed. *Id.;* see also I.R.C.P. 54(d)(1)(D). The Court need not evaluate the requested costs item by item. Instead, "express findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice is sufficient to comply with this requirement." *Puckett v. Verska,* 158 P.3d 937, 945-946 (Idaho 2007).

Here, the Court finds that although Canada Life's discretionary costs were for the most part reasonable and necessary, they were not exceptional. The nature of this case, essentially a breach of contract case, was not exceptional. The Idaho Supreme Court has consistently construed the requirement that costs be "exceptional" under IRCP 54(d)

(1)(D) "to include those costs incurred because the nature of the case was itself exceptional." The Idaho Supreme Court has also stated that "[c]ertain cases, such as personal injury cases generally involve copy, travel and expert witness fees such that these costs are considered ordinary rather than "exceptional" under I.R.C.P. 54(d)(1)(D)." *Id.* (citing *Inama v. Brewer,* 973 P.2d 148, 155 (Idaho 1999). This case is more akin to the ordinary personal injury case. Canada Life's discretionary costs were "routine costs associated with modern litigation overhead" in commercial litigation. *City of McCall v. Seubert,* 130 P.3d 1118, 1126-27 (Idaho 2006). Accordingly, the Court will deny Canada Life's request for non-taxable costs.

5. Idaho Code §§ 45-15-3 and 45-1512

Idaho's anti-deficiency statute provides that in order to recover a deficiency from a grantor personally after foreclosure, the beneficiary must sue the grantor within three months after the trustee's sale. Additionally, the beneficiary can recover only the difference between the debt and the fair market value of the property at the date of sale or the sale amount, whichever is greater. I.C. § 45-1512. Idaho's single action statute provides that a beneficiary under a deed of trust cannot sue the grantor on the debt except under certain limited circumstances. I.C. § 45-1503. The statute's purpose is to compel a creditor who is secured by real property to recover from the grantor's pledged real estate before recovering from the grantor's other assets. Plaintiffs contend that these statutes prevent Canada Life from recovering its attorney fees and costs.

*4 Plaintiffs' argument is based on a contention that Canada Life, for all intents and purposes, is the beneficiary of the deed of trust that secures the ParkCenter Mall. However, Canada Life is not the beneficiary of that deed of trust. Through assignment, Canada Life Assurance Company is the beneficiary of the deed of trust. (See Schwartz Aff., ¶ 7-10, Exs. 1-3, Docket No. 57). Plaintiffs admit as much, but contend that because Canada Life and Canada Life Assurance Company are both subsidiaries of Great West Insurance, the Court should regard the two companies as the same entity. Plaintiffs cite no case law or rules explaining why the Court should not treat the separate entities as separate entities. Accordingly, the Court will not treat them as the same entity.

The anti-deficiency and single action statutes do not apply to parties, like Canada Life, who are not beneficiaries of a deed of trust securing indebtedness owed by the grantor. Accordingly, the Court finds that the statutes do not preclude recovery of attorney fees and costs in this case.

6. Total Fees and Costs

Based on the above analysis, Canada Life is entitled to $437,742.50 in attorney fees. The Court reached this amount by reducing Mr. Faucher's hourly rate from $335.00/355.00 to $300.00 per hour, which reduced Mr. Faucher's bill by $51,498.50. The Court then subtracted that amount from the total amount outlined and claimed in Canada Life's fee bill ($491,310.00-$51,498.50 = $439,811.50). The Court then subtracted an additional $2,069.00 based on Canada Life's concession that it mistakenly included $2,069 .00 in fees for work pertaining to the receivership litigation (See Canada Life Reply Brief, p. 8, n. 18). The Court will not award any non-taxable costs.

II. Motion to Consolidate

Months ago, the Court suggested that, at least for purposes of appeal, the parties should consider whether it would be in the interest of judicial economy to consolidate this case with the other two related matters-Case Nos. 07-254 and 07-228. However, because Plaintiffs have already separately appealed all three cases, the Court finds no reason to consolidate them at this point. Based on the outcome of the appeals, the Court may revisit this issue. However, at this point, the Court will deny the Motion to Consolidate.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Canada Life's Motion for Attorney Fees and Costs (Docket No. 94) shall be, and the same is hereby, GRANTED IN PART and DENIED IN PART. Plaintiffs shall pay Canada Life $437,742.50 in attorney fees.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Second Declaration of Robert A. Faucher (Docket No. 105) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Consolidate Cases (Docket No. 108) shall be, and the same is hereby, DENIED.

Footnotes

1 Mr. Faucher's declaration lists the following attorneys, their experience level and billing rates: (1) Mr. Bithell-nearly 40 years-$405.00 per hour; (2) Mr. Squyers-over 30 years-$350.00 per hour; (3) Mr. Braley-9 years-$235.00 per hour; (4) Mr. Goergen-5 years-$185.00; (5) Mr. Fischenich-3 years-$185.00; and (6) Ms. Davis-2 years-$175.00. Considering the experience and billing rates of Mr. Faucher's colleagues, $300.00 per hour is the reasonable rate for Mr. Faucher in this matter.

End of Document

Bail
Tara
9/25/12
CP

Jeremiah A. Quane, ISB No. 977
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Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY RESPONSES

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 24th day of September, 2012, I served a copy of DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF

INTERROGATORIES together with a copy of this NOTICE, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail [X] Hand Delivered, w/ attachments [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, w/o attachments [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Montgomery Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, w/o attachments [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

DATED this 24th day of September, 2012.

CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

Rail
Tara
KT
9.28.12

Jeremiah A. Quane, ISB No. 977
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Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF CHANGE OF ADDRESS

TO: THE CLERK OF THE ABOVE-ENTITLED COURT and THE ABOVE-ENTITLED PARTIES, and their attorneys of record:

PLEASE TAKE NOTICE that effective October 1, 2012, Carey Perkins LLP's Boise office is moving and its new address will be:

Capitol Park Plaza
300 North 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83701

The Boise office's post office box, firm telephone and facsimile numbers remain the same. Please amend your certificate of service and pleadings accordingly.

DATED this 27th day of September, 2012.

CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2012, I served a true and correct copy of the foregoing NOTICE OF CHANGE OF ADDRESS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

Jeremiah A. Quane

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

A.M NO P.M. FILED 10:45

OCT 11 2012

CHRISTOPHER D. RICH, Clerk
By TARA THERRIEN
DEPUTY

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

ORDER

On September 12, 2012, a hearing was held before this Court on Plaintiff's Motion to Compel Defendants' Answers to Plaintiff's First Set of Interrogatories filed August 24, 2012. The Court having considered this motion, Defendants' opposition thereto, the arguments of counsel presented at this hearing and good cause appearing, it is hereby ordered that said motion is GRANTED. The Court has reviewed the interrogatories at issue and finds the interrogatories do not exceed the number of interrogatories allowed by Rule 33(a)(3) of the Idaho Rules of Civil Procedure as argued by Defendants.

Accordingly, Defendants are hereby ordered to answer said interrogatories without objection within 14 days of the foregoing hearing.

It is further ordered that Plaintiff be awarded his "reasonable expenses in obtaining the order, including attorney fees" as provided in Rule 37(a)(4) of the Idaho Rules of Civil

Procedure and requested in Plaintiff's motion. The Court has reviewed the Affidavit of Counsel filed September 14, 2012 setting forth those expenses including attorney fees and hereby awards Plaintiff his expenses including attorney fees in the amount of $1500.00. Defendants shall remit payment of this amount to counsel for Plaintiff within 30 days of the date of this Order.

this Order does not preclude Plaintiff from requesting full fees at a later date

IT IS SO ORDERED.

Dated this 5th day of ~~September,~~ 2012.

Honorable Deborah A. Bail

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE VIDEO DEPOSITION OF DR. BRIAN CALDER KERR, M.D.

ORIGINAL

To: Dr. Brian Calder Kerr, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 519
Boise, ID 83701-0519

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video deposition of Dr. Brian Calder Kerr, M.D., on **Wednesday, January 30, 2013** at 9:00 a.m. at Nevin, Benjamin, McKay & Bartlett, LLP, 303 W. Bannock, Boise, Idaho 83702, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 04 day of January, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
For: David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 04 day of January, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO DEPOSITION OF DR. BRIAN CALDER KERR, M.D.,** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
P.O. Box 519
Boise, Idaho 83701-0519

Associated Reporting, Inc.
1618 W. Jefferson Street
Boise, Idaho 83702
Court Reporter

FOR: Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE DEPOSITION

To: Silk Touch Laser, LLP
d/b/a Silk Touch Med Spa and/or
Silk Touch Med Spa and Laser Center and/or
Silk Touch Med Spa, Laser, and Lipo of Boise
c/o Jeremiah A. Quane, Esquire
P.O. Box 519
Boise, ID 83701-0519

Pursuant to Rule 30(b)(6) of the Idaho Rules of Civil Procedure, Plaintiff, Charles Ballard, hereby gives notice to Silk Touch Laser, LLP, that on the **31st day of January, 2013,** at 9:00 a.m., the Plaintiff, by counsel, shall take the deposition of an agent or agents to be designated by Silk Touch Laser, LLP or any d/b/a thereof to be most knowledgeable as to the hereinafter specified matters, at the office of Nevin, Benjamin, McKay & Bartlett, LLP, located at 303 W. Bannock, Boise, Idaho, upon oral examination pursuant to the Rules of Civil Procedure before an officer authorized by law to administer oaths.

Topics

Plaintiff hereby requests that Silk Touch Laser, LLP designate an individual or individuals to testify to the following:

1) All aspects of consultation services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

2) All aspects of medical examination services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

3) All aspects of pre-operative services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

4) All aspects of post-operative services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

5) All aspects of surgical and/or cosmetic surgical services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

6) All aspects of the medical equipment used in furtherance of services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

7) All aspects of manufacturer instructions, whether presented in written, video graphic, or any other format, which pertain to proper and/or recommended usage of the medical equipment employed in furtherance of services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

8) All aspects of the medical techniques and procedures employed in furtherance of services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard.

9) All aspects of the sterilization procedures employed by Silk Touch Laser, LLP, its agents, servants, and/or employees in furtherance of rendering services to Krystal Ballard.

10) All aspects of consultation services rendered by Silk Touch Laser, LLP, its agents, servants, and/or employees, to Krystal Ballard, including, but not necessarily limited to, consultation, examination, pre and post-operative or surgical care, equipment, sterilization procedures, and cosmetic surgical procedures.

11) The entire file, including, but not necessarily limited to, billing and medical records, related to the treatment of, and/or services rendered to, Krystal Ballard.

12) Dr. Brian Calder Kerr's employment and qualifications, including his training and experience in performing the procedures performed on Krystal Ballard.

13) Briana Kerr's employment and qualifications.

14) Susan Kerr's employment and qualifications.

15) Donna Berg's employment and qualifications.

16) Procedures, policies, and/or protocols for the selection and procurement of equipment to be employed during surgical procedures.

17) Procedures, policies, and/or protocols for the selection and/or engagement of personnel during surgical procedures.

18) Procedures, policies, and/or protocols for the selection of surgical procedures to be offered to the public.

19) Procedures, policies, and/or protocols pertaining to the certification, training, and/or education of personnel.

20) Procedures, policies, protocols, and/or records pertaining to sterilization of equipment, personnel, and treatment site(s).

21) Procedures, policies, and/or protocols pertaining to the documentation of services rendered.

22) Procedures, policies, and/or protocols pertaining to the documentation and/or memorialization of patient-provider communications.

23) The employment or personnel files for all agents, servants, and/or employees identified in Silk Touch Laser, LLP's responses to Plaintiff's discovery, including, but not limited to Dr. Brian Calder Kerr, Briana Kerr, Susan Kerr, and Donna Berg.

24) The search for, and/or identification of, all electronically stored data or information responsive to Plaintiff's discovery requests.

25) Any and all surveys, investigations, and/or inspections conducted by any organization, whether voluntary or mandated, which pertain to the allegations contained within Plaintiff's Complaint.

26) Logs and/or other records pertaining to spore counts or otherwise pertaining to sterilization of medical equipment.

27) All aspects of Dr. Brian Calder Kerr's membership in professional organizations.

28) All aspects of Silk Touch Laser, LLP's adherence to, or departure from, industry and trade recommendations pertaining to equipment usage, surgical and/or cosmetic surgical procedures, and patient care procedures.

29) Liability coverage.

Pursuant to Rule 30(b)(6), Defendant requests that you produce at said deposition all documents upon which you will rely in responding to these inquiries, including, but not limited to, notes, memoranda, letters, e-mails, handbooks, journals, brochures, and manuals.

The oral examination will continue from day to day until completed.

Dated this 04 day of January, 2013.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
FOR: David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 04 day of January, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE DEPOSITION OF 30(b)(6) REPRESENTATIVE OF SILK TOUCH LASER, LLP** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
P.O. Box 519
Boise, Idaho 83701-0519

Associated Reporting, Inc.
1618 W. Jefferson Street
Boise, Idaho 83702
Court Reporter

FOR: Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE TO TAKE DEPOSITION**

ORIGINAL

To: Briana Kerr
c/o Jeremiah A. Quane, Esquire
P.O. Box 519
Boise, ID 83701-0519

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the deposition of Briana Kerr, on **Thursday, January 31, 2013** at 1:00 p.m. at Nevin, Benjamin, McKay & Bartlett, LLP, 303 W. Bannock, Boise, Idaho 83702, upon oral examination pursuant to the Rules of Civil Procedure before an officer authorized by law to administer oaths.

The oral examination will continue from day to day until completed.

Dated this 04 day of January, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
For: David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 04 day of January, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE DEPOSITION OF BRIANA KERR** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
P.O. Box 519
Boise, Idaho 83701-0519

Associated Reporting, Inc.
1618 W. Jefferson Street
Boise, Idaho 83702
Court Reporter

FOR: Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE DEPOSITION

ORIGINAL

To: Susie Kerr
c/o Jeremiah A. Quane, Esquire
P.O. Box 519
Boise, ID 83701-0519

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the deposition of Susie Kerr, on **Thursday, January 31, 2013** at 11:00 a.m. at Nevin, Benjamin, McKay & Bartlett, LLP, 303 W. Bannock, Boise, Idaho 83702, upon oral examination pursuant to the Rules of Civil Procedure before an officer authorized by law to administer oaths.

The oral examination will continue from day to day until completed.

Dated this 04 day of January, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
For: David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 04 day of January, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE DEPOSITION OF SUSIE KERR** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
P.O. Box 519
Boise, Idaho 83701-0519

Associated Reporting, Inc.
1618 W. Jefferson Street
Boise, Idaho 83702
Court Reporter

FOR: Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE DEPOSITION

To: Donna Berg
c/o Jeremiah A. Quane, Esquire
P.O. Box 519
Boise, ID 83701-0519

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the deposition of Donna Berg, on **Thursday, January 31, 2013** at 3:00 p.m. at Nevin, Benjamin, McKay & Bartlett, LLP, 303 W. Bannock, Boise, Idaho 83702, upon oral examination pursuant to the Rules of Civil Procedure before an officer authorized by law to administer oaths.

The oral examination will continue from day to day until completed.

Dated this 04 day of January, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
FOR: David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 04 day of January, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE DEPOSITION OF DONNA BERG** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
P.O. Box 519
Boise, Idaho 83701-0519

Associated Reporting, Inc.
1618 W. Jefferson Street
Boise, Idaho 83702
Court Reporter

FOR: Scott McKay

ORIGINAL

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE DUCES TECUM OF TAKING THE VIDEO DEPOSITION OF CHARLES BALLARD

TO: THE ABOVE-ENTITLED PLAINTIFF and his counsel of record:

YOU WILL PLEASE TAKE NOTICE that Defendants will take testimony on oral examination of Charles Ballard before a court reporter, a videographer and notary public with the firm of M & M Court Reporting Service, Inc., commencing on Friday, the 1st

day of February, 2013, at 9:00 a.m., and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at the law offices of Nevin, Benjamin, McKay & Bartlett LLP, 303 West Bannock Street, Boise, Idaho, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

The items and materials to be produced at the deposition by Charles Ballard consists of the following:

1. Krystal Ballard's Federal Income Tax Returns for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010.

2. Charles Ballard's Federal Income Tax Returns for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012.

3. Documents, such as a Marriage Certificate, that reflect and pertain to th marriage of Charles Ballard to Krystal Ballard.

4. If Charles Ballard is married at the time of his deposition on February 1, 2013, documents, such as a marriage certificate, that reflect and pertain to his marriage to the person he is married to.

5. If Charles Ballard is not married at the time of his depositions on February 1, 2013, documents, that reflect and pertain to any marriages he has had since July 26, 2010, such as marriage certificates.

6. Any and all documents, records, writings and physical things that pertain to and reflect in any way the following response of Charles Ballard in his Answer to Interrogatory No. 3 of the Defendants:

a. Loss of support to Charles Ballard from the death of Krystal Ballard.

b. Depletion of community assets.

c. Reduction of the community to earn income.

d. Costs and expenses changeable against community property arising from the injuries to Krystal Ballard prior to her death.

e. Funeral expenses.

f. Loss of income from Krystal Ballard.

g. Loss of pension and/or retirement benefits of Krystal Ballard.

h. Loss of health insurance benefits from Krystal Ballard.

7. Any and all documents, records, writings and physical things that support and are relied upon by Charles Ballard for his response to the Defendants' Interrogatory No. 3.

8. Any and all documents, records, writings and physical things that pertain to and support in any way the following allegations in the Complaint:

a. Decedent's funeral expenses.

b. Loss of wages and other benefits of employment which would have been earned by Krystal Ballard and shared with her husband, Plaintiff, during the course of her normal work life expectancy.

c. The reasonable value attributable to the loss of service, care, comfort and society of Krystal Ballard.

9. Bills, invoices, charges and documents that pertain to and reflect the amounts of the services, medical care and treatment provided for Krystal Ballard from the time of the surgery of Dr. Kerr until her death.

10. Bills, invoices, changes and documents that pertain to and reflect the amounts for funeral, burial and last rites having to do with Krystal Ballard.

11. Any and all documents, records, writings and physical things that pertain to and reflect payment of all or any portion of the items described in paragraphs 9 and 10 above.

12. Records, files, documents and reports of all physicians, health care providers, hospitals, institutions and service providers of Krystal Ballard during the time frame of 2000 to the date of her death.

13. Records of the United States Air Force for Krystal Ballard that relate to the time period 2005 until her death.

14. A list of all physicians, health care providers and hospitals who provided services to Krystal Ballard from 2000 to her death.

15. Photographs of Krystal Ballard taken during the last 5 years of her life.

16. Photographs of the gravesite of Krystal Ballard including a headstone or marker that depicts wording or comments.

17. Records, reports, files, documents, tangible things and objects of the Ada County Coroner and/or Ada County.

18. Records, reports, files, documents, tangible things and objects, of the Office of Special Investigations, United States Air Force, Mountain Home Air Force Base or elsewhere.

19. Records, reports, files, documents, tangible things and objects of Dr. Glen Groben and Ada County for the and in conjunction with the autopsy performed on Krystal Ballard.

20. Authorizations signed by Charles Ballard that will allow counsel for Dr. Kerr to obtain the material and items described in paragraphs 12, 13, 17, 18 and 19 directly.

21. Documents and records that pertain to and involve the Estate of Krystal Ballard, its administration, adjudication, wrapping up and closure.

22. The last will and testament of Krystal Ballard and any codicils.

23. Records, documents and writings that relate to or involve any inheritance for Charles Ballard due to the death of Krystal Ballard and life insurance benefits for Charles Ballard that are due Charles Ballard from life insurance on Krystal Ballard.

24. Documents, records, writings and physical things that reflect and pertain to the current net worth of Charles Ballard.

25. Documents and records that pertain to and reflect prescriptions for medications purchased or acquired by Krystal Ballard from the time of the operation by Dr. Kerr until her death.

26. Drivers license of Krystal Ballard that was in effect on the date of her death.

27. Documents, records and writings for applications of Krystal Ballard for any type of insurance that she initiated during the last 3 years before her death.

28. Writings, diaries, notes and recordings of Krystal Ballard and Charles Ballard that pertain to and reflect events, facts, conversations with Dr. Kerr and his office staff/employees of Silk Touch Laser.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 11th day of January, 2013.

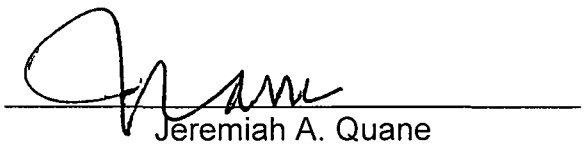
CAREY PERKINS LLP

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2013, I served a true and correct copy of the foregoing NOTICE DUCES TECUM OF TAKING THE VIDEO DEPOSITION OF CHARLES BALLARD by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657



Jeremiah A. Quane

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S RESPONSES TO DEFENDANTS' NOTICE DUCES TECUM OF TAKING THE VIDEO DEPOSITION OF CHARLES BALLARD

559123

ORIGINAL

COMES NOW Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rules 26(b)(1), 30(b)(5), and 34 of the Idaho Rules of Civil Procedure, and hereby responds to Defendants' Notice Duces Tecum of Taking the Video Deposition of Charles Ballard.

On January 11, 2013, Defendants, by facsimile, served upon Plaintiff's counsel a Notice Duces Tecum of Taking the Video Deposition of Charles Ballard. The Notice advised that Mr. Ballard's deposition would take place on February 1, 2013, and set forth twenty-eight requests for production of documents.

Defendants have provided Plaintiff only twenty-one days notice of Mr. Ballard's deposition. Despite the shortened notice, Plaintiff has made a diligent and good faith effort to respond to Defendants' requests, and will supplement accordingly.

General Statements and Objections

A. Representations of fact and law herein are made in good faith without the benefit of complete discovery. These responses represent Plaintiff's best efforts at this stage of the litigation and are based on currently available, non-privileged, and non-work product information and documents.

B. Plaintiff objects to each and every request to the extent that it calls for information subject to the attorney-client privilege, the work product privilege, the privilege for critical self-examination, or any other privilege. To the extent that documents or information arguably subject to such privileges may be provided by Plaintiff, such privileges are not waived beyond the precise extent of the disclosure made, and no waiver of privilege may be implied in that no disclosure of anything which is actually privileged is intended.

C. Plaintiff objects to each and every request to the extent that it may be vague, ambiguous, confusing, nonsensical, incomprehensible, or involves usage of words other than those commonly and customarily used, or assumes matters contrary to fact.

D. Plaintiff objects to providing information not within its knowledge, custody, possession, or control, or which does not exist.

E. Plaintiff objects to each and every request to the extent it may be overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence.

No objection, general or specific, which has been raised herein is waived by the provision of any response herein unless specifically stated to be waived by such answer.

Responses

Requests No. 1 and 2 seek Plaintiff's federal tax returns for the years 2000 through 2012, and Krystal Ballard's federal tax returns for the years 2000 through 2010. Plaintiff objects to these requests to the extent they are overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. The tax returns of Charles Ballard have no relevance to any issue in this case. The tax returns for Krystal Ballard for a decade are not relevant to any issue in this case. Without waiving or limiting these objections, Plaintiff is in the process of obtaining federal tax information for Krystal Ballard.

Request No. 3 seeks "[d]ocuments, such as a Marriage Certificate, that reflect and pertain to the marriage of Charles Ballard to Krystal Ballard." Plaintiff objects to this request to the extent that it is overly broad and unduly burdensome as Defendant's request for "documents" is

overly broad. Without waiving or limiting these objections, Plaintiff hereby produces the requested marriage certificate (BALLARD000001-BALLARD000002).

Request No. 4 requests that "[i]f Charles Ballard is married at the time of his deposition on February 1, 2013, documents, such as a marriage certificate, that reflect and pertain to his marriage to the person he is married to." Mr. Ballard is not married presently. Plaintiff has no documents responsive to this request.

Request No. 5 requests that "[i]f Charles Ballard is not married at the time of his depositions on February 1, 2013, documents, that reflect and pertain to any marriages he has had since July 26, 2010, such as marriage certificates." Mr. Ballard has not been married since July 26, 2010. Plaintiff has no documents responsive to this request.

Request No. 6 requests as follows: "Any and all documents, records, writings and physical things that pertain to and reflect in any way the following response of Charles Ballard in his Answer to Interrogatory No. 3 of the Defendants:

a. Loss of support to Charles Ballard from the death of Krystal Ballard.
b. Depletion of community assets.
c. Reduction of the community to earn income.
d. Costs and expenses changeable against community property arising from the injuries to Krystal Ballard prior to her death.
e. Funeral expenses.
f. Loss of income from Krystal Ballard.
g. Loss of pension and/or retirement benefits of Krystal Ballard.
h. Loss of health insurance benefits from Krystal Ballard."

Plaintiff hereby produces an invoice from Rost Funeral Home (000015BILL-000018BILL), an invoice from Tillman Funeral Home (BALLARD000132), an invoice from Artistic Flowers (BALLARD000133), receipts for items related to Krystal Ballard's funeral (BALLARD000134), a 2011 United States Air Force pay table (BALLARD000101), 2010 United States Air Force pay tables (BALLARD000102-BALLARD000115), and Air Force Benefits Fact Sheets

(BALLARD000116-BALLARD000131). Tax returns, pension and retirement benefit information for Krystal Ballard will be supplemented. Further, pursuant to the scheduling order deadlines, the Plaintiff will produce and economic report reflecting economic losses to Charles Ballard.

Request No. 7 requests "[a]ny and all documents, records, writings and physical things that support and are relied upon by Charles Ballard for his response to the Defendants' Interrogatory No. 3." In his response to Defendants' Interrogatory No. 3, Plaintiff stated that he "claims as special damages all those damages entitled to be claimed under the laws of the State of Idaho . . . ." Plaintiff refers Defendants to the documents referenced in response to Request No. 6.

Request No. 8 requests "[a]ny and all documents, records, writings and physical things that pertain to and support in any way the following allegations in the Complaint:

a. Decedent's funeral expenses,
b. Loss of wages and other benefits of employment which would have been earned by Krystal Ballard and shared with her husband, Plaintiff, during the course of her normal work life expectancy.
c. The reasonable value attributable to the loss of service, care, comfort and society of Krystal Ballard."

Plaintiff hereby produces the documents referenced in response to Request No. 6.

Request No. 9 requests "[b]ills, invoices, charges and documents that pertain to and reflect the amounts of the services, medical care and treatment provided for Krystal Ballard from the time of the surgery of Dr. Kerr until her death." Plaintiff hereby produces medical records from St. Alphonsus Medical Center (SAMC000001-SDAMC000192), medical records from Elmore Medical Center (EMC000001-EMC000029), medical records from Silk Touch Med Spa (STMS000001-STMS00023), medical records from Elmore Ambulance Service (EAS000001-EAS000034), medical records from Life Flight Network (LFN000001-LFN000005), billing

records from Elmore Medical Center (000001BILL-000003BILL), billing records from St. Alphonus Medical Center (000004BILL-000013BILL), a billing record from Elmore Ambulance Service (000014BILL), and a billing record from Life Flight Network (000019BILL).

Request No. 10 requests "[b]ills, invoices, changes and documents that pertain to and reflect the amounts for funeral, burial and last rites having to do with Krystal Ballard." Plaintiff hereby produces an invoice from Rost Funeral Home (000015BILL-000018BILL), an invoice from Tillman Funeral Home (BALLARD000132), an invoice from Artistic Flowers (BALLARD000133), and receipts for items related to Krystal Ballard's funeral (BALLARD000134).

Request No. 11 requests "[a]ny and all documents, records, writings and physical things that pertain to and reflect payment of all or any portion of the items described in paragraphs 9 and 10 above." Plaintiff currently has no responsive documents in his possession.

Request No. 12 requests "[r]ecords, files, documents and reports of all physicians, health care providers, hospitals, institutions and service providers of Krystal Ballard during the time frame of 2000 to the date of her death." Plaintiff objects to this request to the extent it is overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. The medical records of Krystal Ballard for a decade are not relevant to any issue in this case. Without waiving or limiting these objections, Plaintiff produces Air Force medical records (USAF000001-USAF000044), a Patient Medical History Form (BALLARD000020), medical records from St. Alphonsus Med. Ctr. (SAMC000001-SAMC000192), medical records from Elmore Medical Center (EMC000001-EMC000029), medical records from Silk Touch Med Spa (STMS000001-STMS00023), medical records from Elmore Ambulance Service (EAS000001-EAS000034), Life Flight Network medical records

(LFN000001-LFN000005), Elmore Medical Center billing records (000001BILL-000003BILL), billing records from St. Alphonus Medical Center (000004BILL-000013BILL), billing records from Elmore Ambulance Service (000014BILL), and billing records from Life Flight Network (000019BILL).

Request No. 13 requests "[r]ecords of the United States Air Force for Krystal Ballard that relate to the time period 2005 until her death." Plaintiff objects to this request on the grounds it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. Defendant's request for "records" is unduly broad. Certainly every United States Air Force record for Krystal Ballard is not relevant to the claims and defenses in this case. Without waiving or limiting these objections, Plaintiff hereby produces USAF Interim Report of Casualty and Final Report of Casualty (BALLARD000017-BALLARD000018), Air Force Medical Records (USAF000001-USAF000044); Geneva Conventions Identification Card (BALLARD000021-BALLARD000022), Performance Feedback Worksheets (BALLARD000024-BALLARD000027), Reenlistment Eligibility Annex to DD Form 4 (BALLARD000028), Request and Authorization for TDY Travel of DOD Personnel (BALLARD000029-BALLARD000030), Joint Spouse Assignment Requests (BALLARD000031-BALLARD000032), Transcript Request - Community College of the AF (BALLARD000033-BALLARD000034), Mountain Home AFB Memorandum Re: Application for Join Spouse Assignment (BALLARD000035), Financial Management and Comptroller Craftsman Workbook (BALLARD000039-BALLARD000100), Change of Projected Assignment Data (BALLARD000038), Servicemembers' Group Life Insurance Election and Certificate (BALLARD000019), United States Air Force Interim and Final Reports of Casualty (BALLARD000017-BALLARD000018), travel voucher or subvoucher for travel to Iraq

(BALLARD000036), Department of Air Force memorandum to Krystal Ballard Re: Extension of Enlistment for PCS (BALLARD000037), 2011 United States Air Force pay table (BALLARD000101), 2010 United States Air Force pay tables (BALLARD000102-BALLARD000115), and Air Force Benefit Fact Sheets (BALLARD000116-BALLARD000131).

Request No. 14 requests "[a] list of all physicians, health care providers and hospitals who provided services to Krystal Ballard from 2000 to her death." Plaintiff objects to this request to the extent it is overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. The requested records of Krystal Ballard for a decade are not relevant to any issue in this case. Without waiving or limiting these objections, Plaintiff produces the documents set forth in Request No. 12.

Request No. 15 requests "[p]hotographs of Krystal Ballard taken during the last 5 years of her life." Plaintiff objects to this request on the grounds it is overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. . Without waiving or limiting these objections, Plaintiff produces photographs contained within Krystal Ballard's funeral program (BALLARD000004-BALLARD000008), a number of separate photographs (BALLARD000135-BALLARD000149), as well as a video of Krystal Ballard's funeral.

Request No. 16 requests "[p]hotographs of the gravesite of Krystal Ballard including a headstone or marker that depicts wording or comments." Plaintiff produces a photograph (BALLARD000150).

Request No. 17 requests "[r]ecords, reports, files, documents, tangible things and objects of the Ada County Coroner and/or Ada County." Plaintiff hereby produces an Application for

Informal Probate of Will and Informal Appointment of Personal Representative (BALLARD000009-BALLARD000012) and the Ada County Coroner Investigative Report, Narrative Report, and Autopsy Report (ADA000001-ADA000011).

Request No. 18 requests the production of "[r]ecords, reports, files, documents, tangible things and objects, of the Office of Special Investigations, United States Air Force, Mountain Home Air Force Base or elsewhere." Plaintiff objects to this request on the grounds it is overly broad, irrelevant and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. . Without waiving or limiting these objections, Plaintiff produces any and all such records in his possession, which relate to the matters alleged in Plaintiff's Complaint, namely the United States Air Force Interim and Final Reports of Casualty (BALLARD000017-BALLARD000018). Plaintiff will supplement his Response to this Request if he comes into possession of any additional responsive documents.

Request No. 19 requests "[r]ecords, reports, files, documents, tangible things and objects of Dr. Glen Groben and Ada County for the and in conjunction with the autopsy performed on Krystal Ballard." Plaintiff hereby produces a Certificate of Death (BALLARD000003) and the Ada County Coroner Investigative Report, Narrative Report, and Autopsy Report (ADA000001-ADA000011).

Request No. 20 asks Plaintiff to provide "[a]uthorizations signed by Charles Ballard that will allow counsel for Dr. Kerr to obtain the material and items described in paragraphs 12, 13, 17, 18 and 19 directly." Plaintiff incorporates herein each of his objections and responses made to Requests 12, 13, 17, 18, and 19 and refers Defendants to the documents produced in response to each such Request.

Request No. 21 requests "[d]ocuments and records that pertain to and involve the Estate of Krystal Ballard, its administration, adjudication, wrapping up and closure." Plaintiff objects to this request on the grounds it is overly broad, irrelevant, and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. Without waiving or limiting these objections, Plaintiff produces an Application for Informal Probate of Will and Informal Appointment of Personal Representative (BALLARD000009-BALLARD000012), Information to Heirs and Devisees / Notice of Appointment (BALLARD000013-BALLARD000014), and Letters Testamentary (BALLARD000015-BALLARD000016).

Request No. 22 requests "[t]he last will and testament of Krystal Ballard and any codicils." Request No. 23 requests "[r]ecords, documents and writings that relate to or involve any inheritance for Charles Ballard due to the death of Krystal Ballard and life insurance benefits for Charles Ballard that are due Charles Ballard from life insurance on Krystal Ballard." Request No. 24 requests documents "that reflect and pertain to the current net worth of Charles Ballard." Plaintiff objects to each of these requests (Request Nos. 22, 23, 24) on the grounds they are overly broad, irrelevant, and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. None of these Requests seek information which has any relevance to the issues in this case.

Request No. 25 requests "[d]ocuments and records that pertain to and reflect prescriptions for medications purchased or acquired by Krystal Ballard from the time of the operation by Dr. Kerr until her death." Plaintiff hereby produces the above-referenced medical records.

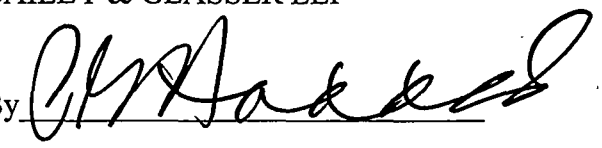
Request No. 26 requests the "[d]rivers license of Krystal Ballard that was in effect on the date of her death." Plaintiff hereby produces the requested driver's license (BALLARD000023).

Request No. 27 requests "[d]ocuments, records and writings for applications of Krystal Ballard for any type of insurance that she initiated during the last 3 years before her death." Plaintiff objects to this request on the grounds it is overly broad, irrelevant, and not reasonably calculated to lead to the discovery of admissible and/or relevant evidence. The Request seeks information which has no relevance to the issues in this case.

Request No. 28 requests "[w]ritings, diaries, notes and recordings of Krystal Ballard and Charles Ballard that pertain to and reflect events, facts, conversations with Dr. Kerr and his office staff/employees of Silk Touch Laser." Plaintiff does not possess responsive documents beyond the applicable medical records referenced above.

Dated this 1st day of February, 2013.

Respectfully Submitted,
BAILEY & GLASSER LLP

By 

P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2013, I served a true and correct copy of the foregoing ***Plaintiff's Objections to Defendants' Notice Duces Tecum of Taking Video Deposition of Charles Ballard*** by hand delivering the same to the following:

Jeremiah A. Quane
CAREY PERKINS, LLP
Boise, Idaho 83701

P. Gregory Haddad

David Z. Nevin (ISB#2280), dnevin@nbmlaw.com
Scott McKay (ISB#4309), smckay@nbmlaw.com
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201 Monroe Street, Suite 2170
Montgomery, Alabama 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

ORIGINAL

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of *Plaintiff's Second Set of Interrogatories and Requests for Production of Documents to Defendant, Silk Touch Laser, LLP*, together with a copy of this *Notice of Service of Discovery*, has been served upon counsel indicated on the certificate of service below.

DATED this 11th day of February, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2013, a true and correct copy of the foregoing ***Notice of Service of Discovery*** was served upon the following via hand delivery:

Jeremiah A. Quane
CAREY PERKINS, LLP
300 N. 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

David Z. Nevin (ISB#2280), dnevin@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

ORIGINAL

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of *Plaintiff's Second Set of Interrogatories and Requests for Production of Documents to Defendant, Brian Calder Kerr, M.D.*, together with a copy of this *Notice of Service of Discovery*, has been served upon counsel indicated on the certificate of service below.

DATED this 11th day of February, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2013, a true and correct copy of the foregoing ***Notice of Service of Discovery*** was served upon the following via hand delivery:

Jeremiah A. Quane
CAREY PERKINS, LLP
300 N. 6th Street, Suite 200
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Boise, Idaho 83701-0519

Scott McKay

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201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE VIDEOTAPED DEPOSITION

ORIGINAL

To: Jonelle Cadiz
1500 Sheridan Drive
Jacksonville, AR 72076

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the videotaped deposition of Jonelle Cadiz, on **Tuesday, April 2, 2013** at 10:00 a.m. at Bushman Court Reporting, 620 W. Third Street, Suite 302, Little Rock, Arkansas 72201, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before an appropriate officer authorized by law to administer oaths.

Dated this 14th day of March, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEOTAPED DEPOSITION OF JONELLE CADIZ** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
CAREY PERKINS, LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83701

And fax to:
208-345-8660

Bushman Court Reporting
620 W. Third Street, Suite 302
Little Rock, AR 72201
Court Reporter

J.B. Perrine

ORIGINAL

Jeremiah A. Quane, ISB No. 977
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

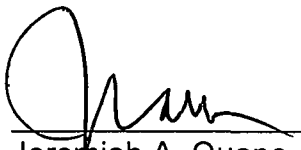
NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 22nd day of March, 2013, I served ANSWER AND RESPONSES OF DEFENDANT SILK TOUCH LASER, LLP TO PLAINTIFF'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR

PRODUCTION OF DOCUMENTS and ANSWERS AND RESPONSES OF DEFENDANT BRIAN CALDER KERR, M.D. TO PLAINTIFF'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS, together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657



Jeremiah A. Quane

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
Scott McKay (ISB#4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CVOC12-04792 **NOTICE OF SERVICE OF DISCOVERY**

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff gives notice to the Court and the Defendants that he has served Plaintiff's Supplemental Response to Defendants' First Set of Interrogatories by hand delivering on March 26, 2013, to the persons indicated on the certificate of service below.

DATED this 26th day of March, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2013, I served a true and correct copy of the foregoing by hand delivering the same to the following:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S EXPERT WITNESS DISCLOSURE

COMES NOW the Plaintiff, Charles Ballard ("Plaintiff"), by his counsel, and discloses the following expert witnesses who may be called upon to testify at the trial of this action:

1. Dean E. Sorensen, M.D.
   Sorensen Cosmetic Surgery Center
   250 Bobwhite Court, Suite 120
   Boise, ID 83706

2. George Nichols, M.D.
   739 Middle Way
   Louisville, KY 40206

3. Keith Barclay Armitage, M.D.
   12600 Cedar Road
   Cleveland Heights, OH 44106

4. Cornelius A. Hofman
   The GEC Group
   5555 N. Star Ridge Way
   Star, ID 83669

5. The following individuals were involved in the care and treatment of Krystal Ballard beginning on July 25, 2010, until her death just after midnight on July 26, 2010:

Elmore Ambulance Service, 895 N. 6th East, Mountain Home, Idaho 83647.

Cody Murphy, EMT; and

Wendy Vanderburgh, EMT – Paramedic.

Elmore Medical Center, 895 N. 6th Street, Mountain Home, Idaho 83647

Karl Olson, MD;

Bertram Stemmler, MD; and

Edward Kim, MD.

Life Flight Network, 2779 S Liberty St, Boise, Idaho 83709

Beth Studebaker, RN; and

Steve Mozingo, PM.

Saint Alphonsus Regional Medical Center, 1055 North Curtis Road, Boise, Idaho 83706

Matthew Campbell, MD - Emergency Department;

Tisha Fujii, DO - Critical Care;

Billy Mrogan, MD - Surgical Consult;

Jeffrey Symmonds, MD - Vascular Examination;

Michael Kenner, MD - Heart & Vascular Center;

Howard Schaff, MD - Gem State Radiology; and

Attending nursing and other staff to include David Atkinson, RN; Rob Hart, RN; Debra Servatius, RN; Kristin Prescott, RN: Tensie Tobenas, RN; Benjamin Gagnebin, RN; Shirley Phillips, DTR (diet/nutrition); Ann Schaffer, CRT; and Wynne Proctor, RN.

The following individuals who participated in, or contributed to, the autopsy of Krystal Ballard conducted by the Ada County Coroner's office, 5550 Morris Hill Road, Boise, Idaho 83706:

Erwin L. Sonnenberg, Coroner;

Glen R. Groben, M.D., Forensic Pathologist;

Robert Karinen, Forensic Lab Supervisor;

Barton L. Kline, Forensic Lab Technician; and

Kelly Cole, Coroner's Investigator.

6. Plaintiff may inquire of Defendant Brian Kerr, MD, whose address is known to Defendants' counsel, regarding opinions held by this Defendant.

7. Plaintiff reserves the right to call rebuttal witnesses.

8. Plaintiff reserves the right to call any and all persons identified by other parties to this action.

9. Plaintiff reserves the right to supplement this disclosure as discovery proceeds.

Dated this 26th day of March, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2013, I served a true and correct copy of the foregoing **PLAINTIFF'S EXPERT WITNESS DISCLOSURE** delivering the same to the following via hand delivery:

Jeremiah A. Quane
CAREY PERKINS, LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83701

Scott McKay

ORIGINAL

NO. A.M. 1137 FILED P.M.

MAY 14 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

ORIGINAL

Jeremiah A. Quane, ISB No. 977
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF TAKING DEPOSITION OF CHARLES BALLARD BY AUDIO-VISUAL MEANS

TO: THE ABOVE-ENTITLED PLAINTIFF and their attorneys of record:

NOTICE OF TAKING DEPOSITION OF CHARLES BALLARD BY AUDIO-VISUAL MEANS - 1

140

YOU WILL PELEASE TAKE NOTICE THAT Defendants will take testimony on oral examination of Charles Ballard by audio-visual and teleconferencing means per Rule 30(b)(4), I.R.C.P., before a video operator and a court reporter and notary public with the firm of Anchor Court Reporting, Pensacola, Florida, commencing on Thursday, the 23rd day of May, 2013, at 1:30 p.m., Florida time, and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at Anchor Court Reporting, 229 South Baylen Street, Pensacola, Florida 32502, at which time and place you are notified to appear and take such part in the examination as you may deem proper. Counsel for the Defendants will participate in the deposition by teleconferencing from Boise, Idaho at REGUS – Downtown, 950 Bannock Street, Boise, Idaho 83702, starting at 12:30 p.m., Boise time.

This deposition shall be taken pursuant to Idaho Rules of Civil Procedure.

DATED this 14th day of May, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2013, I served a true and correct copy of the foregoing NOTICE OF TAKING DEPOSITION OF CHARLES BALLARD BY AUDIO-VISUAL MEANS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657

Jeremiah A. Quane

David Z. Nevin (ISB#2280), dnevin@nbmlaw.com
Scott McKay (ISB#4309), smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad, ghaddad@baileyglasser.com
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
T: (304) 594-0087; F: (304) 594-9709

J.B. Perrine, jbperrine@baileyglasser.com
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE

ORIGINAL

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of *Plaintiff's Supplemental Responses to Defendants' Notice of Duces Tecum of Taking Video Deposition of Charles Ballard* and *Plaintiff's Second Supplemental Answers to Defendants' First Set of Interrogatories*, together with a copy of this *Notice of Service of Discovery*, has been served upon counsel indicated on the certificate of service below.

DATED this 14th day of May, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 14th, 2013, a true and correct copy of the foregoing ***Notice of Service of Discovery*** was served upon the following via hand delivery:

Jeremiah A. Quane
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Facsimile: 208-780-3930

Scott McKay

ORIGINAL

NO. _____
A.M. _____ FILED P.M. 2

MAY 15 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

Jeremiah A. Quane, ISB No. 977
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SUBSTITUTION OF COUNSEL

TO: CLERK OF THE ABOVE-ENTITLED COURT and ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants, pursuant to Idaho Rule of Civil Procedure 11(b)(1), hereby substitute Jeremiah A. Quane of the firm of Quane Jones McColl, PLLC, as its attorneys of record in this action in place of the firm Carey Perkins LLP, in the above-referenced action. All future correspondence, notes, pleadings and other documents relating to this action should henceforth be served upon:

Jeremiah A. Quane
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone – (208) 780-3939
Facsimile – (208) 780-3930
jaq@quanelaw.com

DATED this 13th day of May, 2013.

QUANE JONES McCOLL, PLLC

By_____
Jeremiah A. Quane

DATED this 14th day of May, 2013.

CAREY PERKINS LLP

By_____
Richard L. Stubbs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2013, I served a true and correct copy of the foregoing NOTICE OF SUBSTITUTION OF COUNSEL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (304) 594-9709

James B. Perrine
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104
Telephone (334) 262-6485
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (334) 262-0657

Jeremiah A. Quane

ORIGINAL

Jeremiah A. Quane, ISB No. 977
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' DISCLOSURE OF EXPERT WITNESSES

The Notice of Trial Setting and Order Governing further proceedings dated May 16, 2012, provides *inter alia*, that the Defendants shall disclose all expert witnesses to be used at trial by no later than one hundred twenty (120) days prior to trial and jury trial

to commence on September 24, 2013. In compliance with this Order, the Defendants disclose the following expert witnesses to be used at trial:

1. Dr. Thomas Coffman, Boise, Idaho.
2. Dr. Alan Frankle, Boise, Idaho.
3. Dr. Charles Garrison, Boise and Pocatello, Idaho.
4. Dr. Brian Kerr, Boise, Idaho.
5. Dr. Gregory Laurence, Germantown, Tennessee.
6. Dr. John Lundeby, Spokane, Washington.
7. Dr. Geoffrey Stiller, Moscow, Idaho.
8. Dr. S. Angier Wills, Pocatello, Idaho.

DATED this 28th day of May, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 2013, I served a true and correct copy of the foregoing DEFENDANTS' DISCLOSURE OF EXPERT WITNESSES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657

Jeremiah A. Quane

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE DEPOSITION

ORIGINAL

To: Briana Kerr
c/o Jeremiah A. Quane
Quane, Jones, McColl
U.S. Bank Plaza, Suite 1601
101 S. Capitol Blvd.
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the deposition of Briana Kerr, on Tuesday, June 25, 2013, at 9:00 a.m. at Quane, Jones, McColl, PLLC, 101 S. Capitol, Suite 1601, Boise, Idaho 83701, upon oral examination pursuant to the Rules of Civil Procedure before an officer authorized by law to administer oaths.

The oral examination will continue from day to day until completed.

Dated this 3rd day of June, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE DEPOSITION OF BRIANA KERR** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Quane, Jones, McColl
U.S. Bank Plaza, Suite 1601
101 S. Capitol Blvd.
Boise, ID 83701

Associated Reporting, Inc.
1618 W. Jefferson Street
Boise, Idaho 83702
Court Reporter

Scott McKay

ORIGINAL

Jeremiah A. Quane, ISB No. 977
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

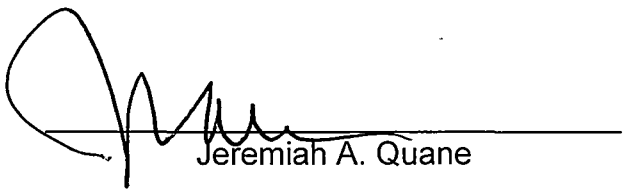
CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 3rd day of June, 2013, I served DEFENDANTS' FIRST SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF

INTERROGATORIES, together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657



Jeremiah A. Quane

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
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BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE VIDEO DEPOSITION OF DR. JOHN P. LUNDEBY, M D

To: Dr. John P. Lundeby, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video deposition of Dr. John P. Lundeby, M.D., on **Friday, July 26, 2013** at 1:00 p.m. at law offices of Ramsden and Lyons, LLP, 700 Northwest Blvd. Coeur d'Alene, ID 83814, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 11 day of June, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP
By: _____

P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO DEPOSITION OF DR. JOHN P. LUNDEBY, M.D.,** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, ,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF PLAINTIFF'S THIRD SET OF DISCOVERY REQUESTS TO DEFENDANTS

ORIGINAL

NOTICE IS HEREBY GIVEN that on the 21st day of June, 2013, **Plaintiff's Third Set of Discovery Requests to Defendants**, along with a true and correct copy of this **Notice of Service**, were served upon counsel for the Defendants by facsimile as follows:

Jeremiah A. Quane, Esq.
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Facsimile: 208-780-3930

NEVIN, BENJAMIN, MCKAY & BARTLETT, LLP

By _____ for
David Nevin
Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES

625782

ORIGINAL

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rule 403 of the Idaho Rules of Evidence, and moves this Court to strike cumulative experts. This motion is supported by a memorandum of law, as well as an Affidavit of Counsel, both filed contemporaneously herewith.

On June 3, 2013, Defendants served their First Supplemental Answers to Plaintiff's First Set of Interrogatories, which identifies highly cumulative expert witness testimony. Because Defendants' disclosed expert witness testimony is so blatantly in violation of Rule 403, Defendants should not simply be precluded from introducing such cumulative evidence at trial, but Plaintiff should be spared the undue and unfair prejudice of incurring the expense of a discovery effort, including depositions, involving experts whose role in this case is necessarily limited to offering cumulative testimony.

Though Plaintiff's counsel made an effort to address this issue in good faith with defense counsel, the parties reached no resolution. Therefore, the Court's involvement is now required. Accordingly, Plaintiff now moves this Court for an order limiting Defendants to two expert witnesses, including Defendant, Dr. Kerr, on any single topic.

Dated this 26th day of June, 2013.

Respectfully submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2013, I served a true and correct copy of the foregoing by hand delivering the same to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
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BAILEY & GLASSER, LLP
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BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF SCOTT MCKAY

ORIGINAL

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

Scott McKay, being first duly sworn, states and alleges the following:

1. I am one of the attorneys representing Plaintiff in this litigation.

2. On June 3, 2013, Defendants served a supplemental answer to Plaintiff's Interrogatory No. 3, which calls for expert witness information. This supplemental answer is attached hereto as Exhibit A.

3. On more than one occasion since that time, Plaintiff's counsel raised objection with defense counsel regarding Defendants' disclosure of multiple experts concerning the same subject matter, including by letter dated June 20, 2013. Letter from James B. Perrine to Terrence S. Jones, June 20, 2013, attached hereto as Exhibit B.

4. By letter dated June 21, 2013, Defendants' counsel maintained the propriety of Defendants' intended expert witness testimony. Letter from Terrence S. Jones to James B. Perrine, June 21, 2013, attached hereto as Exhibit C.

5. Plaintiff has in good faith conferred or attempted to confer with the Defendants in an effort to resolve this dispute without court action.

Scott McKay

STATE OF IDAHO)
) ss
COUNTY OF ADA)

Taken, subscribed and sworn to before me this 26TH day of June, 2013.

Notary Public for Idaho
My commission expires: 11-8-13

DEBI C. PRESHER NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2013, I served a true and correct copy of the foregoing by hand delivering the same to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

JUN 04 2013

COPY

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' FIRST SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendants hereby submit their First Supplemental Answer to Plaintiff's First Set of Interrogatories as follows:

INTERROGATORY NO. 3: State the name and addresses of each person

000289

EXHIBIT A

whom you intend to call as an expert witness at trial, the subject matter on which each expert is expected to testify, the substance of the facts and opinions of each expert, a summary of the grounds for each opinion of each expert, and a summary of each expert's qualifications.

SUPPLMENTAL ANSWER TO INTERROGATORY NO. 3:

1) Brian C. Kerr, M.D.
C/o Quane Jones McColl PLLC
101 S. Capitol Blvd. Suite 1601
Boise, Idaho 83701
(208) 780-3939

Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Kerr is a physician licensed by the state of Idaho to practice medicine and surgery. Dr. Kerr has engaged in the medical specialty of anesthesiology and cosmetic surgery at all times relevant herein. Dr. Kerr will testify as a non-retained expert witness at the trial as to his compliance with the applicable standard of health care practice with respect to all of the medical services rendered to the patient/decedent Krystal Ballard. Dr. Kerr will testify that he has actual knowledge of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that he met such standard taking into account his background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient.

Part of the basis for Dr. Kerr's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician in Boise, Idaho, his prior involvement in the peer review process while working

as an anesthesiologist, his involvement as an anesthesiologist on thousands of surgeries, his prior medical staff privileges, his knowledge of how cosmetic procedures like liposuction are performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers in Boise, Idaho and elsewhere, and his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion. Dr. Kerr will explain his training and experience at the Mayo Clinic during his residency in anesthesiology 1989-1992 as it relates to sterile operating conditions for the anesthetic procedures he performed, was taught and observed. He will explain the same matters for his experience as a staff anesthesiologist at Saint Alphonsus Regional Medical Center in Boise from 1992 to 2008.

Dr. Kerr will discuss the standard of health care practice employed at Saint Alphonsus Regional Medical Center for achieving sterile operating conditions and the disinfection of instruments and equipment and that the similar matters undertaken for the procedure on Krystal Ballard were used and exceeded.

Dr. Kerr will testify that the infection rates at Saint Alphonsus Regional Medical Center were and are for in excess of any infections he has encountered which

are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences.

By way of these and other professional experiences in Boise, Idaho, Dr. Kerr will testify that he has actual knowledge of community standards of health care practice applicable to him. During his professional career in Boise, Idaho, he has been acquainted with physicians who perform cosmetic procedures who are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. Dr. Kerr has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and the procedures utilized by them in this specialty in Boise, Idaho in 2010, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic procedures including the procedures at issue in this case. Dr. Kerr will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice for him or physicians who practice in the same medical specialty he does.

Dr. Kerr will describe and offer testimony on the training he received for the procedures he performed on Krystal Ballard and refer to the publications, data and documents that have been produced in discovery on this subject that are incorporated herein by this reference and explain the numerous similar procedures he performed before his treatment of Krystal Ballard, consisting of 199 liposuctions through July 20, 2010 and 33 fat transfers through July 20, 2010.

Dr. Kerr will explain that there was no requirement, per the standard of health care practice or otherwise, for his facility to be certified, inspected or approved by

any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedure he performed on Krystal Ballard.

During Dr. Kerr's professional career in Boise, Idaho, he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. He will testify regarding the significant experience he has in performing these types of procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that he had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. As reflected in his deposition testimony and discovery responses which are hereby incorporated as if set forth in full, Dr. Kerr had performed these procedures on numerous other patients before and since the procedure at issue in this case. Dr. Kerr will testify that he possesses the professional knowledge and experience that allows him to express the opinions and testimony described in this document.

Dr. Kerr will testify that he has never had a patient experience a post-operative complication like the one alleged in this case nor has he ever had a patient experience a post-operative infection of this nature, nor a patient death. Based in part on his review of this case and in consultation with experienced and trained medical professionals in several other areas of medicine including infectious disease and pathology, he will testify that the patient's death was not due to any error or omission on

his part or the part of anyone associated with his practice. He will testify that he employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies. Dr. Kerr will explain the procedures he performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will explain the same matters in regard to the multitude of procedures her performed before the procedure he performed on Krystal Ballard. He will render the opinion that his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Kerr actually holds the opinions expressed in this document and that his opinions will be stated on a more probable than not basis or reasonable medical certainty.

Dr. Kerr will testify that nothing he elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient. Dr. Kerr will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice by him. He will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. Dr. Kerr's testimony at trial will necessarily contain a mixed component of both factual and expert testimony. He

will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010.

As part of his testimony, Dr. Kerr will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with his deposition testimony, prior discovery responses and the contents of this disclosure which are hereby incorporated. He will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. The standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and no perfect outcome was ever warranted or represented to the patient. The standard of practice applicable includes as a major element aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. Dr. Kerr will be prepared to testify about his experiences in this regard at trial and why his care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Kerr will explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections may occur. Dr. Kerr will explain the advice and information given to Krystal Ballard in regard to the risk, benefits and options he provided to Krystal Ballard on two occasions before his procedure on July 21, 2010 which is documented in his medical records. Dr. Kerr will

explain the standard of health care practice that is applicable to him and that everything undertaken by him in his care and treatment of Krystal Ballard is illustrative of the standard of health care practice, based on the class of health care provider to which he belonged and in which capacity he was functioning. Dr. Kerr will explain that the standard of health care practice provides that he is to be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization.

As part of his testimony and consistent with his specialty of anesthesiology and cosmetic surgery, Dr. Kerr is expected to testify concerning the totality of medical services provided to Krystal Ballard. As part of his testimony, Dr. Kerr will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery. He will discuss his care and treatment of the patient as outlined in the patient's medical records as well as his conversations and interactions with the patient and her husband as discussed in the documents produced in discovery and/or attached as exhibits to Dr. Kerr's deposition. To the extent it is relevant to his opinions, he will also discuss his continuing education courses since transitioning from anesthesia to cosmetic procedures including his further knowledge of cosmetic surgery which includes both the Vaser procedure and fat injection procedures and how they are performed in different locations in this body.

With respect to the fat injection, he will discuss how a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site

being treated. Before the procedure, the areas from where the fat is being removed are injected with a fluid to minimize bruising and discomfort. The fat is removed from the body by a cannula through a small incision. He will discuss how the fat is prepared to be reinjected back into the patient's body and then placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by injecting more than is needed at the time to achieve the desired end result. Over a few weeks, the amount of transferred fat will decrease. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Kerr will discuss the entries in his records including his first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the patient's health history form, the fact that she had previously had a liposuction procedure and desired further treatment of this type, the general state of the patient's health, the operative report and a detailed explanation of how he did the procedure on July 21, 2010, he will discuss the patient's vital signs and her clinical condition before during and after the surgery as well as at the post-operative visit with the patient, his pre-operative, intra operative and post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt, he will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates

to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, he will explain the artistic nature of the procedure and the laborious aspect of moving the cannula back and forth to feather the tissue and achieve the desired aesthetic result.

As part of his testimony, Dr. Kerr will explain the manner and method by which the adipose tissue harvested is then drained and prepared for reinjection, how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss those pieces of equipment and/or attachments and medical goods which are new versus sterilized for reuse between patients and/or procedures, he will discuss the pre and post-operative antibiotics he administered to the patient and the reasons why they were appropriate, he will discuss how the patient never appeared infected or septic to him or even to be suffering from any signs or symptoms of any infection beyond general localized pain in her buttocks which would be expected initially from this type of procedure. He will discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, there was no swelling or signs of a rash or change in condition of the skin surrounding the area. Dr. Kerr will explain how he looked for and documented the absence of these signs and symptoms during his postoperative visit on July 23 and in his subsequent discussions with the patient and her husband prior to her death. He will testify that at no point did the patient present to him as having an infection nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done. He will discuss his knowledge of gram negative rods

and the fact that they do not exist on the skin nor would they be found on his instruments, but rather they are a class of bacteria which resides in the bladder, bowels and urinary tract of a patient.

Dr. Kerr will discuss why the Vaser procedure is an appropriate method of removing unwanted adipose tissue in a patient like Krystal Ballard. He will testify that he had adequate training and experience to perform the surgical procedures on the patient in question and that he performed these procedures in conformity with the local standard of practice to which Dr. Kerr is held. He will explain how the field of laser lipolysis with the use of tumescent anesthesia has expended in recent years. He will discuss how when considering different types of the body for lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or reinject into each location. He will explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

As part of his testimony, he will explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove.

Small-diameter probes are then inserted into the body through small incisions. He will explain how by resonating at a high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Kerr may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. He will discuss his operative report and how he creates his medical record documentation, how and why he selected the antibiotics in question including the decision on July 23 to place the patient on 500 mg of Keflex and that this was an appropriate broad spectrum antibiotic to provide the patient given her location in Mountain Home, he will explain how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how he specifically evaluated, questioned the patient and documented regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that he took the appropriate amount of time to address this patient during her procedure on July 21, 2010. He will discuss his knowledge of the various cosmetic organizations to which he belongs and/or has knowledge of, what they offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field. Dr. Kerr will explain the matter he undertook on July 23, 2010 for evaluating Krystal Ballard and

assessing whether there was any clinical evidence of infection of the surgical sites, including abnormal odor, and thus there was no evidence or suggestion of infection of the sites.

He will discuss how on July 26, 2010 he learned around 1 p.m. that Krystal Ballard had died. After the patient's death he sent a document setting forth his list of concerns to the coroner who he asked for a copy of the autopsy record. He will discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine and that this is consistent with an infectious process in the patient's bladder. This is also an area wherein gram negative rod bacteria are known to populate and exist. He will discuss how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery. He will comment upon the fact that the autopsy failed to address the patient's bladder or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. Dr. Kerr is expected to offer testimony on the autopsy report of Dr. Glen Groben and the matters he described in his deposition in regard to the report, including the fact that Dr. Groben did not perform a microscopic evaluation of the bladder and urinary tract with the exception of the kidneys.

Dr. Kerr is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly. He will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of

acute inflammatory cells within tissue from the surgical sites, it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. Dr. Kerr will render the opinion, more likely than not, that the gram negative bacterial rods, if they existed, were introduced into the patient's surgical site sometime after the procedure rather than being introduced during the procedure. He has never had a patient experience such an infection in all his years. Dr. Kerr will testify that few of his patients who have undergone a lipolysis procedure have ever experienced any kind of post-operative infection and none of those patients died and all of them were diagnosed based on clinical observation. These were limited cellulitis based on clinical suspicion and not based on a culture result. Dr. Kerr will explain that if the opinions of Dr. Dean Sorensen are valid, there should have been other infections of patients before and after the procedure on Krystal Ballard, and there were not.

Dr. Kerr will testify that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss how the patient repeatedly concealed this procedure from her husband and the military and that she was noncompliant with what she had been told both in writing and verbally about how to care for herself. He will discuss how the patient erroneously reported that she had fallen and injured her back and claimed this was the source of her pain rather than admit she had cosmetic surgery performed. He will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will also discuss how the patient admitted to engaging in activities she was told to refrain from

in order to allow her body time to heal. He will discuss his concern that the patient was not properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Kerr will testify that he and his employees followed the appropriate sterile technique in regards to the procedure he performed on Krystal Ballard. He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control. He will explain how the patient was not following the instructions on how to care for herself, change her bandages, and get appropriate rest. He will discuss the patient's disclosure that she had a PT exam in the military scheduled for a day or two after the procedure and was told that she should not engage in that activity. He will discuss how the patient agreed to tell her husband that she had the cosmetic procedure done so he could help care for her, but then she failed to do so on multiple occasions. He will explain that when the patient showed up on July 21 to have the procedure she did not have someone present to drive her home as she was instructed to do. Dr. Kerr will discuss how he did not use a sedating drug with the patient and then observed her for a period of time after the procedure before allowing her to drive home and even offered to have a taxi take the patient home.

The patient was placed on 500 mg of Keflex per day for 10 days as of the July 23 visit. He would have removed the bandages in order to personally observe the area of the wound to check for signs and symptoms of infection. He will testify that the amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require him to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. He will discuss his training in performing liposuction he received from both John Lundeby and at the Keller Medical Institute. He will discuss his experiences with and the differences between Smart Lipo, Ultrasonic liposuction and traditional liposuction. He will discuss his background, training and experience in the use and regular implementation of the sterile technique. He will discuss how this is an office based procedure which is not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such a procedure. He was not required, nor does the standard of practice require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF.

He will discuss how his procedure room is prepared for surgery, how the patient, himself, his assistant and the patient are all prepared for surgery and the sterile technique utilized. He will discuss the autoclave he uses, how it operates and how it helps him maintain a sterile field for his procedures. He will testify that he was not required to test for spores or mold and that these issues have nothing to do with the case. He will discuss the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. He will discuss the operation

and use of the Vaser ultrasonic lipolysis machine utilized for the procedure in this case. He will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how he harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes despite the fact the patient was in the procedure room for around four hours. He will discuss the different cannulas used to aspirate the fat and the artistic technique required to accomplish the desired aesthetic outcome.

He will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss his informed consent discussion with the patient including the contents of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications. He will discuss and interpret the entries in his medical records.

Dr. Kerr will render his opinions consistent with the requirements of Idaho Code §6-1012 and 6-1013. In this regard, he will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of

consent, he will testify that he discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects consistent with the requirements of Idaho Code §39-4506. As part of his testimony, he may also discuss his preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that he improperly performed the lipolysis procedure, the fat injection procedure, that he improperly sterilized his equipment or that he did anything to cause the patient's death. Depending on the testimony of Dr. Dean Sorensen at trial, Dr. Kerr may offer testimony on and descriptive of the fact that Dr. Sorensen is a competitor of his and advertises his belief that non-plastic surgeons should not do liposuction, such as his website that states "unfortunately, there are a number of procedures being performed by physicians who are not trained in plastic surgery. These non-plastic surgeons often utilize technologies that have catchy names and are expensive but in clinical trials have not shown any significant improvement over the standard tumescent liposuction techniques. Patients are advised to select a procedure that is safe and effective based on scientific results performed by a Board Certified plastic surgeon and to ignore the marketing hype so common today." Depending on the proof submitted at trial and the testimony of Dr. Sorensen and/or the tenor or implication of his testimony and opinions, Dr. Kerr may describe the lawsuit against Dr. Sorensen in Boise that resulted in the jury rendering a verdict of malpractice against him and assessing damages of a substantial amount against him. Dr. Kerr may testify that Dr. Sorensen has

never observed or seen the operating procedures of his, including his sterile techniques, use of instruments, disinfectant matters and the way he performed the procedures on Krystal Ballard.

As part of his testimony, Dr. Kerr will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Kerr will testify that he had the best interests of the patient in mind and that he was committed to the rendition of his services in full compliance with the applicable local standard of health care practice and his experience and capability. He will testify that even in hindsight the patient did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. At the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard and Dr. Kerr will opine that Krystal Ballard was not suffering from a urinary tract infection on July 21, 2010.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Kerr has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of anesthesia and cosmetic surgery in Boise, Idaho in 2010 in treating, diagnosing, managing and caring for patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge that it is within his specialty and capability to perform the procedures in question as part of his practice of medicine,

his interactions with cosmetic providers, and his membership and participation in various medical associations, including those in the state of Idaho. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery within Boise, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine in Boise.

Dr. Kerr will discuss the ability, competence and proficiency of Brianna Kerr as a surgical assistant and the manner in which she maintains sterile conditions for surgeries, and the fact that she did nothing in the surgery of Krystal Ballard that would create or contribute to an infection.

His opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, affidavits, discovery responses and depositions taken. Dr. Kerr's professional background and qualifications were discussed in his deposition and are incorporated herein. As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including his own, his employees, and the Plaintiff's. He has also reviewed and considered his medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records

are produced, they will also be considered. Dr. Kerr will explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight.

At Elmore Medical Center, July 25, 2010, the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at St. Alphonsus on July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overlaid. Dr. Kerr will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Kerr will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of a developing urinary tract infection or abnormalities that developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they came from the urinary tract of Krystal Ballard or her intestinal tract and were not introduced during his surgical procedure. Bacteria was found in the urinalysis at Elmore.

It is expected that Dr. Kerr will explain pertinent anatomy, infectious processes, pathophysiology of infections, nidus for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding what drugs would show up on drug test by the Air Force. He will also explain the post-surgery matters he undertook and his efforts to assist Krystal Ballard, including the importance of the

post-treatment instructions given to Krystal Ballard as denoted in his medical records and the evidence that is consistent with non-compliance by Krystal Ballard.

Dr. Kerr reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Kerr reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond. Dr. Kerr has not testified in any matter in the last four years. He is not a retained expert. His curriculum vitae was previously produced and is incorporated by this reference.

2) Gregory Laurence, M.D.
Germantown Aesthetics
7475 Poplar Pike
Germantown, Tennessee 38138
(901) 624-5605

Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Laurence is a physician licensed in the state of Tennessee to practice medicine and surgery. Dr. Laurence is board certified in both family practice and laser surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Laurence will testify as a retained expert witness at the trial. Dr. Laurence will testify that he has actual knowledge

of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient.

Dr. Laurence will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Laurence's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges at Baptist Memorial Hospital and St. Francis Hospital in Memphis, Tennessee, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers were performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers like Dr. Kerr in Boise, Idaho and elsewhere, his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion. As part of his testimony, Dr. Laurence may also explain his training and

experience at the University of Tennessee during his residency in family practice in 1992-95 as it relates to sterile operating conditions for the procedures he performed, was taught and observed. He will explain the same matters for his experience in his own aesthetics surgical center which he operates in Germantown, Tennessee from 2003 to the present.

Dr. Laurence will discuss the standard of health care practice employed at his own surgical facility in Tennessee for achieving sterile operating conditions and the disinfection of instruments and equipment and maintaining a sterile operative field and that the similar actions and efforts undertaken by Dr. Kerr as have been described for the procedure on Krystal Ballard in this case were used and exceeded in his opinion. Dr. Laurence will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were appropriate and working properly at the time of the surgery at issue in this case.

Dr. Laurence will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons. Dr. Laurence has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and

the procedures utilized by them in this specialty, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic procedures including the procedures at issue in this case. Dr. Laurence will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice in the same medical specialty as his and Dr. Kerr.

Dr. Laurence will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. As part of his testimony, he is expected to refer to the publications, data and documents that have been produced in discovery on this subject and explain the numbers of similar procedures he has performed. Dr. Laurence will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard. He will testify that he was not required to test for spores or mold and that these issues have nothing to do with the case.

During Dr. Laurence's professional career he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. Dr. Laurence will testify regarding the significant experience he has in performing these types of

procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Laurence will testify that he possesses the professional knowledge and experience that allows him to express the opinion and testimony described in this document.

Dr. Laurence will testify that the fact this patient experienced a post-operative complication like the one alleged in this case which resulted in a patient death does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections are not proof of a violation. He will render the opinion that the patient's death was not due to any error or omission on Dr. Kerr's part or the part of anyone associated with his practice. He will discuss his own sterilization techniques, training and experience in this area which will help support his opinion that Dr. Kerr employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies.

Dr. Laurence will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient,

but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Laurence will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

As part of his testimony, Dr. Laurence will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Laurence actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty.

Dr. Laurence will testify regarding the specific issues set forth in this disclosure, but he will also testify globally that nothing Dr. Kerr elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient. Dr. Laurence will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice.

Dr. Laurence will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Laurence will testify regarding his various publications, honors and university

appointments as set forth in his curriculum vitae which is hereby incorporated as if set forth in full. He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American Institute of Ultrasound Medicine, the Association of American Physicians and Surgeons, the American Society of Cosmetic Breast Surgeons, and the National Society of Cosmetic Physicians.

Dr. Laurence will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Laurence will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Laurence holds the opinion and will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient.

Dr. Laurence will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and

properly followed the patient and communicated with her and her family. Dr. Laurence will be prepared to testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Laurence will explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur.

Dr. Laurence will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records. Dr. Laurence will explain that everything undertaken by Dr. Kerr in his care and treatment of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Laurence will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon which Plaintiff is unfairly trying to do in this case.

As part of his testimony, Dr. Laurence will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's

medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband.

With respect to the fat injection procedure at issue, Dr. Laurence will discuss and explain to the jury the medical basis upon which a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient. He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin.

Dr. Laurence will discuss and describe how the adipose tissue is then prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Laurence will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact that she had previously had a liposuction procedure and desired further treatment of this type. To the extent it is relevant to his opinions, Dr. Laurence will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient. He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Laurence will explain that Krystal Ballard appeared to be in good health and without a urinary tract infection before the procedure on July 21, 2010 and there is no evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice.

Dr. Laurence will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue. From his unique perspective as a cosmetic surgeon, Dr. Laurence will explain the artistic nature of the liposuction

procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient.

In the process of providing his opinions that the care by Dr. Kerr was appropriate, Dr. Laurence will also explain the manner and method by which the adipose tissue harvested was then drained and prepared for reinjection. He will also discuss how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss these pieces of equipment as well as their various attachments as well as describing the medical equipment which is new versus that which must be re-sterilized for reuse between patients and/or procedures. Dr. Laurence will discuss the pre and post-operative antibiotics administered by Dr. Kerr to the patient and explain why they were appropriate medications to give to the patient as a prophylaxis against infection.

Dr. Laurence will discuss how the patient never appeared infected or septic per the medical records and deposition testimony. He will discuss the expected localized pain patients can expect to experience following a fat transfer procedure. To the extent it becomes relevant to aid in expressing his favorable opinions, Dr. Laurence may also discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor.

Dr. Laurence will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and

her family prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done.

Consistent with his background and experience in medicine and surgery, Dr. Laurence will discuss his knowledge of gram negative rods and the fact that such organisms do not exist on or in the skin, nor would they be found on surgical instruments. Instead, they represent a class of bacteria which reside in the urinary tract and bowels of a patient. He will testify that Dr. Kerr had adequate training and experience to perform the surgeries in question, that Dr. Kerr's medical records contain an adequate description of the care rendered and the discussions with the patient, that Dr. Kerr implemented appropriate sterility techniques and conditions for surgery and that he used correct solutions for cleaning and disinfecting instruments and assuring that operative conditions were adequately sterile to guard against the risk of infection. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

To the extent the surgical selection is questioned or needs further explanation at trial, Dr. Laurence will be prepared to discuss why the Vaser procedure is an appropriate method of removing unwanted adipose tissue in a patient like Krystal Ballard. As part of his testimony and in order to expand upon his background and experience in cosmetic surgery, Dr. Laurence may offer testimony explaining how the field of laser lipolysis with the use of tumescent anesthesia has developed in recent years.

This may include testimony addressing that when considering different types of the body for lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or re-inject into each location. As part of his testimony, Dr. Laurence will be prepared to explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

As part of his testimony, he will explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions. He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin

retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Laurence may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how Dr. Kerr's records and deposition evidence that he specifically and appropriately evaluated and questioned the patient and then documented in his records regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on July 21, 2010.

As outlined above, Dr. Laurence will discuss his knowledge of the various cosmetic organizations to which he belongs and/or has knowledge of, what they offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field. Dr. Laurence will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites.

He will discuss his review and comments of the autopsy record and the patient's subsequent treatment records. By way of example, Dr. Laurence is expected to

discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine. Based on his experience in family practice, he will render the opinion that this laboratory finding is consistent with, and provides strong evidence of, an infectious process located within the patient's bladder. He will explain how the bladder is also an area wherein gram negative rod bacteria are known to populate and exist in the face of an infection.

Dr. Laurence will also comment upon the significance from his perspective regarding how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly.

Dr. Laurence will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. Dr. Laurence will render the opinion, more likely than not, that the gram negative bacterial rods were introduced into

the patient's surgical site sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient elected to place herself and her health care provider in by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery performed.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Laurence will testify that Dr. Kerr and his employees followed the appropriate sterile technique in regards to the procedure he performed on Krystal Ballard.

He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control.

Dr. Laurence will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require Dr. Kerr to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. He will discuss his background, training and experience in the use and regular implementation of the sterile technique in his practice in order to lay a foundation for his opinions as to the adequacy of Dr. Kerr's sterile technique. Dr. Laurence will discuss how liposuction and fat transfers are office based procedures which are not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Laurence will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Laurence will render the opinion that Dr. Kerr's procedure room was properly prepared for surgery and to protect and preserve an appropriate sterile field. He will discuss the autoclave at issue, how it operates and how

it helps Dr. Kerr maintain a sterile field for his procedures. He will discuss the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. He will discuss the operation and use of the Vaser ultrasonic lipolysis machine utilized for the procedure in this case. He will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure.

As it relates to rebutting the testimony of the Plaintiff's experts, Dr. Laurence will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications.

Dr. Laurence will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr. Kerr's preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr improperly sterilized his equipment or that Dr. Kerr did anything to cause the patient's death.

As part of his testimony, Dr. Laurence may also address and explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight. He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at St. Alphonsus on July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Laurence

will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Laurence will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection the developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they came from the urinary tract of Krystal Ballard or her intestinal tract and were not introduced during his surgical procedure. As part of his testimony, it is expected that Dr. Laurence will explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

As part of his testimony, Dr. Laurence will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Laurence will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Laurence has relied upon his own unique training and

experience as a licensed physician engaged in the medical specialty of cosmetic surgery in Tennessee in treating, diagnosing, managing and caring for patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine, and his membership and participation in various medical associations and organizations as set forth herein. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine.

Dr. Laurence's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Laurence's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including Dr. Kerr's, employees of Silk Touch, and the Plaintiff's. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance

Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered.

Dr. Laurence reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Laurence reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

3) Charles Garrison, M.D.
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Pocatello, Idaho 83205
208.891.8505

Subject Matter: Facts of case, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Garrison is a physician licensed by the state of Idaho to practice medicine and surgery. Dr. Garrison has engaged in the medical specialty of forensic pathology at all times relevant herein which he practices in Pocatello and Boise, Idaho. Dr. Garrison will testify as a retained expert witness at the trial and his testimony will address the issue of the cause of the patient's death. Part of the basis for Dr. Garrison's opinions include: his background, training, research, practice and experience in performing forensic pathology and in determining disease processes

as well as the cause of death of patients like Krystal Ballard as part of his regular practice of medicine.

Dr. Garrison will render opinions which refute and rebut the opinions, conclusions and methodology advanced by Plaintiff's experts including the opinions of George Nichols, M.D. and Keith Armitage, M.D. who claim that the bacterial infection which the patient died from was a direct result of bacteria introduced during the July 21, 2010 procedure and who further claim that the presence of gram negative rods are proof of a breach in sterility by the Defendants. The Plaintiffs' experts contend that the toxic shock and multisystem organ failure which the patient suffered from occurred as a result of contaminated equipment of the Defendants. Dr. Garrison, who has viewed and analyzed the medical and autopsy records as well as the tissue pathology slides from the post mortem examination, will refute these opinions at trial.

Dr. Garrison will render his opinions to a reasonable degree of medical certainty. Dr. Garrison's medical specialty, training, experience and knowledge enable him to render the opinions expressed in this document, which includes the subjects of bacteria, bacterial infections, virus, gram negative rods, types of bacteria that embrace gram negative rods, the presence and location of gram negative rods, sepsis, toxic shock, cause of death of patients from sepsis and toxic shock and bacteria that inhabit the skin, urinary tract and bowel. He will testify that the presence of gram negative bacteria in the wounds of Krystal Ballard, are by no means proof to a reasonable medical certainty, that a breach in sterility occurred in the surgical procedure. He will explain that although the patient's death involved gram negative sepsis, to contend as Plaintiffs' experts do, that the etiology of her sepsis was a primary infection of the wound which occurred as a result

of a breach in sterility, is to ignore the medical facts of the case, and wound infections in general.

He will testify that for Plaintiffs' experts to state that there are no other reasons for Krystal Ballard's death other than as a direct result of bacteria introduced intraoperatively during the procedure as a result of contaminated equipment, is to ignore the process of postoperative wound infections, their etiology, the facts of this case, the patient's presenting symptoms and treatment course, how wounds are evaluated to determine the presence or absence of an infection and the routes by which they occur. In this regard, Dr. Garrison will explain post-operative wound infections and compare them to other infectious processes, including those associated with the patient's urinary track bacteria and abnormal urinalysis.

He will testify regarding how infections become septic. He will render the opinion that the sepsis which led to the septic shock and multi-system organ failure was caused by the patient's primary infection which was the urinary track, not any wound infection as alleged by Plaintiffs in this case. In this regard, he may also discuss the fluid retention and weight gain of the patient in the days prior to her death associated with her organ failure, but yet there was never any overt signs of the patient having any wound infection at the locations of the fat transfer or liposuction. The presence of gram negative bacteria in the surgical wound(s) of Krystal Ballard is simply proof of their presence, but by no means is it proof that they arrived there by or through the surgical procedure of Dr. Kerr.

As part of his testimony, Dr. Garrison will explain the difference between a primary versus a secondary infection and how it relates to the onset of sepsis in a patient

like Krystal Ballard. He will render the opinion that the patient's sepsis and subsequent septic shock and death were not proximately caused by any bacteria introduced into the operative field during Dr. Kerr's July 21, 2010 liposuction and fat transfer procedure. He will testify that Dr. Nichols conclusions are not only medically flawed and inaccurate, but they fail to take into consideration any other diagnostic evaluation that might have been done to further define the etiology of the infection, and reach such a conclusion with proper and appropriate medical investigation.

He will testify that the most that can be said about the presence of gram negative bacteria allegedly found in the wounds of Krystal Ballard at autopsy is simply that it is proof of their presence at that location – which location cannot be determined for certainty since the tissue samples were not labeled as to precise location. He will testify that such a bacterial finding at autopsy is by no means definitive proof to a reasonable degree of medical certainty that the gram negative organism, whatever it was, arrived there by or through the surgical procedure performed by Dr. Kerr, nor does such a finding at autopsy establish that the patient's death was due to any breach in sterility or cleaning protocol of any of the equipment, instruments or facility within the Silk Touch Med Spa facility.

Dr. Garrison will testify that he would expect to see gram positive organisms populate the site of the operative wound if in fact the sepsis was due to a skin infection caused by a breach in sterility as alleged. He will explain how in this case the presence of the gram negative organisms represented a secondary process to the patient's ongoing urinary tract infection. In this regard, he will explain the process by which a urinary tract infection can lead to sepsis in a patient like Krystal Ballard. He will testify

that he has not seen a circumstance wherein a gram negative rod resulted in sepsis, septic shock followed by the death of the patient.

He will testify that the autopsy conducted in this case did not identify any specific organism. He will discuss how in most cases of a postoperative surgical wound infection, that he generally observes signs and symptoms of infection due to a breach in sterility within two to three days of surgery which did not occur in this case. He will discuss how the evidence in this case demonstrates that both Dr. Groben, Dr. Kerr, the patient's husband and the patient prior to her death all describe a patient and an operative site which is not grossly infected at any time, even at autopsy. He will testify that the absence of evidence of any gross infection at the surgical site is wholly inconsistent with it having caused the patient's death as Plaintiffs' experts contend. In this regard, Dr. Garrison will discuss the cardinal signs of infection and how the patient presented without evidence of any fever and without evidence of any warmth, redness or drainage to the wound site. He will discuss and explain the significance of such a finding.

He will testify that there is nothing from the autopsy, the depositions, the medical records or the death of the patient which establish to any reasonable degree of medical certainty that there was any breach of sterility in this case. He will discuss the autopsy report including the fact that the tissue samples do not identify with any degree of specificity where they were taken from which further compounds the relevance of the finding of gram negative rods. He will testify that Plaintiffs' experts cannot state to any degree of medical certainty that the mere presence of gram negative organisms was in any way caused by, evidence of, or the result of a breach in sterility or cleaning protocol by any of the Defendants or their employees. In the opinion of Dr. Garrison, it is most

probable, which means to a reasonable degree of medical certainty, that the gram negative bacteria came from the bowel or urinary tract of Krystal Ballard where they reside and that their presence was not due to their being introduced during the procedure by Dr. Kerr.

As further support for his opinions, he will discuss the significance of the fact that there were not any other postoperative infections reported or experienced by any patient who was seen at the Silk Touch Med Spa before or since this patient's procedure and how this is further evidence that the sterilization procedures at the facility were adequate to maintain a proper sterile field. As part of his testimony, he will discuss how the process of sterilization works and how bacteria are eliminated by various cleaning processes and how there is not just one approved way to maintain a sterile field. As part of his testimony, he may also discuss how different types of bacteria are susceptible to different cleaning techniques, temperature and/or antibiotics.

As part of his testimony, Dr. Garrison will discuss different types of bacteria, how bacteria multiply, how they react to different parts of the human body, where they normally live in the human body, how they are identified in various standard tests, how the body fights off and/or responds to and/or relies upon different types of bacteria, where various types of bacteria normally reside within and on the human body, how different kinds of gram negative bacteria organisms are known to reside within the human urinary tract and bowels as well as within fecal matter.

For purposes of explaining his testimony he is expected to discuss general anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. He may

discuss how antibiotics are able to travel throughout the body, how infection within certain types of tissue can be harder to treat depending on the vascularity of the area of the infection (such as treating localized infections in fatty tissue versus in muscle) and whether or not an infection is localized versus systemic. It is expected that Dr. Garrison will use during his testimony demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the bacteria.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Garrison has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of forensic pathology, in evaluating laboratory results, tissue samples, autopsy records, consultations with other physicians and otherwise managing and identification of bacterial disease processes in patients like Krystal Ballard, his observations of the habits, customs and practice experiences of other forensic pathologists who address medical situations like those presented in this case, and his membership and participation in various medical associations, including those in the state of Idaho.

The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing forensic pathology, his review of the care and treatment of the patient by Dr. Kerr and others, and his review and consideration of the depositions and discovery responses taken and/or disclosed to date in this case. His opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory and infectious disease studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and

interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Garrison's professional background and qualifications are set forth in his attached curriculum vitae, which is hereby incorporated by reference.

As part of his review, he has had available to review and consider the medical records of Silk Touch Med Spa, Dr. Brian Kerr, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and portions of the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be made available to this witness for consideration.

Dr. Garrison reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Garrison reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with the law. The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

4) Thomas Coffman, M.D.
125 East Idaho, Suite 203
Boise, Idaho 83712

Subject Matter: Facts of case, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Coffman is a physician licensed by the state of Idaho to practice medicine and surgery. Dr. Coffman is engaged in the medical specialty of infectious disease at all times relevant herein which he practices in Boise, Idaho. Dr. Coffman will testify as a retained expert witness at the trial and his testimony will address the issue of the cause of the patient's death and the fact that death did not result from the events of the procedure of Dr. Kerr. Part of the basis for Dr. Coffman's opinions include: his background, training, research, practice and experience in infectious diseases and in determining disease and infectious processes as well as the cause of death of patients like Krystal Ballard as part of his regular practice of medicine.

Dr. Coffman will render opinions which refute and rebut the opinions, conclusions and methodology advanced by Plaintiff's experts including the opinions of George Nichols, M.D. and Keith Armitage, M.D. who claim that the bacterial infection which the patient died from was a direct result of bacteria introduced during the July 21, 2010 procedure and who further claim that the presence of gram negative rods are proof of a breach in sterility by the Defendants. The Plaintiffs' experts contend that the toxic shock and multisystem organ failure which the patient suffered from occurred as a result of contaminated equipment of the Defendants. Dr. Coffman, who has viewed and analyzed the medical and autopsy records as well as the tissue pathology slides from the post mortem examination, will refute these opinions at trial.

Counsel for the Defendants have requested access to blood samples, tissue samples and gram stained samples from the autopsy which are to be evaluated by Dr. Coffman and other defense experts, however, as of the writing of this disclosure, only the tissue sample slides have been produced by the Coroner's office. Arrangements are

still being made and the defense is still waiting to receive both the gram stained slides and the blood samples for further evaluation and testing. As a result, Dr. Coffman is unable to complete his work on this matter thus far. The opinions of Dr. Coffman which are known thus far are set forth herein and it is expected that additional opinions will be supplemented once the missing materials identified above have been made available for review.

Dr. Coffman will render his opinions on a more probable than not basis which is to a reasonable degree of medical certainty. Dr. Coffman's medical specialty, training, experience and knowledge enable him to render the opinions expressed in this document, which includes the subjects of bacteria, bacterial infections, virus, tissue types, gram negative versus gram positive rods, types of bacteria that embrace gram negative and gram positive rods, the presence and location of gram negative versus gram positive rods and the methodologies for reviewing each, sepsis, toxic shock, cause of death of patients from sepsis and toxic shock and identification and type of bacteria that reside and inhabit the skin, urinary tract and bowel.

He will testify that Dr. Kerr was not required to test for spores or mold and that these issues have nothing to do with the case. Dr. Coffman will discuss other disease processes which are known to cause a rapid patient death such as occurred in this case. He will discuss how infections lead to sepsis and toxic shock. He will testify that based on his view of the tissue slides that he sees evidence of white blood cells which can be evidence of the reparative process following surgery. He will testify as to why he believes the blood cultures were negative as well as what the various components of a complete blood count mean to him as an expert in infectious disease.

As part of his testimony, Dr. Coffman will discuss where gram negative versus gram positive bacteria are known to reside in the body. He will testify that gram negative bacteria do not reside on or in the skin, but instead reside within the urinary tract and bowel. He will testify that even if gram negative bacteria were observed in any of the tissue samples that this does not rule out that the patient may well have had an ongoing infection in another area of her body such as her urinary tract.

As part of his testimony, Dr. Coffman will testify that he has substantial experience in identifying bacteria and other cellular structures and organisms in tissue samples obtained from the human body. He will testify that he is regularly called upon in his specialty in infectious disease to make such determinations and that he is capable of identifying the differences between a gram negative versus a gram positive bacteria on properly prepared slides as well as being able to further classify and define specific species of bacteria and other organisms and cellular structures within the human body.

Dr. Coffman will render the opinion that based on his review of the materials to date that any sepsis, toxic shock or other infectious process suffered by the patient was not caused by or in any way due to a lack of sterility or failure to properly clean and maintain the equipment and/or sterile field by Dr. Kerr and/or his office staff.

He will rebut the Plaintiffs' experts wherein they opine that there are no other reasons for Krystal Ballard's death other than as a direct result of bacteria introduced intraoperatively during the procedure as a result of contaminated equipment. In this regard, he will discuss the process of postoperative wound infections, their etiology, the facts of this case, the patient's presenting symptoms and treatment course, how wounds are evaluated to determine the presence or absence of an infection and the

routes by which they occur. In this regard, Dr. Coffman will explain post-operative wound infections and compare them to other infectious processes to the extent not otherwise discussed by other defense experts.

He will testify regarding how various infections can lead to the condition known as sepsis. He will render the opinion that the sepsis which allegedly led to the septic shock and multi-system organ failure was caused by the patient's primary infection which was not a wound infection as alleged by Plaintiffs in this case. As part of his testimony, Dr. Coffman will explain the difference between a primary versus a secondary infection and how it relates to the onset of sepsis in a patient like Krystal Ballard. He will render the opinion that the patient's sepsis and subsequent septic shock and death cannot be blamed on Dr. Kerr's July 21, 2010 liposuction and fat transfer procedure.

He will testify that Dr. Nichols conclusions are not only medically flawed and inaccurate, but they fail to take into consideration any other diagnostic evaluation that might have been done to further define the etiology of the infection, and reach such a conclusion with proper and appropriate medical investigation. Even assuming arguendo as to the findings by Dr. Groben, Dr. Coffman will testify that the most that can be said about the presence of gram negative bacteria allegedly found in the wounds of Krystal Ballard at autopsy is simply that it is proof of their presence at that location – which location cannot be determined for certainty since the tissue samples were not labeled as to precise location.

Dr. Coffman will testify that such a bacterial finding at autopsy, is by no means definitive proof to a reasonable degree of medical certainty that the gram negative organism arrived there by or through the surgical procedure performed by Dr. Kerr, nor

does such a finding at autopsy establish that the patient's death was due to any breach in sterility or cleaning protocol of any of the equipment, instruments or facility within the Silk Touch Med Spa facility.

Dr. Coffman will testify that he would expect to see gram positive organisms populate the site of the operative wound if in fact the patient's sepsis was due to a skin infection caused by a breach in sterility as alleged. Dr. Coffman will discuss and explain the process by which a urinary tract infection can lead to sepsis in a patient like Krystal Ballard. He will testify that he has not seen a circumstance wherein a gram negative rod resulted in sepsis, septic shock followed by the death of the patient. It is the opinion of Dr. Coffman that the infectious process of Krystal Ballard, as stated in the autopsy report, came from bacteria from her urinary tract or bowel that developed after the procedure of Dr. Kerr.

He will testify that the autopsy conducted in this case failed to identify any specific organism. He will discuss how the evidence in this case demonstrates that both Dr. Groben, Dr. Kerr, the patient's husband and the patient prior to her death all describe a patient and an operative site which was not grossly infected at any time. He will testify that the absence of evidence of any gross infection at the surgical site is inconsistent with such an alleged infection as having caused the patient's death as Plaintiffs' experts contend. In this regard, Dr. Coffman will discuss the cardinal signs of infection and how the patient presented without evidence of any fever and without evidence of any warmth, redness or drainage to the wound site. He will discuss and explain the significance of such a finding.

He will testify that there is nothing from the autopsy, the depositions, the medical records or the death of the patient which establish to any reasonable degree of medical certainty that there was any breach of sterility in this case and that the conclusions stated by the Plaintiff's experts on this topic are without a factual basis in the record. He will discuss the autopsy report, the photos, blood tests, tissue samples and gram staining. He will testify that Plaintiffs' experts cannot state to any degree of medical certainty that the mere presence of gram negative organisms were in any way the result of a breach in sterility or cleaning protocol by any of the Defendants or their employees. As further support for his opinions, he will discuss the significance of the fact that there were not any other postoperative infections reported or experienced by any patient who was seen at the Silk Touch Med Spa before or since this patient's procedure and how this is further evidence that the sterilization procedures at the facility were adequate to maintain a proper sterile field. He will render the opinion that for the patient to have suffered from an infection due to a breach in sterility caused by any failure in the cleaning and sanitizing protocol of the defendants, that one would expect to see substantial evidence of other contaminated equipment related postoperative infections which there are none of in this case.

From his unique perspective as an expert in infectious disease, as part of his testimony Dr. Coffman may also discuss the process of medical equipment sterilization and how bacteria are eliminated by various cleaning processes and how there is not just one approved way to maintain a sterile operative field. As part of his testimony, he may also discuss how different types of bacteria are susceptible to different cleaning techniques, temperature and/or antibiotics.

As part of his testimony, Dr. Coffman will be prepared to discuss different types of bacteria, how bacteria multiply, how they react to and survive in different parts of the human body, where they normally reside within the human body, how they are identified in various standard tests, how the body fights off, responds to and/or relies upon different types of bacteria, how different kinds of gram negative bacteria organisms are known to reside within the human urinary tract and bowels.

For purposes of explaining his testimony he is expected to discuss general anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. He may discuss how antibiotics are able to travel throughout the body, how infection within certain types of tissue can be harder to treat depending on the vascularity of the area of the infection (such as treating localized infections confined to fatty tissue versus infections which are able to make their way into muscle and the blood stream) and whether or not an infection is localized versus systemic. It is expected that Dr. Coffman will use during his testimony demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the bacteria.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Coffman has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of infectious disease in evaluating laboratory results, tissue samples, blood tests, gram staining, operating laboratory equipment, autopsy records and otherwise managing and identification of bacterial disease processes in patients like Krystal Ballard, his observations of the habits, customs and practice experiences of other infectious disease specialists who address

medical situations like those presented in this case, and his membership and participation in various medical associations, including those in the state of Idaho.

The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing medicine in the area of infectious disease; his review of the care and treatment of the patient by Dr. Kerr and others, and his review and consideration of the depositions and discovery responses taken and/or disclosed to date in this case. His opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory and infectious disease studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Coffman's professional background and qualifications are set forth in his attached curriculum vitae, which is hereby incorporated by reference.

As part of his review, he has had available to review and consider the medical records of Silk Touch Med Spa, Dr. Brian Kerr, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and portions of the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be made available to this witness for consideration.

Dr. Coffman reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Coffman reserves the right not to offer all or any of the opinions set forth

in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with the law. The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

5) Alan W. Frankle, Ph.D.
1491 Lewis Lane
Boise, Idaho 83712

Subject Matter: Damages and economic analysis.

Substance of Opinions and Expected Testimony: Dr. Frankle is an economist and retired professor from Boise State University. He has been an economist in Boise, Idaho, continuously from 1984 to the present. Dr. Frankle will respond to and rebut the opinions of the patient's economic expert, Cornelius Hofman. It is expected that Dr. Frankle will render opinions regarding discount rates and present value calculations regarding the patient's special damages claims. He may also testify regarding inflationary rates for annuities.

The economic report of Plaintiff's expert, Cornelius Hofman, was not produced until May 14 by means of the Plaintiff's second supplemental answers to the written interrogatories of the Defendants. By court order dated May 16, 2012, the Defendant's disclosure of experts shall be disclosed 60 days after the Plaintiff's disclosure of experts. It is impossible for Dr. Frankle to respond to and submit his opinions on the report of Mr. Hofman at this time and should the court allow Mr. Hofman to

render testimony and opinions at trial over the objection of the defendants, the expert opinions of Dr. Frankle should not have to be disclosed until 60 days after May 14, 2013.

As a result, Defendants reserve the right to supplement the opinions of Dr. Frankle. As part of his opinions, however, he is expected to address the issue of consumption rates and how the Plaintiff has improperly calculated the decedent's rate of consumption in order to inflate claims for future lost wages. In this regard, he will address the permissible categories of damages eligible to the Plaintiff in this case, namely, the damages for wrongful death are measured by the support the Plaintiff as the surviving spouse would have received had the decedent lived. He will discuss the absence of any children in this case and that no support would have been provided by the decedent to support any children.

Dr. Frankle will also discuss the improper assumptions in earnings and the failure to consider other income and expense offsets which exist by virtue of both the Plaintiff and the decedent being members of the military. By law in Idaho, Plaintiff is not entitled to recover any amounts for loss of inheritance, loss of income or loss of accumulation which are deemed speculative, particularly here where in the decedent was only 27 years of age, had been married for less than four years and had been in the military for such a short period of time. Dr. Frankle will discuss the speculative nature of said damages and how these categories relate to the improper opinions advanced by Mr. Hofman.

Dr. Frankle is still in need of additional tax records for Charles Ballard and we currently have no tax records for Krystal Ballard despite the outstanding requests for these records. Dr. Frankle has further opinions he may render once being provided with

these missing tax records as well as being able to comment on the fact that Mr. Hofman did not request or utilize such records when generating his report purporting to forecast the current and future losses of the Plaintiff.

Dr. Frankle will dispute the consumption rates relied upon by Mr. Hofman in the range of 24%. He will further testify Plaintiff has not produced a credible projection of earnings or anticipated promotions/advancements for either the Plaintiff or the decedent. For purposes of responding to the report of Mr. Hofman, Dr. Frankle has assumed a similar projection of earnings for both Charles and Krystal Ballard. He will discuss the absence of data and reports from the Air Force as to what track, if any, the decedent and Charles Ballard are/were on as respects aspirations for advancement, further promotions, raises in income, etc. Dr. Frankle will also comment upon the fact that Mr. Hofman has not produced item No. 39 relied upon as a basis for some of his opinions in his report.

Regarding the issue of loss of household services, Dr. Frankle will comment upon the lack of any documentation regarding what household services, if any, that the decedent provided in order to arrive at his conclusion.

There are additional issues which have not been addressed by Mr. Hofman including the fact that often the decedent and the Plaintiff were not living together and if they were it was often only half time. Mr. Hofman's report fails to factor this key component of household services.

Based on the limited information available, for the household services, one assumes each spouse spends 38% of the time on indivisible tasks, 31% on tasks for themselves and 31% on tasks for the other. Charles Ballard therefore only lost the 38%

for services that were concerned with indivisible tasks. The 31% of tasks that the decedent did for the Plaintiff are therefore cancelled out because he is no longer having to do the 31% for the decedent. Thus his only potential household services loss is for those indivisible tasks she performed which they shared equally.

Underlying Facts and Data: Dr. Frankle will rely on his education, training and experience as an economist; the use and recognition of standard and accepted economic data, government reports, publications and authorities; his experience teaching economics and finance at Boise State University; his review of the economic loss report of the patient's experts and his assumptions and calculations for determining the annual costs for household services and lost wages associated with an individual like Krystal Ballard.

Dr. Frankle reserves the right to rely as further support for his opinions on recognized economic literature related to any of the subjects set forth in this disclosure. Additional materials which Dr. Frankle may ultimately review and consider for forming his opinions is unknown and reserved based on the foregoing. The Defendants have not received the income tax returns or documents that reflect the earnings of the decedent over the past several years even though they were requested of the Plaintiff to be produced several months ago. As a consequence, Dr. Frankle does not have this material showing the decedent's actual earnings which Dr. Frankle will utilize to further criticize the invalidity of Mr. Hofman's opinions. In the event Dr. Frankle is deposed his deposition testimony is hereby incorporated into this disclosure as if set forth in full.

Dr. Frankle reserves the right not to offer any of the opinions set forth herein as this disclosure is prepared with the assistance of counsel and is worded broadly in

order to comply with the requirements of Rule 26(b)(4). The ultimate testimony to be offered at trial will depend entirely on what testimony is deemed necessary to refute the testimony of Plaintiffs and their experts. Plaintiff has the burden of proof and only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

Dr. Frankle's Curriculum Vitae setting forth his qualifications and prior publications is attached hereto and incorporated herein as if set forth in full.

6) John Lundeby, M.D., FACS, FAACS
Shape Cosmetic Surgery and Med Spa, PLLC
524 W. 6th Ave
Spokane, Washington 99204

Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Lundeby is a physician licensed in the state of Idaho and Washington to practice medicine and surgery. Dr. Lundeby is board certified by the American Board of Surgery and the American Board of Cosmetic Surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Lundeby will testify as a retained expert witness at the trial. Dr. Lundeby will testify that he has actual knowledge of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to the medical treatment rendered to the patient.

Dr. Lundeby will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types

of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Lundeby's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges at Kootenai Medical Center and Northwest Specialty Hospital, both in Idaho, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers were performed in Boise in 2010.

Dr. Lundeby will discuss his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers like Dr. Kerr in Boise, Idaho and elsewhere, and his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case. As part of his testimony, Dr. Lundeby may also explain his training and experience at the University of Washington and the San Joaquin General Hospital in 1991-96.

Dr. Lundeby will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were adequate and working properly at the time of the surgery at issue in this case.

Dr. Lundeby will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons. Dr. Lundeby has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and the procedures utilized by them in this specialty. Dr. Lundeby will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice in the same medical specialty as his and Dr. Kerr.

Dr. Lundeby will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. He will testify that Dr. Kerr did not need any residency in general or other surgical field in order to competently perform the liposuction and fat grafting procedures at issue in this case. As part of his testimony, he is expected to discuss the fact that he provided training to Dr. Kerr at his office in Spokane and that Dr. Lundeby has trained many physicians in performing a variety of cosmetic procedures.

He will testify that he has performed cosmetic surgery with Dr. Kerr and has witnessed his habits and customs in this regard in a surgical setting. Dr. Lundeby is expected to refer to the publications, data and documents referred to in his attached curriculum vitae. He is expected to discuss the numbers of similar procedures he has performed. Dr. Lundeby will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or

approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard.

During Dr. Lundeby's professional career he has received and provided specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. Dr. Lundeby will testify regarding the significant experience he has in performing these types of procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Lundeby will testify that he possesses the professional knowledge and experience that allows him to express the opinion and testimony described in this document.

Dr. Lundeby will testify that the fact this patient died does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections, if that is what occurred in this case, are not proof of a violation in operative technique, patient selection or breach in sterility. He will render the opinion that based on the record in this case that to a reasonable degree of medical certainty the patient's death was not due to any error or omission on the part of Dr. Kerr or his practice.

Dr. Lundeby will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient, but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Lundeby will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

As part of his testimony, Dr. Lundeby will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures would not have caused or resulted in the introduction of any bacteria to the patient. Dr. Lundeby actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty. Dr. Lundeby will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed or proven to be the result of violations of the standard of health care practice.

Dr. Lundeby will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center,

publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Lundeby will testify regarding his various publications, honors, committee and university appointments as set forth in his curriculum vitae which is hereby incorporated as if set forth in full. He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American Society for Laser Medicine and Surgery, the American Academy of Cosmetic Surgery, the National Society of Cosmetic Physicians, the American College of Surgeons and both the Idaho and American Medical Associations.

Dr. Lundeby will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Lundeby will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Lundeby holds the opinion and will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient.

Dr. Lundeby will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and properly followed the patient and communicated with her and her family. Dr. Lundeby will be prepared to testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Lundeby will explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur.

To the extent he is asked to address the issue of informed consent, Dr. Lundeby will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records. Dr. Lundeby will explain that the surgical care by Dr. Kerr of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Lundeby will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon which Plaintiff is unfairly trying to do in this case.

As part of his testimony, Dr. Lundeby will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband. He will discuss the training classes he provides to physicians, like Dr. Kerr, regarding introduction to and advanced applications for liposuction procedures.

With respect to the fat injection procedure at issue, Dr. Lundeby will discuss and explain to the jury the medical basis upon which a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient. He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin.

Dr. Lundeby will render the opinion that Dr. Kerr's facility did not need to be certified in order to operate in Idaho. He will testify that there is no evidence that Dr. Kerr went too deep and entered the abdominal cavity or otherwise impacted the bowel in any way so as to contaminate the operative field during the liposuction procedure. He will discuss the pain response a patient would be expected to give if the fascia were to have

been impacted, particularly where the patient did not have any sedatives on board for the procedure.

Dr. Lundeby will discuss and describe how the adipose tissue is prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will discuss how the fat is deposited above the muscle and in some instances within portions of the muscle. He will discuss the skill in making injections with accompanies performing fat transfer procedures and that it takes a degree of artistic talent, but that it is not otherwise generally a technically challenging or physically taxing activity for a cosmetic surgeon to engage in.

He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Lundeby will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact

that she had previously had a liposuction procedure and desired further treatment of this type.

Dr. Lundeby will testify that the preoperative preparation of the patient utilizing Hibiclens and alcohol. He will discuss how physicians and hospitals use Hibiclens to cleanse patients as well as their own hands and exposed parts of their bodies before surgery to prevent the spread of bacteria, infection, or disease to patients. It is also used to cleanse wounds to prevent the spread of bacteria and infection. Dr. Lundeby will render the opinion that the skin preparation and surgical sterile technique for the surgery in using Hibiclens and alcohol were appropriate and good agents to use for that purpose.

To the extent it is relevant to his opinions, Dr. Lundeby will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient. He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Lundeby will explain that Krystal Ballard was in good health before the procedure on July 21, 2010 and there is no clinical evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice.

He may discuss the fact that sometimes patients will elect not to disclose health conditions to the physician which may impact the timing of an elective procedure. The reason for this nondisclosure is generally because they are concerned that the physician will cancel or postpone the procedure which may be inconvenient to a patient due to the fact that the patient desires to achieve a recovery by a specific date.

Dr. Lundeby will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue. From his unique perspective as a cosmetic surgeon, Dr. Lundeby will explain the artistic nature of the liposuction procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient.

Dr. Lundeby will discuss how the patient never appeared infected or septic per the medical records and deposition testimony while she was seen by Dr. Kerr. He will discuss the expected localized pain patients can expect to experience following a fat transfer procedure. To the extent it becomes relevant to aid in expressing his favorable opinions, Dr. Lundeby may also discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor. Dr. Lundeby will discuss his experience in caring for postoperative wounds and infections based on his long history of performing all manner of both cosmetic and general surgery. Dr. Lundeby will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and her

family prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done. He will testify that Dr. Kerr was not required to obtain any diagnostic tests before electing to perform surgery on July 21.

Consistent with his background and experience in medicine and surgery, Dr. Lundeby will discuss his knowledge of gram negative rods and the fact that such organisms do not exist on the skin, nor would they be found on surgical instruments following an appropriate cleansing through an autoclave. Instead, he will discuss how they represent a class of bacteria which reside in the urinary tract and bowels of a patient. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

As part of his testimony, Dr. Lundeby will be prepared to explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

In connection with describing his opinions and the basis therefore, Dr. Lundeby may be called upon to explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions. He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Lundeby may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how Dr. Kerr's records and deposition evidence that he specifically and appropriately evaluated and questioned the patient and then documented in his records regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on

July 21, 2010. He will testify that the records and deposition testimony document that Dr. Kerr is a caring, hands on physician who goes to great lengths to monitor and be available for his patients.

Dr. Lundeby will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites. He will render the opinion that in order for Dr. Kerr to have infected the patient in some manner at the time the surgery was performed on July 21, that there would have to have been evidence of infection at the location of the surgery by the time of the autopsy or at Elmore Medical Center. He will testify that the absence of any evidence of infection at the injection or liposuction sites is proof to Dr. Lundeby that the patient was not infected during the surgery and that her death is due to some other cause.

He will discuss his review of the autopsy record and the patient's subsequent treatment records. By way of example, Dr. Lundeby is expected to discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine. Based on his experience in general surgery, he will render the opinion that this laboratory finding is consistent with, and provides strong evidence of, an infectious process located within the patient's bladder or urinary tract. He will explain how the bladder is also an area wherein gram negative rod bacteria are known to populate and exist in the face of an infection. He will discuss the concept of how infections, like a urinary tract infection, can be spread hematogenously or via the blood stream.

Dr. Lundeby will also comment upon the significance from his perspective regarding how the patient did not present to Elmore Medical Center with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly.

Dr. Lundeby will discuss how the patient presented to Elmore Medical Center with a blood gas pH of 6.99 and how this is dangerously low and provides strong evidence that the patient was extremely ill by that point and that she needlessly delayed seeking medical attention despite the urging and instruction of Dr. Kerr and his staff. He will testify that the patient's decision to delay returning for further care to either Dr. Kerr or the ER after July 23 is the reason she died and that if she had returned sooner that she more likely than not would have been saved. He will discuss how the cost of vanity and the patient's apparent unrelenting desire for secrecy resulted in her own tragic demise. He will discuss with the jury that it is not the physicians fault when the patient fails to do as they are instructed and return when their condition worsened as it clearly did long before this patient ultimately elected to seek medical help and was transported critically ill to Elmore Medical Center.

Dr. Lundeby will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. In this regard, Dr. Lundeby will discuss how there are commonly a variety of bacteria located near the surface normally of wound sites which is not evidence of an infection, but that the more important inquiry which would be more indicative of an infection is whether the gram negative rods were located within the deeper issues under the wound sites which cannot be determined from the autopsy documents in this case.

He will discuss the normal wound biology is to see evidence of bacteria on the surface. Dr. Lundeby will render the opinion, more likely than not, that the gram negative bacterial rods were introduced into the patient's surgical site sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure. Dr. Lundeby will render the opinion that based on his experience that gram negative rods do not result in the sudden and unexpected patient death such as occurred in this case. He will discuss the fact that the autopsy records eliminate embolism as a cause of death for this patient. Despite this finding at autopsy, he will testify that it would be extremely uncommon (outside of necrotizing fasciitis which attacks the soft tissue and the fascia or tissue covering the muscle and can cause rapid death) for an alleged soft tissue infection to spread, become septic and kill a patient within the limited time frame at issue in this case. In this regard, he will discuss how sepsis is a presumptive clinical diagnosis which is compounded in this case due to the absence of any positive blood cultures. Dr.

Lundeby is expected to offer testimony on several aspects of the autopsy report of Dr. Groben, starting with sepsis with probable toxic shock syndrome of unknown etiology and manner of death natural. His inspection of the incisions through the surgical sites reveal reparative changes, but no gross evidence of an infectious process. No pockets of pus or discolored fluid are seen. No evidence of erythema around the incisions sites. Subcutaneous fat and muscle of the abdominal wall, lower back and buttocks show no areas of necrosis or discoloration associated with reparative changes and no pockets of discolored fluid or pus. These autopsy findings are consistent with and support his opinion that bacteria were just introduced during the procedure of Dr. Kerr.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient elected to place herself and her health care provider in by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery performed.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is

essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Lundeby will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control.

Dr. Lundeby will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require Dr. Kerr to obtain a urinalysis or complete blood count on the patient on July 23. Dr. Lundeby will discuss how liposuction and fat transfers are office based procedures which are not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Lundeby will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Lundeby will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure.

As it relates to rebutting the testimony of the Plaintiff's experts, Dr. Lundeby will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications.

Dr. Lundeby will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally

attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr. Kerr's preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr did anything to cause the patient's death.

As part of his testimony, Dr. Lundeby may also address and explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight. He will discuss the concept of third spacing of fluid or leaking of fluid out of cellular structures due to the body's global inflammatory response. He will discuss this in connection with efforts which were made to maintain fluid volume for the patient once she presented at the hospital. He will testify that a weight gain of 50 pounds due to efforts to maintain fluid volume in the face of the patient's condition would not be unexpected.

He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at St. Alphonsus on

July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Lundeby will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Lundeby will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection that developed after the procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they were more likely to come from the urinary tract of Krystal Ballard or her intestinal tract and that they were not introduced during his surgical procedure. As part of his testimony, it is expected that Dr. Lundeby will explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth in this case, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

As part of his testimony, Dr. Lundeby will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Lundeby will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Lundeby has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of cosmetic and general surgery in Spokane, Washington in treating, diagnosing, managing and caring for elective procedure patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers and the way they perform the procedures at issue in this case, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine, and his membership and participation in various medical associations and organizations as set forth herein. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine.

Dr. Lundeby's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Lundeby's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions of Dr. Kerr. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered.

Dr. Lundeby reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Lundeby reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts.

7) Geoffrey Stiller, M.D.
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Subject Matter: Facts of case, standards of health care practice, causation, and the care and treatment of Krystal Ballard.

Substance of facts known and opinions held: Dr. Stiller is a physician licensed in the state of Idaho to practice medicine and surgery. Dr. Stiller is board certified in both general and cosmetic surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Stiller will testify as a retained expert witness at the trial. Dr. Stiller will testify that he has actual knowledge of the standard of

health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion, and based on his own unique background, that Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient. Dr. Stiller actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty.

Dr. Stiller will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Stiller's opinions include: his background, training, research, practice and experience in performing general and cosmetic surgical procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges in Idaho, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers are performed, including how they were performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures.

Dr. Stiller will explain his knowledge of how the Vaser ultrasonic liposuction procedure is performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic surgery providers like Dr. Kerr in Boise, Idaho and elsewhere, his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner

and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion.

As part of his testimony, Dr. Stiller may also explain his training and experience at the Graduate Hospital in Philadelphia, Pennsylvania during his residency in general surgery 1997-2001 as it relates to sterile operating conditions for the procedures he performed, was taught and observed, including his role as chief resident. He will explain the same matters for his experience in his own surgical facility which he currently operates at Palouse Surgeons in both Pullman, Washington and Moscow, Idaho.

Dr. Stiller will discuss the standard of health care practice employed at his own facility in Moscow, Idaho for achieving and maintaining sterile operating conditions and the disinfection of instruments and equipment and maintaining a sterile operative field and that the similar actions and efforts undertaken by Dr. Kerr as have been described for the procedure on Krystal Ballard in this case were used and exceeded in his opinion. Dr. Stiller will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially nil.

He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were appropriate and working properly at the time of the surgery at issue in this case. Dr. Stiller will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons.

He may also discuss his various publications and presentations on cosmetic surgery including liposuction and fat transfers as set forth in his attached curriculum vitae. Dr. Stiller will discuss how he has become acquainted with the nature and scope of practice he and other cosmetic surgical procedure providers utilize as well as the procedures utilized by them in this specialty, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic surgical procedures including the procedures at issue in this case. He will testify that there is more than one way to achieve proper sterilization.

Dr. Stiller will explain that the standard of health care practice for a plastic surgeon is not the same standard of health care practice for someone in the same medical specialty as his and Dr. Kerr. Dr. Stiller will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. As part of his testimony, he is expected to refer to the publications, data and documents that have been produced in discovery on this subject and explain the numbers of similar procedures he has performed.

Dr. Stiller will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard. During Dr. Stiller's professional career he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will

testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue.

He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Stiller will testify that he possesses the professional knowledge and experience that allows him to express the opinion and testimony described in this document.

Dr. Stiller will testify that the fact this patient experienced a post-operative complication like the one alleged in this case which resulted in a patient death does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections are not proof of a violation. He will render the opinion that the patient's death was not due to any error or omission on Dr. Kerr's part or the part of anyone associated with his practice. He will discuss his own sterilization techniques, training and experience in this area which will help support his opinion that Dr. Kerr employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies.

Dr. Stiller will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss

how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient, but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Stiller will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

Dr. Stiller will render the opinion that gram negative bacteria do not cause sepsis or toxic shock as alleged in this case. As part of his testimony, he will discuss the urinalysis obtained at Elmore Medical Center which revealed plus 3 bacteria, white and red blood cells, elevated white blood cell count with a left differential shift and ketones. As part of his testimony, Dr. Stiller will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Stiller will testify regarding the specific issues set forth in this disclosure, but he will also testify globally that nothing Dr. Kerr elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient.

Dr. Stiller will be rendering his testimony based on his own unique perspective as a general and cosmetic surgeon and the training and practice experience he has received. Dr. Stiller will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice. Dr. Stiller will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is

established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Stiller will testify regarding his various publications, honors and university appointments at the National Society of Cosmetic Physicians and the University of Washington School of Medicine WWAMI program as set forth in his curriculum vitae which is hereby incorporated as if set forth in full.

He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American College of Surgeons, American Academy of Cosmetic Surgery and the Idaho Medical Association. He will discuss what these organizations offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field.

Dr. Stiller will opine that the standard of health care practice is the care typically provided under similar circumstances by physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Stiller will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Stiller holds the opinion that compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results.

He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient. Dr. Stiller will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and properly followed the patient and communicated with her and her family. Dr. Stiller will testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice to which he is held.

As with all operative procedures, the risk of infection is always a possibility and Dr. Stiller will discuss that post-operative infections, if they should develop, are an accepted and recognized risk factor that are usually not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur even under the best of care conditions. Dr. Stiller will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records.

Dr. Stiller will explain that everything undertaken by Dr. Kerr with regard to his care and treatment of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice typically provided, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Stiller

will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon.

In order to support his opinions, Dr. Stiller is expected to discuss the training he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband.

With respect to the fat injection procedure at issue, Dr. Stiller will discuss and explain to the jury the medical basis upon which a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will discuss his research and publications on this topic. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient.

He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin. Dr. Stiller will discuss and describe how the adipose tissue is then prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. With use of

demonstrative exhibits and various medical instruments, he will explain both the lipo and fat injection process to the jury. He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects.

Dr. Stiller will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Stiller will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact that she had previously had a liposuction procedure and desired further treatment of this type. To the extent it is relevant to his opinions, Dr. Stiller will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient.

He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Stiller will explain that Krystal Ballard was in

good health before the procedure on July 21, 2010 and there is no clinical evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice. He will render the opinion that the patient developed an infectious process in her urinary tract after the procedures by Dr. Kerr which had nothing to do with the surgery or the sterilization procedures used by the Defendants in this case. In order to further illustrate his testimony to the jury, Dr. Stiller will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue.

From his unique perspective as both a general and cosmetic surgeon, Dr. Stiller will explain the artistic nature of the liposuction procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient. In the process of providing his opinions that the care by Dr. Kerr was appropriate, Dr. Stiller will address the method by which the adipose tissue harvested was drained and prepared for re-injection. He will also discuss how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss these pieces of equipment as well as their various attachments and describe that medical equipment which is new versus that which must be re-sterilized for reuse between patients and/or procedures.

Dr. Stiller will discuss the appropriate nature of the pre and post-operative antibiotics administered by Dr. Kerr to the patient and explain why they were given not for an infection, but rather as a prophylaxis against infection. Dr. Stiller will render the opinion that the evidence in this case establishes that the patient never appeared infected or septic while being treated by Dr. Kerr. He will discuss the localized pain patients can expect to experience following a fat transfer procedure into the buttocks region.

Dr. Stiller will discuss the cardinal signs of infection and how the patient did not demonstrate having any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor when she was seen by Dr. Kerr and when she was seen at Elmore Medical Center the day before her death.

Dr. Stiller will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and her husband prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, toxic shock or sepsis, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done. Consistent with his background and experience in medicine and surgery, Dr. Stiller will discuss his knowledge of various bacteria including gram negative rods and the fact that such organisms do not exist on or in the skin, nor would they be found on surgical

instruments in the event of a breach in sterility. Instead, he will discuss how they represent a class of bacteria which reside in the urinary tract and bowels of a patient.

He will testify that Dr. Kerr had adequate training and experience to perform the surgeries in question, that Dr. Kerr's medical records contain an adequate description of the care rendered and the discussions with the patient, that Dr. Kerr implemented appropriate sterility techniques and conditions for surgery and that he used correct solutions for cleaning and disinfecting instruments and assuring that operative conditions were adequately sterile to guard against the risk of infection. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

As part of his testimony and in order to expand upon his background and experience in cosmetic surgery, Dr. Stiller will discuss how the field of laser lipolysis with the use of tumescent anesthesia has developed in recent years. This may include testimony addressing that when considering different types of the body to undergo lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or re-inject into each location. As part of his testimony, Dr. Stiller will be prepared to explain the positioning of the patient, incision sites for various injections and instruments, patient selection, choice of instrument sizes and positioning, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period.

He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date. As part of his explanation of how the Vaser Lipo process works, he will describe it as a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions.

He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction which requires far greater traction and trauma to the surrounding anatomical structures.

Dr. Stiller may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area and the instructions given to the patient. He will render the opinion that Dr. Kerr's records and deposition testimony evidence that he appropriately evaluated and questioned the

patient and then documented in his records these issues on each encounter he had with the patient.

He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on July 21, 2010. Dr. Stiller will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites. He will discuss his review and comments of the autopsy record and the patient's subsequent treatment records. He will discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center.

He will render the opinion that the laboratory data at Elmore Medical Center is consistent with, and provides strong evidence of, an infectious process located within the patient's bladder which occurred postoperatively and not located within the operative area of Dr. Kerr. He will explain how gram negative rod bacteria are known to populate and exist in the urinary tract. Dr. Stiller will also comment upon the significance from his perspective regarding how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010.

He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly. Dr. Stiller will address the confusing aspect of the autopsy report wherein the pathologist referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where actually harvested from the patient. Dr. Stiller will render the opinion that the gram negative rods were introduced into the patient's surgical site(s) sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure and that their introduction had nothing to do with the cleanliness and/or sterility of Dr. Kerr's facility and equipment.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient placed herself in despite the advice and instruction of her health care provider by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery and needed help monitoring her care and condition.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Stiller will testify that Dr. Kerr and his employees followed the appropriate sterile technique in regards to the procedure performed on Krystal Ballard. He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. Dr. Stiller will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively.

He will testify that the standard of practice did not require Dr. Kerr to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. Dr. Stiller will discuss his background, training and experience in the use and regular implementation of the sterile technique in his practice as further support for his opinions as to the adequacy of Dr. Kerr's sterile technique. Dr. Stiller will discuss how liposuction and fat transfers are office based procedures which are not

required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Stiller will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Stiller will render the opinion that Dr. Kerr's procedure room was properly prepared for surgery and to protect and preserve an appropriate sterile field and that he did not require additional rooms or locations to store and clean equipment. He will discuss the autoclave at issue, how it operates and how it helps Dr. Kerr maintain a sterile field for his procedures. He will discuss how an autoclave operates, how it is loaded, what is done to maintain an autoclave, how it is tested and that Dr. Kerr was not required to do more with his autoclave that he has described in this case.

Dr. Stiller will describe the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. With respect to the lipo procedure in this case, he will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will testify that these were not excessive amounts and may comment upon the findings set forth at autopsy and in the autopsy photos demonstrating the areas of adipose tissue within the patient.

Dr. Stiller will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure. As it relates to rebutting the testimony of the Plaintiff's experts, he will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was a proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. Dr. Stiller will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. As part of his testimony, and to the extent it is an issue at trial, Dr. Stiller will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications. He may also discuss his experiences in discussing risks and benefits with patients and the fact that certain patients fail to follow the advice and instructions and end up with an unexpected and/or dissatisfactory result.

Dr. Stiller will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, to the extent not covered by other witnesses, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr. Kerr's preoperative clinical

examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits.

He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr improperly sterilized his equipment or that Dr. Kerr did anything to cause the patient's death. Based on his own unique surgical perspective, Dr. Stiller may also address and explain the significant documented weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will discuss the medical reasons and significance of these changes in weight as it relates to the issues of fluid overload and organ failure.

He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. He may also comment upon the findings at autopsy which documented no frank evidence of an infection as aptly depicted in the autopsy photos. He may further address and explain to the jury how at Elmore Medical Center the patient's cardiac ejection fraction was noted to be only 17% which is poor. In addition, later at St. Alphonsus on July 25, 2010, the patient's central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Stiller will explain these factors and their relative significance in terms of

the causes for the death of Krystal Ballard all of which have nothing to do with the care and treatment rendered by Dr. Kerr.

Dr. Stiller will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection the developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they more likely than not came from the urinary tract of Krystal Ballard or her intestinal tract and were not introduced during Dr. Kerr's surgical procedure. As part of his testimony, it is expected that Dr. Stiller will discuss and explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

It should be noted that in response to the Plaintiff's counsel's concern about the defense experts, Dr. Stiller will testify such that he avoids the presentation of needless cumulative testimony by tailoring his responses such as to avoid excessive duplication of other defense experts. As part of his testimony, Dr. Stiller may be called upon to discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself.

Dr. Stiller will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her

undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Stiller has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of general and cosmetic surgery in Moscow, Idaho in consenting, diagnosing, treating, operating, managing, caring for and following up with patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine (regardless of the fact that Dr. Kerr also happens to be board certified in anesthesia), and his membership and participation in various medical associations and organizations as set forth herein.

The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine. Dr. Stiller's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr.

Stiller's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including Dr. Kerr's, employees of Silk Touch, and the Plaintiff's. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered.

Dr. Stiller reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. He reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

DATED this 31st day of May, 2013.

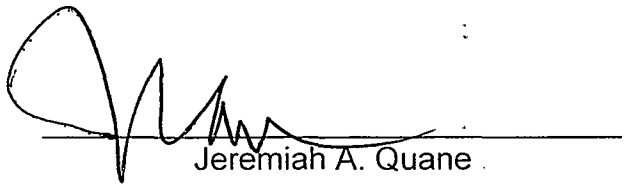
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2013, I served a true and correct copy of the foregoing DEFENDANTS' FIRST SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP 303 West Bannock Street P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail [ ] Hand Delivered, w/ attachments [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, w/o attachments [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, w/o attachments [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657



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June 20, 2013

VIA FACSIMILE ONLY 208-780-3930

Terrence S. Jones, Esq.
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

Re: Ballard v. Kerr, et al.

Dear Mr. Jones:

In providing dates for experts, please provide dates within the deadlines set by the Court for completion of discovery. To the extent this proves impractical for any particular expert, we are willing to discuss conducting a deposition after the discovery deadline, provided that under no circumstances would such discovery effect the trial date.

We have previously raised with you your disclosure of multiple experts concerning the same subject matter. Specifically, you have disclosed five experts, including Dr. Kerr, in the area of cosmetic and plastic surgery. We are quite certain the Court will not permit you to present redundant expert testimony at trial. Accordingly, we ask that you identify no more than two experts in this field. In other words, tell us the experts you actually intend to call as your trial witnesses so we can avoid unnecessary depositions. If you are not willing to do this, we will seek appropriate relief from the Court.

Thank you for your attention to this matter.

Sincerely,

/s/ James B. Perrine

James B. Perrine, Esq.

JBP/flc

cc: Scott McKay, Esq. (via facsimile only)

624183

EXHIBIT B

Quane Jones McColl, PLLC
Attorneys at Law

Terrence S. Jones tsj@quanelaw.com

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Suite 1601
P.O. Box 1576
Boise, ID 83701
(208) 780-3939 Telephone
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June 21, 2013

VIA FACSIMILE (334) 262-0657
James B. Perrine
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Perrine:

I am writing in response to your letter of June 20th. Regarding the depositions of Drs. Garrison and Frankle, their availability in August is based solely on their limited schedules. I provided you with earlier dates for Dr. Frankle in June, but this was wisely deferred until you are able to produce the requested tax records. Please understand that we are not looking to change the trial date by having these depositions after the discovery deadline. We take the position that we provided you with complete expert witness disclosures in conformity with the requirements of discovery and it is your decision to take depositions that we believe will simply prove duplicative of these disclosures.

Regarding your claim that we have listed multiple experts on the same subject matter, we disagree with your characterization. Rule 403 speaks to the prohibition of presenting needlessly cumulative evidence. We are mindful of this rule and will not run afoul of it at trial. We have listed several experts from different specialties of medicine to testify on behalf of the Defendants. The fact that you elected to only list one expert does not mean that we should be so limited at trial. The jury is entitled to hear from different experts with different background who all agree that Dr. Kerr did not violate the applicable local standard of practice.

In the spirit of cooperation, we will agree to withdraw Dr. Wills as one of our experts. This eliminates the need to take his deposition. We do, however, intend to

EXHIBIT C

call all of our remaining experts at trial and will vigorously oppose any efforts to otherwise limit the number of defense expert witnesses. We do not have an excessive number and your decision to include Dr. Kerr in your numerical calculation is improper. You may consider this our effort to meet and confer and informally resolve this matter.

Very truly yours,

Terrence S. Jones

TSJ/ms
cc: Scott McKay (via fax)
P. Gregory Haddad (via fax)

David Nevin (ISB #2280) dnevin@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES

625832

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rule 403 of the Idaho Rules of Evidence, and files his Memorandum of Law in Support of Plaintiff's Motion to Exclude Cumulative Expert Witnesses. Because Defendants intend to offer multiple expert witnesses to offer blatantly duplicative, redundant, and cumulative evidence as to each element of this professional negligence action, defense experts should be excluded. Plaintiff should not be saddled with the expense of deposing all of these expert witnesses when Defendants' discovery responses demonstrate an overtly obvious attempt to offer evidence in violation of Idaho Rule of Evidence 403.

a. Factual Background

On June 3, 2013, Defendants served a supplemental answer to Plaintiff's Interrogatory No. 3, which calls for expert witness information. (*See* Defs.' First Supp. Ans. to Pl.'s First Set of Interrogs (Affidavit of Counsel **Exhibit A**).) By their 108-page disclosure (not including attachments), Defendants explicitly identify four experts who they intend to offer as standard of care witnesses: the Defendant, Dr. Kerr; Gregory Laurence, M.D., John Lundeby, M.D., FACS, FAACS; and Geoffrey Stiller, M.D. (*Id.*) It should be noted, however, that Dr. Thomas Coffman will offer a standard of care opinion to the degree he opines "that Dr. Kerr was not required to test for spores or mold . . . ." (*Id.* at 52.)

According to Defendants, Drs. Kerr, Laurence, Garrison, Coffman, and Lundeby will testify as to "facts of the case," causation, and damages. (*Id.* at 2, 22, 43, 63.) Defendants intend to offer Dr. Stiller's testimony to address "facts of the case" and causation. All of these expert witnesses are intended to offer testimony on "the care and treatment of Krystal Ballard." (*Id.* at 2, 22, 43, 63, 85.)

Defendants' supplemental answer to Plaintiff's third interrogatory is replete with examples of cumulative evidence. With regard to the applicable standard of care, for example, Defendants intend for "Dr. Kerr [to] explain that there was no requirement, per the standard of health care practice or otherwise, for his facility to be certified, inspected, or approved by any organization or governmental agency . . . ." (*Id.* at 4-5.) Defendants intend for Dr. Lundeby to provide the exact same testimony. (*Id.* at 25.)

Additionally, Drs. Kerr, Lundeby, Coffman, and Stiller will all testify that Defendants employed proper techniques to maintain sterility. (*Id.* at 15, 24, 53, 64, 87.) Relatedly, Defendants intend to offer Dr. Garrison to testify that there is no evidence to establish "that there was any breach of sterility in this case." (*Id.* at 47; *see also id.* at 48 ("[S]terilization procedures were adequate to maintain a proper sterile field.").) These are but some of the examples of cumulative expert testimony contained with the subject discovery response.

In an attempt to resolve this dispute without Court involvement, counsel exchanged correspondence on this issue. (Letter from James B. Perrine to Terrence S. Jones, June 20, 2013 (Affidavit of Counsel **Exhibit B**); Letter from Terrence S. Jones to James B. Perrine, June 21, 2013 (Affidavit of Counsel **Exhibit C**).) It is Defendants' position that they will not run afoul of Rule 403 because their disclosed experts are "from different specialties of medicine." (*Id.* at 1.) Plaintiff maintains disagreement with Defendants' position, and the dispute remains unresolved.

b. Defendants' intention to offer blatantly cumulative expert witness testimony in this matter justifies exclusion of expert witnesses.

It is axiomatic that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Idaho R. Evid. 403; *see also Burgess v.*

Salmon River Canal Co., Ltd., 127 Idaho 565, 574, 903 P.2d 730, 739 (1995) (cumulative expert testimony properly excluded pursuant to Idaho R. Evid. 403).

In this matter, the overtly cumulative nature of Defendants' anticipated expert witness testimony is unfairly prejudicial to Plaintiff. Defendants' 108-page answer to Plaintiff's third interrogatory contains numerous examples of cumulative testimony as to multiple elements of Plaintiff's cause of action. Because Defendants' disclosed expert witness testimony is so blatantly in violation of Rule 403, Defendants should not simply be precluded from introducing such cumulative evidence at trial, but Plaintiff should be spared undue and unfair prejudice of incurring the expense of a discovery effort, including depositions, involving experts whose role in this case is necessarily limited to offering cumulative testimony.

Defendants are simply wrong to suggest that they will not run afoul of Rule 403 on account of their expert witnesses' varied medical specialties. The fact remains that those experts have been retained to offer opinions as to a single cause of action. To some degree, all experts have different backgrounds, yet that does not justify duplication of testimony on the same subject matter.

Plaintiff takes no issue with the fact that Defendants may elect to offer expert testimony to supplement that of Dr. Kerr on any particular element of Plaintiff's cause of action. However, the breadth, scope, and depth of cumulative testimony demonstrated within Defendants' discovery response is wholly inappropriate, as it is clearly and unfairly prejudicial.

c. Conclusion

Therefore, pursuant to Rule 403 of the Idaho Rules of Evidence, Defendants should be limited to two expert witnesses, including Defendant, Dr. Kerr, on any single topic.

Dated this 26th day of June, 2013.

Respectfully submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2013, I served a true and correct copy of the foregoing by hand delivering the same to the following:

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16th Floor, U.S. Bank Plaza
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P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CVOC12-04792 **NOTICE OF HEARING**

ORIGINAL

000400

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff gives notice to the Defendants that he will call for hearing his Motion to Exclude Cumulative Expert Witnesses on July 10, 2013 at 3:30 p.m. before the Honorable Deborah A. Bail.

DATED this 26th day of June, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2013, I served a true and correct copy of the foregoing ***Notice of Hearing*** by hand delivering the same to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
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Scott McKay

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES

STATE OF IDAHO)
: ss.
County of Ada)

Terrence S. Jones, having been first duly sworn upon oath, deposes and says:

1. I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. Attached hereto as Exhibit A is a true and correct copy of Plaintiff's First Supplemental Responses to Defendants First Set of Interrogatories.

3. Attached hereto as Exhibit B is a true and correct copy of Plaintiff's Second Supplemental Responses to Defendants First Set of Interrogatories.

4. Attached hereto as Exhibit C are true and correct copies of the professional credentials and curriculum vitae of Drs. Stiller, Laurence, Lundeby, Garrison and Coffman.

5. Attached hereto as Exhibit D is a true and correct copy of the ***McLean*** Decision.

6. Attached hereto as Exhibit E is a true and correct copy of the ***B.C. Sims*** Decision.

7. Attached hereto as Exhibit F is a true and correct copy of the ***Kobos*** Decision.

8. Attached hereto as Exhibit G is a true and correct copy of the ***Johnson*** Decision.

9. Attached hereto as Exhibit H is a true and correct copy of the ***Frederick*** Decision.

10. Attached hereto as Exhibit I is a true and correct copy of the

transcript from an oral ruling by the Honorable Joel D. Horton in the case of ***Yoonas v. Ediger***, Ada County Case No. CV PI 0000249D.

11. Attached hereto as Exhibit J is a true and correct copy of the transcript from an oral ruling by the Honorable Carl B. Kerrick in the case of ***Strandbakke v. Moreno***, Nez Perce County, No. CV 05-0002547.

FURTHER your Affiant saith not.

Terrence S. Jones

SUBSCRIBED AND SWORN to before me this 2nd day of July, 2013.

(SEAL)

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2013, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274 [X] Email
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709 [X] Email
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657 [X] Email
Honorable Deborah A. Bail District Court 200 W Front St Boise, ID 83702-7300	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

Terrence S. Jones

EXHIBIT A

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

ORIGINAL

COMES NOW the Plaintiff Charles Ballard ("Plaintiff"), in accordance with Rule 33 of the Idaho Rules of Civil Procedure, and submits the following Supplemental Responses to Defendants' First Set of Interrogatories.

General Statements and Objections

A. Representations of fact and law herein are made in good faith without the benefit of complete discovery. These responses represent Plaintiff's best efforts at this stage of the litigation and are based on currently available, non-privileged, and non-work product information and documents.

B. Plaintiff objects to each and every request to the extent that it calls for information subject to the attorney-client privilege, the work product privilege, the privilege for critical self-examination, or any other privilege. To the extent that documents or information arguably subject to such privileges may be provided by Plaintiff, such privileges are not waived beyond the precise extent of the disclosure made, and no waiver of privilege may be implied in that no disclosure of anything which is actually privileged is intended.

C. Plaintiff objects to each and every request to the extent that it may be vague, ambiguous, confusing, nonsensical, incomprehensible, or involves usage of words other than those commonly and customarily used, or assumes matters contrary to fact.

D. Plaintiff objects to providing information not within its knowledge, custody, possession, or control, or which does not exist.

E. No objection, general or specific, which has been raised herein is waived by the provision of any response herein unless specifically stated to be waived by such answer.

RESPONSES

INTERROGATORY NO. 1: Please set forth the name and address of each and every individual known to you or your counsel who has knowledge or who purports to have knowledge of any of the facts of this case. By this Interrogatory we seek the names and addresses of all individuals who have knowledge or purport to have knowledge of the facts of this case which pertain to your claim for damages as well as matters pertaining to liability.

SUPPLEMENTAL RESPONSE:

New Address: Charles Ballard, 2590 Hidden Estates Circle, Navarre, FL 32566.

Persons with knowledge of the marriage between Plaintiff and Krystal Ballard and Plaintiff's loss of comfort and support from the untimely death of Krystal Ballard and Krystal Ballard's service to the United States as an enlisted member of the United States Air Force and her career plans, include but are not limited to:

Tearie Wilkins, 2275 Lexington Drive, Barksdale AFB, Louisiana 71110; and

Jonelle Cadiz, 1500 Sheridan Drive, Jacksonville, Arkansas 72076.

Persons with knowledge of Krystal Ballard's service to the United States and performance while an enlisted member of the United States Air Force include, but are not limited to:

MSgt. Rachel L. Tower, United States Air Force (currently deployed); and

Lt. Col. Michael R. Auel, United States Air Force.

The following individuals were involved in the care and treatment of Krystal Ballard beginning on July 25, 2010, until her death just after midnight on July 26, 2010. The knowledge and information possessed by each of these individuals, including opinions held, are set forth in the previously produced records associated with these individuals and referenced again below.

Elmore Ambulance Service, 895 N. 6th East, Mountain Home, Idaho 83647. (*See* Bates EAS000001 – EAS000034, previously produced.)

Cody Murphy, EMT; and

Wendy Vanderburgh, EMT – Paramedic.

Elmore Medical Center, 895 N. 6th Street, Mountain Home, Idaho 83647. (*See* Bates EMC000001 – EMC000029, previously produced.)

Karl Olson, MD - Emergency Department;

Bertrem Stemmler, MD - Medical Imaging; and

Edward Kim, MD - Laboratory, Pathologist.

Life Flight Network, 2779 S Liberty St, Boise, Idaho 83709 (*See* Bates LFN000001 – LFN000005, previously produced.)

Beth Studebaker, RN; and

Steve Mozingo, PM.

Saint Alphonsus Regional Medical Center, 1055 North Curtis Road, Boise, Idaho 83706 (*See* Bates SAMC000001 – SAMC000192, previously produced.)

Matthew Campbell, MD - Emergency Department;

Tisha Fujii, DO - Critical Care;

Billy Mrogan, MD - Surgical Consult;

Jeffrey Symmonds, MD - Vascular Examination;

Michael Kenner, MD - Heart & Vascular Center; and

Howard Schaff, MD - Gem State Radiology.

See also records for attending nursing and other staff to include David Atkinson, RN; Rob Hart, RN; Debra Servatius, RN; Kristin Prescott, RN: Tensie Tobenas, RN; Benjamin

Gagnebin, RN; Shirley Phillips, DTR (diet/nutrition); Ann Schaffer, CRT; and Wynne Proctor, RN.

The following individuals who participated or contributed to the autopsy and death investigation of Krystal Ballard conducted by the Ada County Coroner's office, 5550 Morris Hill Road, Boise, Idaho 83706. The knowledge and information possessed by each of these individuals, including opinions held, are set forth in the previously produced records associated with these individuals and the Coroner's office. (*See* Bates ADA000001 – ADA000011, previously produced.)

Erwin L. Sonnenberg, Coroner;

Glen R. Groben, M.D., Forensic Pathologist - in particular *see* Autopsy Report authored by Dr. Groben, dated September 24, 2010 (Bates ADA000004 – ADA000011), previously produced);

Robert Karinen, Forensic Lab Supervisor;

Barton L. Kline, Forensic Lab Technician; and

Kelly Cole, Coroner's Investigator - in particular *see* Investigative Report and Investigative/Narrative Report (Bates ADA000001 – ADA000003, previously produced.)

INTERROGATORY NO. 5: Please state the name and address of each person whom you intend to call as an expert witness at the trial, and for each such person set forth a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the testimony and a listing of any

other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

SUPPLEMENTAL RESPONSE:

Dean E. Sorensen, M.D.
Sorensen Cosmetic Surgery Center
250 Bobwhite Court, Suite 120
Boise, ID 83706

Dean Sorensen, M.D. is a physician who has practiced cosmetic medicine including plastic surgery in Ada County for over 20 years. He owns and operates the Sorensen Cosmetic Surgery Center of Idaho. Dr. Sorensen's facility serves the Boise and Eagle, Idaho areas. Dr. Sorensen also has staff privileges at St. Luke's Regional Medical Center in Boise. Dr. Sorensen is familiar with the standard of care applicable to defendants at the time Krystal Ballard was treated by Dr. Kerr at his clinic, Silk Touch MedSpa and Laser Center. He is familiar with the standard of care applicable to physicians such as Defendant Brian Kerr, M.D. practicing cosmetic medicine including cosmetic and aesthetic procedures and surgery in Ada County including Boise and Eagle at the time Krystal Ballard was treated by Dr. Kerr at his clinic in July 2010.

Dr. Sorensen's Curriculum Vitae is attached in supplemental response to Defendants' Interrogatory No. 6. By way of background, he received his degree in medicine from Loyola University in Chicago. Upon completion of his medical school training, Dr. Sorensen underwent an internship followed by a residency in general surgery at Highland Hospital in Oakland, California and the U.S. Naval Hospital in Portsmouth, Virginia. Subsequently, he undertook a two-year fellowship in plastic surgery at the University of Utah Medical Center in Salt Lake City. Following a facelift fellowship, Dr. Sorensen returned to Boise where his practice includes plastic, aesthetic and reconstructive procedures and services. Dr. Sorensen is board-certified by

the American Board of Surgery and the American Board of Plastic Surgery. He is a Fellow of the American College of Surgeons, a member of the American Society of Plastic Surgeons and the Aesthetic Society. He is a member of the AMA and Idaho Medical Association. He is past President of the Ada County Medical Society. He has served on the Idaho State Board of Medicine and the Idaho State Board of Medical Discipline. Dr. Sorensen is an inspector for AAAASF, which certifies ambulatory surgical facilities similar to that of the defendants for compliance with local and national standards of care, including the sterilization policies, procedures and protocols employed by such facilities. By virtue of his education, training and experience as described above, Dr. Sorensen is familiar with the standard of care for physicians and surgical facilities offering cosmetic and aesthetic services such as those performed by the defendants and which were performed on Krystal Ballard by the defendants, including the appropriate sterilization policies, procedure and protocols required by the standard of care in both the Boise, Eagle, Ada County and surrounding areas. Dr. Sorensen is familiar with the applicable standard of health care practice in the areas served by St. Luke's Regional Medical Center and St. Alphonsus Regional Medical Center, to include Ada County, Idaho and the cities of Boise and Eagle, which existed at the time and place of the treatment of Krystal Ballard on or about July 21, 2010 in Eagle, Idaho, and which was applicable to the class of health care providers to which the defendants Dr. Kerr and his clinic, Silk Touch Med Spa & Laser Center, belong, and in which he and the clinic were functioning, and which applied to similarly trained and qualified providers of the same class in the same community, taking into account their training, experience, and fields of medical specialization (hereafter "the applicable standard of care").

Dr. Sorensen has reviewed the pertinent medical records of Krystal Ballard, including the report of the post-mortem examination of Krystal Ballard. He has also reviewed the deposition transcripts of Dr. Kerr, Ms. Kerr and Donna Berg as part of his review in this case. As discovery proceeds, Dr. Sorensen will receive additional discovery materials as they become available and, therefore, his anticipated opinions are subject to modification and supplementation. All of Dr. Sorensen's anticipated opinions will be to a reasonable degree of medical certainty.

It is expected that Dr. Sorensen will testify that Krystal Ballard died as a direct and proximate result of conduct of the defendants that was not only negligent, but rose to the level of reckless misconduct, and which grossly violated the applicable standard of care. A review of the depositions reveal that Dr. Kerr and his clinic staff lacked adequate training in appropriate sterilization of a facility, its equipment and instruments. Further, Dr. Kerr and his clinic staff failed to properly avail themselves of information readily available to provide for appropriate sterility in carrying out their cosmetic and aesthetic practice. These standards are readily available from organizations that certify ambulatory and surgical facilities, the Center for Disease Control, the medical literature, and references within the user's manual of the machinery used during Krystal Ballard's surgery and medical treatment.

Specifically, but without limitation, it is expected that Dr. Sorensen will testify as follows:

1. Krystal Ballard died from septic shock as a result of bacteria which entered her body during the surgical procedure performed by Dr. Kerr on July 21, 2010 at the defendants' facility.

2. The infection was introduced into Ms. Ballard's buttocks during the procedure and was determined to be gram negative rods which are commonly found in stool. While a failure to appropriately prepare the patient for the fat transfer could have been the cause of the bacteria

being introduced into Krystal Ballard's body, most likely it occurred because the material obtained from the abdomen was contaminated because of the wholly inadequate, negligent, and reckless misconduct of the defendants in failing to sterilize the instruments and equipment used during the procedure.

3. The procedure room used for the liposuction on Ms. Ballard was not a clean environment by any reasonable surgical standards. It was used for other, non-surgical procedures and as a storage area for supplies and contaminated instruments used during procedures.

4. The instruments used in the liposuction and fat transfer procedures on Ms. Ballard were initially put in a basin in the procedure room and "washed" with Hibiclens and alcohol. Alcohol is not approved as a sterilization solution, nor is Hibiclens approved for sterilization of medical instruments, supplies or equipment.

5. The dirty instruments were taken from the procedure room not to an area designated for dirty equipment, but rather to a room where the autoclave was kept for allegedly sterilizing the equipment.

6. The defendants broke almost every rule of safe care of surgical instruments as measured by any reasonable standard in their treatment of Ms. Ballard. There were no protocols or procedures for cleaning of instruments, nor housekeeping and cleaning of the procedure room or the clean room. After the initial gross cleaning in the procedure room the instruments were placed in a Hibiclens/alcohol mixture not an approved proteolytic enzyme solution wash and were then transferred to the room where the autoclave was, which should have been but was not a clean room.

7. The autoclave used depends on the mechanical monitoring of sterilization. Gauges on the autoclave do not ensure sterilization. The defendants admit there was no maintenance and service checks of the autoclave, nor were any logs kept of any inspection of the autoclave.

8. Allegedly chemical indicators were used, but Dr. Kerr and his clinic staff do not wrap the cassettes and there are no records of what the chemical indicators revealed. There should be documentation of internal as well as external use of chemical indicators because chemical indicators cannot be used as means of ensuring sterility. Biological indicators must be used (spore tests) but were not. The failure to use biological indicators and spore counts is egregious.

9. The autoclave used by the defendants in their treatment of Ms. Ballard as an alleged means of sterilizing hollow chambers and cannulas must have both a negative or vacuum pressure as well as a gravity cycle. The former forces steam through the cannula for appropriate sterilization of the instruments.

10. The employees handling the instruments used to treat Ms. Ballard and responsible for cleaning and sterilization do not have an adequate medical background, nor adequate training in the safe handling, cleaning and sterilization of equipment, nor were there any protocols in place to provide that guidance, and Dr. Kerr himself lacks fundamental knowledge of appropriate cleaning and sterilization to provide the training and guidance to other staff.

Dr. Sorensen will testify that defendants including specifically Dr. Kerr violated the applicable standard of care by virtue of the above described treatment of Krystal Ballard. Dr. Kerr and defendants breached the applicable standard of care in the way in which they operated the facility at the time Ms. Ballard was treated, including through the complete neglect and failure to adhere to even the most basic standards required in the Boise, Eagle and Ada County

areas, and defendants' conduct was negligent, reckless and demonstrated a willful disregard for patient safety which lead directly to and proximately caused the death of Krystal Ballard.

Dr. Sorensen charges $500.00 per hour in connection with his consultation and services as an expert witness in this matter. He has not authored any publications within the preceding ten years and has not testified as an expert at trial or deposition within the preceding four years.

George Nichols, M.D.
739 Middle Way
Louisville, KY 40206

Dr. Nichols is a medical doctor who specializes in anatomical, clinical, and forensic pathology. A copy of Dr. Nichols' Curriculum Vitae, which outlines his education, training, and experience in his medical specialty is provided as part of Plaintiff's Supplemental Responses to Interrogatory No. 6. Dr. Nichols has reviewed the pertinent medical records of Krystal Ballard, including the autopsy report prepared in conjunction with the post-mortem examination, as well as recuts of the pathology slides from the post-mortem examination. As discovery proceeds, Dr. Nichols will receive additional discovery materials and, therefore, his anticipated opinions are subject to modification and supplementation. All of Dr. Nichols' opinions are expected to be to a reasonable degree of medical certainty.

It is expected that Dr. Nichols will testify that the bacterial infection from which Krystal Ballard died was a direct result of bacteria being introduced into her body during the procedure performed by Dr. Kerr on July 21, 2010, and as a result of a breach in sterility, as gram negative rods are proof to a reasonable degree of certainty that a breach in sterility occurred. As a result of bacteria being introduced into her body, Krystal Ballard was exposed to an exotoxin, which causes an inflammatory response (toxic shock) and blood vessels to dilate. As a result of the sepsis, Krystal Ballard's organs were underperfused, ischemia to the organs ensued, and Krystal

Ballard succumbed to multisystem organ failure. Dr. Nichols will testify that there is no other reason for Krystal Ballard's death other than as a direct result of bacteria introduced intra-operatively during the procedure, most likely as a result of contaminated equipment.

Dr. Nichols charges $400.00 per hour in connection with his consultation and services as an expert witness in this matter, with a minimum charge of $2,500.00, and a flat fee of $4,000.00 where an out-of-state appearance necessitates his missing an entire day's work.

A listing of any other cases in which Dr. Nichols has testified as an expert at trial or by deposition within the preceding four years is attached hereto[1], bates numbered **BALLARD000200 – BALLARD000207.**

Keith Barclay Armitage, M.D.
12600 Cedar Road
Cleveland Heights, OH 44106

Dr. Armitage is a medical doctor, who specializes in infectious disease. A copy of Dr. Armitage's Curriculum Vitae, which outlines his education, training, and experience in that medical specialty, is provided as part of Plaintiff's Supplemental Response to Defendants' Interrogatory No. 6. Dr. Armitage has reviewed the pertinent medical records of Krystal Ballard, including the autopsy report prepared in conjunction with the post-mortem examination. As discovery proceeds, Dr. Armitage will receive additional discovery materials and, therefore his anticipated opinions are subject to modification and supplementation. All of Dr. Armitage's opinions are expected to be to a reasonable degree of medical certainty.

It is expected that Dr. Armitage will testify that the bacterial infection from which Krystal Ballard died was a direct result of bacteria being introduced into her body during the procedure performed by Defendant Dr. Kerr on July 21, 2010, which occurred as a result of a

[1] All documents referenced in this Supplemental Response are contained on a compact disc attached hereto.

breach in sterility. The gram negative rod bacteria discovered at autopsy are proof to a reasonable degree of certainty that they resulted from operative sterility issues from instruments used during the procedure and introduced intra-operatively. As a result of the bacteria being introduced into Krystal Ballard's body during the procedure performed by Defendant Dr. Kerr, Krystal Ballard became septic and died.

A listing of all publications authored by Dr. Armitage within the preceding ten years is attached hereto, bates numbered **BALLARD000254 – BALLARD000260**.

Dr. Armitage, in connection with his consultation and services as an expert witness in this matter, charges $300.00 per hour to review records, discuss the case, and prepare any reports, $400.00 per hour to attend any deposition, and $1,500.00 per half day to testify at trial.

Cornelius A. Hofman
The GEC Group
5555 N. Star Ridge Way
Star, ID 83669

Cornelius A. Hofman is an economist. A copy of Mr. Hofman's Curriculum Vitae, which outlines his qualifications, professional experience, and background is provided as part of Plaintiff's Supplemental Responses to Defendants' Interrogatory No. 6. Mr. Hofman will present testimony on his opinions of net present value of lost financial support and lost non-financial support to Plaintiff, which is attributed to the untimely death of Krystal Ballard. Mr. Hofman has been provided information concerning the educational background, employment history, and wage earning and benefits history of Krystal Ballard, as well as the services Mrs. Ballard provided to her husband. Please refer to the materials attached hereto and bates numbered **GEC000001 – GEC000347**.

As discovery proceeds, Mr. Hofman will receive additional discovery materials, expected to include, but not be limited to, the tax return information for Mrs. Ballard and Plaintiff, economic and financial literature, college transcripts, and military benefits. Accordingly, his anticipated opinions are subject to modification and supplementation.

Mr. Hofman, in connection with his consultation and services as an expert witness in this matter, charges $3,900.00 for analysis and report preparation and $490.00 per hour to testify at any deposition or trial.

A listing of any other cases in which Mr. Hofman has testified as an expert at trial or by deposition within the preceding four years is attached hereto, bates numbered **BALLARD000224 – BALLARD000231**.

INTERROGATORY NO. 6: For each and every person you have identified in answer to Interrogatory No. 5, set forth the qualifications, professional experience and background of the individual.

SUPPLEMENTAL RESPONSE:[2]

The qualifications, professional experience and background of Dean E. Sorensen, M.D. are set forth at **BALLARD000233 – BALLARD000235**, attached hereto.

The qualifications, professional experience and background of George Nichols, M.D. are set forth at **BALLARD000190 – BALLARD000199**, attached hereto.

The qualifications, professional experience and background of Keith Barclay Armitage, M.D. are set forth at **BALLARD000236 – BALLARD000253**, attached hereto.

[2] As previously noted, the documents referenced in this Supplemental Response are contained on a compact disc attached hereto

The qualifications, professional experience and background of Cornelius A. Hofman are set forth at **BALLARD000208 – BALLARD000223**, attached hereto.

DATED this 26th day of March, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

EXHIBIT B

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
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P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PLAINTIFF'S SECOND SUPPLEMENTAL ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

COMES NOW the Plaintiff, Charles Ballard ("Plaintiff"), in accordance with Rule 33 of the Idaho Rules of Civil Procedure, and submits the following Second Supplemental Answers to Defendants' First Set of Interrogatories.

General Statements and Objections

A. Representations of fact and law herein are made in good faith without the benefit of complete discovery. These answers represent Plaintiff's best efforts at this stage of the litigation and are based on currently available, non-privileged, and non-work product information and documents.

B. Plaintiff objects to each and every interrogatory to the extent that it calls for information subject to the attorney-client privilege, the work product privilege, the privilege for critical self-examination, or any other privilege. To the extent that documents or information arguably subject to such privileges may be provided by Plaintiff, such privileges are not waived beyond the precise extent of the disclosure made, and no waiver of privilege may be implied in that no disclosure of anything which is actually privileged is intended.

C. Plaintiff objects to each and every interrogatory to the extent that it may be vague, ambiguous, confusing, nonsensical, incomprehensible, or involves usage of words other than those commonly and customarily used, or assumes matters contrary to fact.

D. Plaintiff objects to providing information not within its knowledge, custody, possession, or control, or which does not exist.

E. No objection, general or specific, which has been raised herein is waived by the provision of any answer herein unless specifically stated to be waived by such answer.

ANSWERS

INTERROGATORY NO. 5: Please state the name and address of each person whom you intend to call as an expert witness at the trial, and for each such person set forth a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the testimony and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

SECOND SUPPLEMENTAL ANSWER:

Plaintiff previously disclosed Cornelius A. Hofman with the GEC Group in response to this interrogatory. Mr. Hofman is an economist. Plaintiff supplements his prior response to this interrogatory concerning Mr. Hofman and produces herewith Mr. Hofman's report dated May 8, 2013, styled "Assessment of Economic Loss" prepared in connection with this case and the death of Krystal Melissa Ballard, bates numbered **GEC000351 – GEC000395**.

Additionally, we provided Mr. Hofman with Krystal's transcript from Embry-Riddle Aeronautical University and her transcript from University of Maryland University College. Those documents are bates numbered **GEC000348-GEC000349** and **GEC000350**, respectively, and are attached hereto.

Plaintiff previously disclosed Keith Armitage, M.D., in response to this interrogatory. Dr. Armitage specializes in infectious disease medicine. In addition to the previously disclosed opinions of Dr. Armitage, which are incorporated by reference herein, it is expected that Dr. Armitage will testify concerning the lack of effect the antibiotic prescribed by Dr. Kerr would have on the gram negative bacteria cultured at autopsy. Dr. Armitage is expected to testify that

the antibiotic prescribed by Dr. Kerr in follow up to the procedure he performed on Krystal Ballard would not be effective in treating gram negative bacteria. Further, the prescribing of a Medrol Dosepak by Dr. Kerr would suppress the body's own immune system and have a deleterious effect on a patient with an infection. Further, Dr. Armitage will testify that the time interval between the cosmetic procedure and Krystal Ballard's death is such that the introduction of the fatal bacteria occurred intraoperatively. Had the infection occurred post-operatively, Krystal Ballard would not have exhibited signs of sepsis until much later. Additionally, the bacteria responsible for post-operative infections are gram positive bacteria, usually from skin flora, not gram negative bacteria. As such, the gram negative bacteria is not a typical post-operative infection but rather one coming from peritoneal cavity flora which must have been transferred to the buttocks during the fat transfer.

Further, Plaintiff saith not.

DATED this 14th day of May, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

EXHIBIT C

7485 Poplar Pike
Germantown, TN 38138
(901) 752-4999

Gregory N. Laurence, M.D.

Professional Experience

Medical Director, Complete Medical Care Germantown & Germantown Aesthetics Surgery Center
Hospital Laparotomy privileges
Qualified in laparoscopic procedures
Obstetrical Family-centered care
Capable abdominal and vascular ultrasound
Training, experience, and proven ability in office cosmetic surgery, facial and body

Board Certification	American Academy of Family Physicians 8880 Ward Parkway Kansas City, Missouri 64114-2797 September 1995–present	Diplomat 1995-2000 Fellow 2000-present
	American Board of Laser Surgery Diplomat	2009 - present
Medical Licensure	Tennessee #25017–Issued 10/26/93 State of Tennessee Division of Health Related Boards. Expires 6/30/2013	
	Idaho, pending licensure Utah, pending licensure	
Medical Education	May 2008	Fellow American Society of Cosmetic Breast Surgery
	July 1995–June 1996	The University of Tennessee, Memphis Fellowship in Advanced Women's Health Director, Charles E. Couch, M.D., FACOG
	July 1992–June 1995	The University of Tennessee, Memphis UT/Saint Francis Family Practice Residency Program, Memphis, TN
	August 1988–June 1992	University of Texas at Houston Medical School, Houston, Texas–M.D. Degree June 1992
Previous Education	January 1987–May 1987	University of Houston, Houston, Texas Graduate Studies

	September 1981–May 1986	Baylor University Waco, Texas B.S. Degree in Biology
Society Memberships	American Institute of Ultrasound in Medicine (AIUM) 1994–present Association of American Physicians and Surgery 1999-present American Academy of Family Physicians (AAFP) 1992–present American Society of Cosmetic Breast Surgeons 2003-present National Society of Cosmetic Physicians 2011-present American Congress of Phlebology 2009-present	
Hospital Appointments	Baptist Memorial Hospital – East, Department of Family Medicine Chairman October 1999 – 2000 Baptist Memorial Hospital – East, Medical Executive Committee, 2000 Tenet/St. Francis Hospital, Maternal/Fetal Well-Being Committee 1998 – 2000 Methodist Hospital, FP/OB Joint Practice Committee 1998 - 2000	
University Appointments	The University of Tennessee, Memphis Department of Family Medicine **Clinical Instructor** July 1, 1995–June 30, 1996 **Associate Clinical Professor** July 1, 1996–present	
Hospital Appointments	Active Staff Saint Francis Hospital 5959 Park Avenue Memphis, TN 38119 August 7, 1995–present	Courtesy Staff Methodist Hospital 1265 Union Avenue Memphis, TN 38104 December 1, 1996–2003
	Active Staff Baptist Memorial Hospital 899 Madison Avenue Memphis, TN 38146 October 1996–present	Courtesy Staff Delta Medical Center 3000 Getwell Road Memphis, TN 38118 September 12, 1996–present (901) 369-8517; fax 369-8503

Professional Experience	Private Practice (August 1996–1999) Peabody Healthcare 6005 Park Avenue Suite 424B Memphis, TN 38119 Private Practice (August 1999–2002) Laurence Family Practice & Obstetrics 2195 West Street Germantown, TN 38138 Private Practice (August 2002–2008) Germantown Family Practice & Obstetrics 2195 West Street Germantown, TN 38138 Private Practice (2003–present) Germantown Aesthetics, LP 7485 Poplar Pike Germantown, TN 38138 Private Practice (August 2008–present) Complete Medical Care Germantown 7485 Poplar Pike Germantown, TN 38138 Private Practice (August 2009–present) The Vein Institute 7485 Poplar Pike Germantown, TN 38138	
Publications	Laurence, Gregory; Orientale, Eugene, Jr., "Colorectal Cancer: Screening Diagnosis and Management," Manual of Family Practice; ed.: Robert B. Taylor, publisher: Little Brown. 1996. Laurence, Gregory, "Obstetrical Privileging in Memphis," Tennessee Family Physician; ed.: J. Lou Manning, pg 8-9, winter 1999. Laurence, Gregory, "MemoryGel TM Breast Implant Post-Approval Study," IRB Company, Inc; ed.: Clinical Study. 5271 Mentor PAS	
Preceptorships	June 30 – July 3, 2001 July10 – July 12, 2002	Subfascial Breast Augmentation Internal Mastopexy J. Dan Metcalf, MD (Oklahoma City, OK)
	June 2003	Transumbilical Breast Augmentaion

	June 2004	Robert Shumway, MD (LaJolla, CA)
	June 2003 June 2004	Biplanar Breast Augmentation Chip Splinter, MD (San Diego, CA)
	June 2004 June 2005	Transumbilical Breast Augmentation Peter Cheski, MD (Beverley Hills, CA)
References	Adam Baker, M.D. 2120 Merchants Row Ste 2 Germantown, TN 38138 Ph: (901) 362-7170 Susan Nelson, M.D. 2032 Satinwood Memphis, TN 38119 (901) 758-8287 William Macmillan Rodney, M.D. Chairman University of Tennessee Department of Family Medicine, 1989–1997 6575 Black Thorn Cove Memphis, TN 38119 (901) 753-0423	
Malpractice Insurance Carrier	State Volunteer Mutual Insurance Company 1M/3M coverage 8/5/96 to present 101 Westpark Drive, Suite 300, P.O. Box 1065 Brentwood, Tennessee 37024-1065 (615) 377-1999 or (800) 342-2239; fax (615) 377-9192	
DEA Certificate	BL3847083, exp 3/31/2014	
Honors	University of Tennessee Community Physicians Award for teaching medical students 2003	
	"Physician Champion" for Baptist Memorial Hospital Celebrate Nursing	
	Germantown News Reader's Choice Award "Best Physician" – 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011	
	Plastic Surgery Practice Best of 2011 Named 'One of the Top Cosmetic Surgeons in the Nation'	
	The Aesthetic Awards 2011-2012 Awarded 'Best Non-Surgical Facial Rejuvenation'	

Geoffrey D. Stiller, MD, FACS, FAACS

Education:

1981-1987	Mining and Mechanical Institute, Freeland, PA
1987-1991	Eastern College, St. Davids, PA Graduated Magna Cum Laude with a B.S. in Biology and minor in Chemistry
1992-1996	University of Minnesota Medical School Graduate medical studies leading to an MD

Residency:

1996-1997	Intern in General Surgery, Graduate Hospital, Philadelphia, PA
1997-2000	Resident in General Surgery, Graduate Hospital, Philadelphia, PA
2000-2001	Administrative Chief Surgical Resident, Graduate Hospital, Philadelphia, PA

Fellowship:

2007-2008	Fellow in Cosmetic Surgery, Southcenter Cosmetic Surgery and Hair Restoration, Inc. Seattle, WA

Employment:

Aug 2001-June 2005	USAF, Mountain Home AFB, Mountain Home, ID Staff General Surgeon, Chief of Surgery, Officer in charge of Surgery Clinic, Interim Chief of Medical Staff
2002-2005	Department of Veterans Affairs, Boise, ID Associate Staff General Surgeon without compensation
Jan 2005-July 2005	Palouse Surgeons, LLC, Pullman, WA General Surgeon Locum Tenem

Aug 2005-Aug 2008	Palouse Surgeons, LLC, Pullman, WA
	Owner, General/Vascular/Thoracic/Laparoscopic Surgeon
Sept 2007-Aug 2008	Southcenter Cosmetic Surgery & Hair Resoration, Inc.,
	Seattle, WA
	Cosmetic Surgery Fellow
Sept 2008-Mar 2009	Genesis ENT and Plastic Surgery, Charlotte, NC
	Cosmetic Surgeon
Apr 2009-Mar 2010	Uplift Cosmetic Surgery, Laser and Skin Center, Charlotte, NC
	Owner
Mar 2010- Feb 2012	Shape Cosmetic Surgery and Medspa, Spokane, WA
	Cosmetic Surgeon
Mar 2012-present	Palouse Surgeons, LLC, Pullman, WA
	Cosmetic and General Surgeon

Faculty Appointment:

Aug 2005-Aug 2008	Affiliate Faculty University of Washington Medical School
	WWAMI program
20010-present	Faculty of the National Society of Cosmetic Physicians

Publications:

Stiller, GD, et al: A Unique Method of Body Contouring after Massive Weight Loss. The American Journal of Cosmetic Surgery. 3:130

Weese, JL, et al: Neoadjuvant chemotherapy, radical resection with intraoperative radiation therapy (IORT): Improved treatment for gastric adenocarcinoma. Surgery 128-4:566-71, 2000

Centeno, RF, et al: An alternative approach: antegrade catheter-directed thrombolysis in a case of phlegmasia cerulean dolens. Am Surg 65(3): 229-31, 1999

Presentations:

Nov 2010	Brazilian Butt Lift. National Society of Cosmetic Physicians
Nov 2010	Awake Inframammary Breast Augmentation. National Society of Cosmetic Physicians
Nov 2011	Brazilian Butt Lift. National Society of Cosmetic Physicians
Nov 2011	Liposuction of the Inner and Outer thigh, Banana roll, and Knees National Society of Cosmetic Physicians
Nov 2011	Abdominoplasty Complications. National Society of Cosmetic Physicians
Nov 2011	Thighplasty. National Society of Cosmetic Physicians
Nov 2011	Breast Augmentation Approaches. National Society of Cosmetic Physicians
Nov 2011	Facial Rejuvenation with Facelift and Fat Transfers. National Society Of Cosmetic Physicians
Apr 2012	Cosmetic Surgery on the Palouse. Gritman Medical Center
Sep 2012	Breast Cancer and Reconstruction. Moscow Breast Cancer Support Group
Oct 2012	Brazilian Butt Lift. National Society of Cosmetic Physicians
Oct 2012	Breast Augmentation Techniques. National Society of Cosmetic Physicians
Oct 2012	Facial Rejuvenation using Autologous Fat Transfer. National Society of Cosmetic Physicians
Oct 2012	Hand Rejuvenation using Autologous Fat Transfer. National Society of Cosmetic Physicians
Oct 2012	Mini-Facelift. National Society of Cosmetic Physicians
Oct 2012	Lipo-Abdominoplasty. National Society of Cosmetic Physicians

Awards:

1998	Robert Lauks Award: chosen by faculty as the exemplary surgical resident in overall knowledge and care of the surgical patient (one award given per year for the entire residency)

2000	Robert Lauks Award: chosen by faculty as the exemplary surgical resident in overall knowledge and care of the surgical patient (one award given per year for the entire residency)
2001	Paul Nemir Award: chosen by faculty and peers as the senior surgical resident with outstanding surgical skills and knowledge
2001-2002	Customer Service Award Hero: Mountain Home AFB patient survey
2002-2003	Customer Service Award Hero: Mountain Home AFB patient survey
2003-2004	Customer Service Award Hero: Mountain Home AFB patient survey
2005	USAF Meritorious Service Medal
2006	Pullman Regional Hospital Patient Satisfaction Award, Runner-up

Medical License:

State of Idaho

State of Washington

State of North Carolina expired, not renewed

State of South Carolina expired, not renewed

State of Pennsylvania expired, not renewed

Board Certification:

Board Certified by the American College of Surgery 2003, re-certified 2012

Board Certified by the American Board of Cosmetic Surgery 2011

Society Memberships:

Fellow of the American College of Surgeons

Fellow of the American Academy of Cosmetic Surgery

Idaho Medical Association

Washington Medical Association

Hobbies:

Hiking, camping, canoeing, fly-fishing, hunting, kayaking, skiing, boating, scuba diving, home remodeling

John P. Lundeby, MD, FACS, FAACS

Curriculum Vita

Office Address:

Shape Cosmetic Surgery and Med Spa, PLLC

AAAHC Accredited Surgery Center

524 W. 6th Avenue

Spokane, WA 99204

Birth Information:

Cottonwood, Idaho USA

Current Positions:

Owner- Shape Cosmetic Surgery & Med Spa, PLLC

Nov 2009-current

Owner- North Idaho Surgery, PLLC

Nov 2009-current

Previous Positions:

Co-Owner- The Laser & Vein Center, PLLC, dba Reflections Med Spas

Jan 2005-Jan 2010

Co-Owner- Lake City Surgeons, PLLC

Jan 2005-current

Senior Partner and Owner- Palouse Surgical Associates, PLLC

Aug 1996-Dec 2007

Education:

University of Washington School of Medicine, MD

Jun 1991

University of Idaho, BS Zoology with Chemistry Minor

May 1987

North Idaho College, AAS Machine Shop

May 1982

Postgraduate Medical Education:

Chief Resident in General Surgery

San Joaquin General Hospital, Stockton, CA

Jul 1994-Jun 1996

Resident in General Surgery

San Joaquin General Hospital, Stockton, CA

Jul 1992-Jun 1994

Intern in General Surgery

San Joaquin General Hospital, Stockton, CA

Jun 1991-Jun 1992

Professional Licensure/Certification:

Board Certified, American Board of Cosmetic Surgery,

Body, Breast & Extremity Surgery

2012-current

Board Eligible, American Board of Laser Surgery

2010

Board Certified, Recertified, American Board of Surgery

2006-current

Board Certified, American Board of Surgery

1997-2006

Idaho State Medical License

1997-current

Washington State Medical License

1996-current

California State Medical License

1992, now inactive

DEA Certificate Idaho

1992-current

DEA Certificate Washington

2008-current

Idaho Board of Pharmacy Certificate

1997-current

Diplomat, National Board of Medical Examiners

1992

Advanced Cardiac Life Support Certified

1989-current

Advanced Trauma Life Support Certified

Current

Pediatric Life Support

Previously Certified

Professional Society Memberships:

Fellow, American Academy of Cosmetic Surgery

Faculty Member, National Society of Cosmetic Physicians

Fellow, American College of surgeons

Member, American College of Phlebology

Member, American Society for Laser Medicine and Surgery

Member, Idaho Medical Association

Member, Kootenai Benewah Medical Society

Member, Spokane County Medical Society

Member, Washington State Medical Association

Member, American Medical Association

Committee Appointments/Offices Held:

Chairman, Executive Committee and Medical Staff Committee, Shape Cosmetic Surgery & Med Spa, PLLC

2009-present

Chairman, Medical Quality Improvement Committee, Shape Cosmetic Surgery & Med Spa, PLLC

2009-present

President, Kootenai-Benewah Medical Society

2007-2008

Trauma Director, Kootenai Medical Center

2006-2007

Secretary Treasurer/President Elect, Kootenai Benewah Medical Society

2006-2007

Chairman, Board of Directors, Palouse Surgery Center, LLC

2002-2004

Chief of Surgery, Gritman Medical Center

Chief of Staff, Gritman Medical Center

Chief of Trauma, Gritman Medical Center

Co-Director, Intensive Care Unit, Pullman Memorial Hospital

Chief of Surgery, Pullman Memorial Hospital

Vice President Medical Staff, Gritman Medical Center

Secretary Treasurer Medical Staff, Gritman Medical Center

Member, Medical Staff Executive Committee, San Joaquin General Hospital

Editorial Board, Hospital Physician

President, San Joaquin General Hospital Housestaff Association

Honors/Awards:

Most Outstanding Surgical Trainee

San Joaquin General Hospital

1996

Faculty/Teaching Positions:

Clinical Faculty, NSOCP

2009-present

Clinical Lecturer, Cynosure Corporation

2008-present

Certified Trainer in Laser Medicine, Cutera

2006-2008

Clinical Instructor, Surgery

Department of Surgery

University of Washington

1997-2008

Affiliate Faculty, Clinical Instructor

WWAMI Program

University of Idaho

1997-2008

Medical Staff Appointments:

Kootenai Medical Center

Coeur d'Alene, Idaho

2005-present, currently Community Associate Staff

Northwest Specialty Hospital

Post Falls, Idaho

2005-2012

Northern Idaho Advanced Care Hospital

Post Falls, Idaho

August 2006-2012

Research/Presentations/Articles:

"Lasers in Clinical Medicine", Houston, TX

Dec 2010

"Arm Liposuction", NSOCP, Tucson, AZ

Nov 2010

"Pitfalls to Avoid in Liposuction", NSOCP, Tucson, AZ

Nov 2010

"Lasers in Clinical Medicine", Cynosure, Seattle, Las Vegas, Austin,

Houston, New York City, Greenwich, Phoenix, Chicago

2009-2010

"Smartlipo: A Clinician's Perspective", Seattle, WA

Aug 2008

"Smartlipo for Practitioners", Seattle, WA

Jun 2008

"Vein Therapy Using the Cutera 1064 nm Laser", Cutera Clinical Forum, Washington, DC

May 2007

"Thoracic Trauma", CE presentation to the ED Nurses, Kootenai Medical Center,

Mar 2007

"Chest Trauma", CE presentation to Coeur d'Alene Fire Department Paramedics

Feb 2007

"Vein Treatment Using the 1064 nm Cutera Laser", Corporate Webinar, Cutera International

Jan 2007

"Body contouring: Dr. Michelangelo?", North Idaho Business Journal

Dec 2006

"Varicose Vein Treatment", Risk Management presentation, NPIC, Portland, OR

Nov 2006

"Insurance and Varicose Veins", North Idaho Business Journal

Sep 2006

"Dare to be Bare", North Idaho Business Journal

May 2006

"Laparoscopic Nissen Fundoplication" CME presentation, Kootenai Medical Center

Apr 2006

"Embarrassing Rosacea Can Be Controlled", North Idaho Business Journal

Feb 2006

"Scar Treatment Starts with Prevention, Then Appropriate Care", North Idaho Business Journal

Dec 2005

"Consider Laser Safety", North Idaho Business Journal

Nov 2005

"Varicose Veins Now Very Treatable", North Idaho Business Journal

Sep 2005

'What to Look For in a Med Spa", North Idaho Business Journal

2005

"Laparoscopic Nissen Fundoplication", CME presentation, Gritman Medical Center

2001

"Chest Tube Management", CME presentation, Pullman Memorial Hospital

2000

"Wound Healing", CME presentation, Gritman Medical Center

1999

"Post Traumatic Chylous Ascites in a child: Review of the Literature and Case Report",

Stockton Surgical Society

1994

"Evaluation of Triage Criteria for Trauma Victims Utilizing Aeromedical Transport", unpublished research

1990

Charles O. Garrison

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PERSONAL INFORMATION:

- Date of Birth: [redacted]
- Birthplace: Nampa, Idaho
- Military Service: Us Air Force, 1955-1959

EDUCATION:

- Maryknoll College, Glen Ellyn, Illinois (1953-1955),
- Idaho State College, Pocatello, Idaho (1959-1962), BS
- Washington University School of Medicine, St. Louis, Missouri (1962-1966) MD

INTERNSHIP:

- Kansas University Medical Center, Kansas City, Kansas (1966-1967)
    - Mixed - Internal Medicine, 10 months; Pathology, 2 months

POSTGRADUATE:

- Residency, Internal Medicine, Mayo Clinic, Rochester, Minnesota (1967-1968)
- Residency, Anatomic and Clinical Pathology, Mayo Clinic, Rochester, Minnesota (1968-1972)
- Forensic Pathology, Office of the Medical Investigator, University of New Mexico School of Medicine, Albuquerque, New Mexico (1978-1987)

SCHOLASTIC:

- High Honors, Idaho State College (1962)

LICENSURE:

- Missouri (1966)
- Minnesota (1967)
- Colorado (1972)
- Idaho (1976)

PROFESSIONAL & ACADEMIC:

- Chief Resident Associate, Surgical Pathology, Mayo Clinic, Rochester, Minnesota (1972)
- Associate Consultant, Surgical Pathology, Mayo Clinic, Rochester, Minnesota (1972)
- Pathologist, Southwest Memorial Hospital, Cortez, Colorado (1973-1974)
- Pathologist, Project HOPE, Washington, D.C. (1974-1975)

- Chief Pathologist, Cornwall Regional Hospital, Montego Bay, Jamaica (1974)
    - With the institution, but also under the auspices of Project HOPE.
- Senior Lecturer, University of Ife, Ile-Ife, Nigeria (Pathology-1975)
    - With the institution, but also under the auspices of Project HOPE.
- Co-Director, Bannock Regional Medical Center Pathology, Pocatello, Idaho
- Co-Director, Pocatello Regional Medical Center Pathology, Pocatello, Idaho
- Co-Director, Eastern Idaho Clinical Pathology Laboratory, Pocatello, Idaho
- Co-Director, Western Pathology Associates, Pocatello, Idaho
- Consultant, locum tenens, Southland Hospital, Invercargill, New Zealand (November 2000-March 2001)
- Consultant, locum tenens, IDX Pathology, Boise, Idaho (2001)
- Consultant, locum tenens, Snake River Pathology, Burley, Idaho (2001-2002)
- Wound Care Specialist, Idaho Wound Care & Hyperbarics Center, Pocatello, Idaho (June 2003 – October 2012)
- Consultant in Wound Care, Pocatello Care and Rehabilitation Center, Pocatello, Idaho (2010 – to present)
- Director, LabCorp Laboratories, Pocatello, Idaho (approx. 2008 to present)
- Forensic Pathologist, Ada County Coroner's Office, Ada County, Boise, Idaho (2007 – present, and as consultant 1978 – 2007)
- Forensic Pathologist, General Pathologist both Anatomic and Clinical, Idaho Pathology Laboratories (October 2012 – to present)

BOARDS:

- American Board of Pathology: Anatomic and Clinical Pathology (May 1973)
- American Board of Pathology: Forensic Pathology (May 1988)

PROFESSIONAL ORGANIZATIONS:

- College of American Pathologists
- American Society of clinical Pathologists
- American Academy of Forensic Sciences
- National Association of Medical Examiners
- Idaho Medical Society
- Southeast Idaho District Medical Society
- Bannock County Peace Officers Association
- Idaho Peace Officers Association

CONTINUING MEDICAL EDUCATION:

- Montelores County Medical Meeting 97 Postgraduate Seminars, Stoner, Colorado, January, 1973
- University of Chicago 97 Seminar for Vaginal and Cervical Cytology, April, 1973

- Montelores County Medical Meeting 97 Postgraduate Seminars, Stoner, Colorado, January, 1974
- American Society of Clinical Pathologists 97 Winter Meeting 97 Postgraduate Seminars, February, 1974

- Medicolegal Investigation of Death: Idaho Peace Officers Training Academy, April, 1977
- Investigation of Sex Crimes 97 Idaho Peace Officers Training Academy, June, 1977
- Tutorial on Neoplastic Hematopathology: The University of Chicago and the City of Hope National Medical Center, October, 1977
- Tutorial on Immunology 97 San Antonio, Texas July, 1977, University of Texas Health Science Center
- Current Concepts on the Classification and Morphology of Leukemia 97 Mayo Clinic, Rochester, Minnesota, April, 1978
- Tutorial on Pathology: Idaho Pathology Society 97 February, 1978
- Seminar on Medical Investigation of Death: Office of The Medical Investigator, School of Medicine, Albuquerque, New Mexico, August,1978, and August, 1982
- Tutorial on Pathology: Idaho Pathology Society, February 1978 and 1979
- Idaho POST Academy (Peace Officer's Standards and Training), February, 1980, Idaho State University, Pocatello, Idaho
- Office of Medical Investigator, University of New Mexico under James T. Weston, M.D.
- Office of Medical Investigator, University of New Mexico under John Smialek M.D. and Patricia McFeeley, M.D.
- Annual Cytology Case Study Program; Colorado Association for Continuing Medical Laboratory Education, 1988, 1989, 1990, 1991
- CAP/LAP Inspector Training Program; Boise, Idaho, 1989
- Evaluating Suspicious Child Death; Ada County Medical Education Consortium, 1989
- Neoplasms and Diseases of the Head and Neck; College of American Pathologists 97 Arizona Society of Pathology, 1989
- Myelodysplastic Syndromes; Mayo Foundation, 1990
- Obstetrical Pathology; Placentas and Perinatal Disorders; College of American Pathology, Arizona Society of Pathology, 1990
- Children's Hospital, San Diego, CA, Center for Child Protection. Evaluating the sexually abused child. July 1991
- Webcast: New Technology to Address the Ever-Changing Wound Microenvironment. June, 2005
- Webcast: Monochromatic Infrared Photo Energy Clinical Outcomes in the Treatment of Diabetic Neuropathy. July, 2005
- SAWC 2005, San Diego California
- 6th Annual Wound Care & Health Conference, Virgin Islands, December 2005

- HBO and Wound Care Symposium, Vail, Colorado, January, 2007
- Great Eight Teleconference Pressure Ulcers: March, 2007
- SAWC-WHS, San Diego, Ca., April, 2008
- New England Seminar in Forensic Sciences; Colby College, Waterville, Maine; August 2012.

AFFILIATIONS:

- People to People Health Foundation, Inc., (Project HOPE): Pathologist, July 1974, December 1975.

COMMITTEES:

- Co-Chairman: Committee on Child Abuse, Bannock County, Idaho
- Chairman: Infection Control Committee, Bannock Regional Medical Center and Pocatello Regional Medical Center, Pocatello, Idaho
- Medical Investigator and Coordinator with Law Enforcement and Child Protection of Health and Welfare regarding Child Abuse
- Medicolegal Investigator for Pocatello Police Department, Idaho State Police, Sheriff's Offices in Bannock, Bingham, Power, Bear Lake, Caribou, Cassia, Custer, Minidoka, Fremont, Blaine, Jerome and Twin Falls Counties and their respective City Police Departments
- Consultant, National Governor's Conference, State of Idaho 1985
- Interagency Task Force on Child Abuse; Bannock County, Idaho

PRESENTATIONS:

- Seminar on Basic Hematology 97 Sponsored by Idaho Department of Health and Welfare (one week) April, 1978
- Seminar on Medical Aspects of Child Abuse to Juvenile Judges of Idaho, Idaho State Supreme Court, February, 1978
- Seminar on Hematology and Hematologic Photomicroscopy for Zeiss Optics in Seattle, Washington, August, 1979
- Instructor in Medicolegal Investigation of Death, Idaho Peace Officer's Training Academy
- Seminar on Rape Investigation, Medical and Legal, to Law Enforcement Agencies throughout State of Idaho, Sponsored by Idaho POST Academy
- Instructor in Medicolegal Investigation of Death and Investigation of Sex Crimes with F.B.I. Presentations annually in Idaho
- Presentation on Child Abuse at Eastern Montana College for Western Canada, Idaho, Montana, and Wyoming. Sponsored by F.B.I. and Eastern Montana College, June, 1985
- Presentation on Child Abuse and Sex Crimes, Idaho State University, Pocatello, Idaho. Sponsored by F.B.I. and Idaho POST Academy, June, 1986, 1987, 1988, 1989
- Instructor, Accident Investigation, Idaho State Police
- Instructor, Death and Accident Investigation, Montana Law Enforcement

Academy, 1987

- Instructor, Federal Bureau of Investigation, Bureau of Indian Affairs; Physical and Sexual Abuse of Children, Billings, Montana, 1988
- Numerous presentations of Physical and Sexual Abuse of Children to CASA Trainees; Law Enforcement Agencies; Public School Teachers; High School Students (to include classroom presentations as well as junior Civitan)
- Guest Lecturer - Idaho State University course on Sexual Abuse, 1991
- Guest Lecturer – Medical Technology Conference, Queenstown, New Zealand, 2002
- Guest Lecturer – Conference on Child Abuse – Invercargill, Christ Church, and Nelson, New Zealand, 2003

PUBLICATIONS:

- Participant, CPA, American Journal of Medicine, 41:30097308, August, 1966
- Garrison, C.O., Dines, D.E., Harrison, E.G., Jr., Douglas, W.W., and Miller, W.E., The Alveolar Pattern of Pulmonary Lymphoma. Mayo Clinic Proc., 44:26097271, April, 1969
- Garrison, C.O., Dines, D.E., Harrison, E.G., Jr., Douglas, W.W., and Miller, W.E., Unusual X-ray Findings in Pulmonary Lymphoma. (Clinifoto Department) Geriatrics, 25:889791, June, 1970
- Ludwig, J., Garrison, C.O., and Baggenstoss, A.H., Latent Hepatic Cirrhosis: A Study of 92 Cases. Am. J. Digest Dis., 15: January, 1970
- Rodarte, J.R., Garrison, C.O., Holley, K.E., and Fontana, R.S., Whipple's Disease Simulating Sarcoidosis. Arch. Intern. Med., 129: March, 1972
- Garrison, C.O., Kazier, F.J., Bowie, E.J.W., Owen, C.A., Jr., Protamine Sulfate and Ethanol Gel: A Laboratory and Clinical Evaluation for Determination of Disseminated Intravascular Coagulation. (Study completed, Manuscript in preparation.)

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EDUCATION

1975-1979 University of California (Santa Cruz, CA)

- B.A., Biology

1979-1984 University of Iowa Medical School Iowa City IA

- MD

1984-1987 University of Iowa Hospital and Clinics Iowa City, IA

- Resident in Internal Medicine

1987-1989 University of Iowa-Department of Medicine

- Fellow in Infectious Disease

BOARD CERTIFICATION

- American Board of Internal Medicine-1987
- American Board of Infectious Disease-1990
- American Board of Infectious Disease-2001

LICENSURE

- Idaho-1990 M-5628

April 14, 2010

PROFESSIONAL EXPERIENCE

- 2009- 2011 Chief of Staff, St Lukes Regional Medical Center
- Clinical Assistant Professor of Medicine, University of Washington School of Medicine
- Chairman, Infection Control Committee, St Lukes Regional Medical Center
- Chairman, Infection Control Committee, Elks Rehabilitation Hospital
- Co-Chairman Infections Control, St Alphonsus Regional Medical Center
- 1990-Present Private Practice, Infectious Disease
- 2001-Present, HIV Clinical Services (Ryan White Grant) Family Practice Residency of Idaho

PUBLICATIONS

- **Coffman, TJ,** Cox CD, Edeker BL, Britigan BE. The pseudomonas siderophore can function as a hydroxyl radical catalyst, J. Clin. Inves., V6 #4, pp 1030-37, Oct 1990
- Schlecte JA, **Coffman, TJ.** Plasma free cortisol in depressive illness: A review of findings and clinical applications. J Psych. Med., 3:23-31, 1985
- Adams HP, Dawson G, **Coffman, TJ,** Corry R. Stroke in renal transplant recipients, Arch. Neurol., 43:113-115, 1988
- Britigan BE, **Coffman, TJ,** Adelberg DR, Cohen MS. Mononuclear Phagocytes have the potential for sustained hydroxyl production: Use of spin trapping techniques to investigate mononuclear phagocyte free radical production, J. Exp. Med., 168:2367-2372, 1988
- Britigan BE, **Coffman TJ,** Buettner GR. Spin trapping evidence for the lack of significant hydroxyl radical phagocytes using a spin adduct resistant to superoxide mediated destruction. J. Biol. Chem.

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- Britigan BE, **Coffman, TJ,** Adelberg DR, Cohen MS Monocytes and monocyte-derived macrophages lack the endogenous capacity to form hydroxyl radical as assessed by spinning trapping. Clin. Res. 36:452A, 1988
- **Coffman, TJ,** Cohen Ms, Mcgowan SE, Adelberg DR, Britigan BE. Free radical production of human moncyte-derived and pulmonary alveolar macrophages and the impact of y-interferon assessed by spin trapping. Proceedings of the 28th Interscience conference on Antimicrobial Agents and Chemotherapy, p. 160, 1988

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- Kaiser DL, Bilar J, **Coffman TJ,** Adams IIP. Neurologic complications of prosthetic valve endocarditis. Am. Neurol. Assoc
- **Coffman TJ,** Buettner GR, Hamill DR, Britigan BE. The pseudomonas siderophore pyochelin can function as a hydroxyl radical catalyst Clin. Res., 37:426, 1989
- **Coffman TJ,** Buettner GR, Hamill DR, Britigan BE. An improved spin trapping system for assessment of Neutrophil hydroxyl radical formation using DMSO and phenyl-N-burtylnitrone, Clin. Res., 37:908A, 1989

April 14, 2010

EXHIBIT D

Westlaw.

62 A.3d 922
430 N.J.Super. 156, 62 A.3d 922
(Cite as: 430 N.J.Super. 156, 62 A.3d 922)

H

Superior Court of New Jersey,
Appellate Division.
Lisa McLEAN, Administratrix ad Prosequendum of the Estate of Kevin McLean, and Lisa McLean, Individually, Plaintiff–Appellant,
v.
LIBERTY HEALTH SYSTEM, Greenville Hospital, and A. Khan, M.D., Defendants–Respondents,
and
Jersey City Medical Center, Manuel Aragones, M.D. and Surriaya Khanum, M.D., Defendants.

No. A–1793–11T4.
Submitted Nov. 8, 2012.
Decided March 28, 2013.

Background: Mother of deceased patient brought medical malpractice action against hospital and emergency room physician, alleging that defendants had negligently failed to detect and treat an infection, causing patient to become paralyzed and die. After a jury trial, the Superior Court, Law Division, Hudson County, entered judgment on verdict in favor of defendants, and mother appealed.

Holdings: The Superior Court, Appellate Division, Ashrafi, J.A.D., held that:
(1) probative value of **testimony** of plaintiff's **expert** was not outweighed by risk of **needless** presentation of **cumulative** evidence, and
(2) **exclusion** of testimony denied plaintiff fair trial.

Reversed and remanded.

West Headnotes

[1] Evidence 157 ⇐146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to mislead or confuse. Most Cited Cases

Probative value of **expert testimony** of emergency room physician, that defendant physician had violated standard of care in treating patient, was not outweighed by risk of **needless** presentation of **cumulative** evidence, and thus testimony was admissible in medical malpractice action arising when defendant physician failed to detect or treat a serious infection in patient who came to emergency room twice in three days; even though plaintiff had presented **expert testimony** of another emergency room physician that defendant had violated standard of care in both visits, value of second opinion on complicated medical issues was high. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 403.

[2] Evidence 157 ⇐146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to mislead or confuse. Most Cited Cases

The burden lies with the party seeking **exclusion** of evidence to show that the probative value of the evidence is substantially outweighed by one or more factors including risk of confusion of issues, undue delay, waste of time, or **needless** presentation of **cumulative** evidence. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 403.

[3] New Trial 275 ⇐35

275 New Trial
275II **Grounds**
275II(C) Rulings and Instructions at Trial
275k35 k. Reception of evidence. Most Cited Cases

Trial court error, excluding **testimony** of second **expert** on issue of whether defendant emergency room physician breached standard of care, denied plaintiff a fair trial in medical malpractice action, warranting new trial; trial court unreasonably limited plaintiff to one witness on issue of liability on **grounds** that second witness would be

duplicative, breach of standard of care was central disputed issue in the case, defendant specifically and falsely argued that plaintiff had only one expert testifying on issue of breach of standard of care, and trial court's evidentiary ruling prevented plaintiff from responding to defendant's improper argument. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 403.

[4] Trial 388 ⚿120(3)

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k120 Matters Not Sustained by Evidence
388k120(3) k. Evidence rejected or excluded. Most Cited Cases

An attorney may not take advantage of a favorable evidentiary ruling and make opening statements or closing arguments that are contrary to facts which the other party was precluded from adducing.

[5] Health 198H ⚿826

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk824 Questions of Law or Fact and Directed Verdicts
198Hk826 k. Proximate cause. Most Cited Cases

Issue was for jury on whether patient's pre-existing condition, a antibiotic-resistant infection, was the proximate cause of his paralysis and death, in medical malpractice action against emergency room physician who had failed to detect or treat the infection; defense expert testified that even if defendant had detected the infection and treated it with antibiotics, the results would not have been any different.

[6] Health 198H ⚿827

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk827 k. Instructions. Most Cited

Evidence in medical malpractice action did not warrant jury instruction asking jury to apportion, on a percentage basis between patient's pre-existing infection and defendant physician's alleged negligence in failing to detect or treat the infection, proximate cause of patient's paralysis and death, but instead jury should have been asked only whether plaintiff proved that the increased risk of harm resulting from defendant's negligence was a substantial factor in causing patient's injuries and death; testimony of defendant's expert, that even if defendant had detected the infection and treated it with antibiotics the results would not have been any different, was insufficient to satisfy defendant's burden of establishing that damages could have been reasonably apportioned and what those apportioned damages were.

[7] Evidence 157 ⚿351

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k351 k. Unofficial or business records in general. Most Cited Cases

Trial 388 ⚿55

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k55 k. Exclusion of improper evidence. Most Cited Cases

Statements contained in patient's medical records, opinions as to when patient had contracted antibiotic-resistant infection and what had caused the infection, were required to be redacted from records before records were admitted in evidence, under rule governing expert opinions contained in ad-

missible hearsay evidence, in medical malpractice action arising from emergency room physician's failure to detect or treat the infection; physicians expressing the opinions contained in the records were not called as witnesses in the action, and the opinions in the records conformed to opinions of patient's experts but were contradicted by defendant's experts. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 808.

**924 Drazin and Warshaw, P.C., attorneys for appellant (John R. Connelly, Jr., Redbank, on the brief).

Wahrenberger & Pietro, L.L.P., attorneys for respondents, Liberty Health System and Greenville Hospital (Judith A. Wahrenberger, of counsel; Lindsay B. Beaumont, on the brief).

James B. Sharp & Associates, L.L.C., Parsippany, attorneys for respondent, A. Khan, M.D. (Mr. Sharp, of counsel and on the brief; Peter Espey, on the brief).

Before Judges FUENTES, ASHRAFI and HAYDEN.

The opinion of the court was delivered by ASHRAFI, J.A.D.

*159 An undetected infection left a sixteen-year-old boy paralyzed and allegedly led to his death. Plaintiff, who is the boy's mother and the administratrix of his estate, filed a medical malpractice lawsuit claiming that an emergency medical doctor who treated her son twice within three days should have discovered the *160 infection. Defendants contended that the patient's symptoms gave the doctor no reason to suspect an infection. The jury's verdict was that plaintiff did not prove medical malpractice.

Plaintiff now appeals, asserting that several errors at the trial tainted the jury's verdict, and also, that the verdict was against the weight of the evidence. We reverse and order a new trial. The trial court should not have prohibited plaintiff from presenting the testimony of a second expert witness on the subject of medical malpractice because his testimony would be duplicative.

I.

Kevin McLean was born in 1988. On September 24, 2005, when Kevin was sixteen-years-old, he and some friends were assaulted in Jersey City, and Kevin was stabbed in the thigh and in the arm. Plaintiff-mother, Lisa McLean, rushed to the scene, and Kevin was taken by ambulance to Jersey City Medical Center. His wounds were treated in the emergency department, and he was discharged with a prescription for an antibiotic. Kevin followed up on the care of his wounds with his primary care physician, pediatrician Reginald Coleman, and the wounds appeared to have healed within a few weeks.

**925 About six weeks after the stabbing, on November 9, 2005, Kevin complained of low back pain, which was radiating into his left leg. Plaintiff took him to the emergency room at Greenville Hospital that afternoon. Kevin and his mother did not draw a connection between the stabbing and the back pain, and they did not volunteer information about the stabbing injuries at the emergency department in Greenville Hospital. About three hours after he arrived at the hospital, Kevin was examined by defendant, Dr. Anwar Khan. The doctor ordered urinalysis and an x-ray of the back, both of which were normal. The doctor diagnosed Kevin with a back sprain and administered pain medication. Kevin's pain improved quickly, and the doctor discharged him from the hospital at about 10:00 that night.

*161 Two days later, on November 11, Kevin's back pain had worsened and was now radiating into both legs. He was walking with a visible limp. Plaintiff took him again to the emergency department at Greenville Hospital, and again Kevin was seen by Dr. Khan. This time, the doctor ordered two CT scans, both without intravenous contrast. [FN1] The scans were unremarkable. The doctor dia-

gnosed Kevin with sacroiliitis, a type of joint inflammation. He discharged Kevin with prescriptions for a pain reliever and a muscle relaxant and instructed him to follow-up with his own doctor.

> FN1. CT, short for computed tomography, is an imaging procedure that uses a computer to interpret data from x-rays and to produce an image of a selected area of the body. *Stedman's Medical Dictionary* 1996 (28th ed.2006). Intravenous contrast enhances the ability to see certain structures on the CT scan.

Kevin's condition did not improve over the next several days. On November 15, he was seen by Dr. Coleman, who observed that Kevin did not "look right" and had him admitted at Jersey City Medical Center. Kevin's condition declined rapidly. After several tests, he was transferred to St. Joseph's Medical Center. There, he went into cardiac arrest and became comatose. Kevin was eventually diagnosed with methicillin-resistant staphylococcus aureus (MRSA), a type of staph infection that resists antibiotics.

Despite the treatment that was administered at St. Joseph's hospital, Kevin's blood tests did not come back negative for infection until November 22. In addition, doctors performed a CT-guided aspiration of Kevin's upper thigh, from which they drained a half liter of pus.

Kevin began to regain consciousness in December, but the damage was already done. The infection and cardiac arrest caused brain damage that paralyzed him from the neck down. He spent the rest of his life in either a hospital bed or a nursing home. Two years after his visits to Greenville Hospital, Kevin died on October 27, 2007, of complications from his quadriplegia.

***162** Plaintiff filed her medical malpractice complaint in August 2008, naming as defendants Greenville Hospital, Dr. Khan, and Liberty Health System, as well as Jersey City Medical Center and other doctors. Defendants other than those associated with Greenville Hospital were dismissed from the case without finding that they had any liability for Kevin's injuries and death. The trial of the malpractice case against the Greenville Hospital defendants [FN2] was conducted from September 19 **926 to October 5, 2011. The trial focused on expert testimony to establish what caused Kevin's infection and eventual death. The witnesses at trial were plaintiff-mother, Kevin's grandmother, defendant-doctor, and a total of six expert witnesses, four called by plaintiff and two by defendant. Each side presented an expert on the standard of care in emergency medicine, as well as an expert in infectious diseases. Plaintiff also presented expert testimony from a radiologist and a forensic economist. As we will discuss, plaintiff had consulted with additional experts and was prepared to present their testimony as well, but the court had informally granted a pretrial motion of defendant that restricted each side to one expert witness on any subject or specialty relevant to the case.

> FN2. Plaintiff's claims against Greenville Hospital and the entity that owned it were based solely on the doctrine of respondeat superior, legal responsibility for the alleged negligence of Dr. Khan as the emergency room doctor. In the remainder of this opinion, we will refer to the Greenville Hospital defendants in the singular as "defendant."

The jury returned a verdict that defendant was not negligent in his treatment of Kevin. The trial court denied plaintiff's motion for a new trial, and judgment was entered in favor of defendant. Plaintiff then filed this appeal.

II.

[1] We agree with plaintiff that the trial court erred in prohibiting plaintiff from presenting testimony by a second malpractice liability expert and that the error entitles plaintiff to a new trial.

***163** In preparation for the trial, plaintiff con-

sulted with and prepared to call at the trial five medical expert witnesses: James Bagnell, M.D., an emergency department physician; Alan Schechter, M.D., also an emergency department physician; William Matuozzi, M.D., a radiologist; Mark Cooper, M.D., another radiologist; and Arthur Klein, M.D., an infectious disease physician.[FN3] Our record on appeal does not document how the trial court's limitation on the number of experts came about. We do not have a record of a formal pretrial motion or an actual ruling on the record limiting each side to one expert in a specific field of medicine. It appears from counsel's comments during the trial and statements in the appellate briefs that defendant moved to limit the number of expert witnesses that could testify before the jury and that the trial court indicated informally its favorable inclination on the motion.

> FN3. Plaintiff also presented testimony at the trial from a non-medical expert witness, forensic economist Royal Bunin, M.B.A., on the subject of plaintiff's economic loss for the wrongful death claim. Defendant's experts at the trial were Michael VanRooyen, M.D., an emergency department physician; and Chester Smialowicz, M.D., an infectious disease physician.

On the morning of jury selection, the trial court and the attorneys discussed the list of anticipated witnesses who would testify. The court reminded plaintiff's attorney of its "understanding" that plaintiff would not call all of her expert witnesses to testify. Plaintiff's attorney referred to the trial court's "preliminary indication[ ] about a ruling that [plaintiff] should not use two E.R. doctors and two radiologists." Apparently accepting the court's ruling at that time without making a formal objection, counsel named Dr. Bagnell as the emergency department expert who would testify for plaintiff.

Dr. Bagnell was expected to testify, and did later testify before the jury, that defendant deviated from the accepted standard of medical care for an emergency department physician on both visits of Kevin to Greenville Hospital, November 9th and November 11th. Dr. Bagnell's opinion was that deviation occurred when ***164** defendant failed to elicit from Kevin his recent history of stab wounds, failed to palpate the patient and independently discover****927** the wounds, and also failed to perform a CT scan with contrast, which would have revealed the infection.

Before Dr. Bagnell testified, during counsel's opening statements to the jury, Dr. Khan's attorney made a remark that prompted plaintiff's attorney to revisit the issue of the court's restriction on the number of expert witnesses. In his opening statement, defense counsel remarked:

> [W]e will prove to you that no emergency room physician with a possible exception of Dr. Bagnell, plaintiff's expert who is going to testify here, would ever have thought for a scintilla of a moment that this is a patient with an infection. None.

This statement was false. Dr. Schechter's expert report for plaintiff concluded that the accepted standard of care had been met by defendant's treatment of Kevin on November 9th, but it also indicated that on November 11th, when the back pain persisted and increased, "the standard of care required that an infectious or compressive cause for Mr. McLean's back pain be searched for." Dr. Schechter summarized his opinion as follows regarding November 11th:

> Mr. McLean presented for a second time to the emergency department at Greenville Hospital on November 11, 2005 with three to four days of back pain radiating to his legs. The workup that was done on that day did not meet the accepted standard of medical care. Needed blood tests were not done. A needed rectal temperature was not done. Needed appropriate imagings were not done. Mr. McLean was prematurely discharged from the Greenville Hospital emergency department on November 11, 2005.

After the opening statements, plaintiff's attor-

ney moved for reconsideration of the limitation on expert witnesses. Counsel argued that he had complied with the court's instruction to choose one emergency department expert to testify and that defense counsel had now told the jury "that there's no other ER doctor in the world save the witness that we intend to put on the stand that shares the opinion that his client did anything wrong." Plaintiff's attorney requested that the court either allow Dr. Schechter to testify or inform the jury that plaintiff had a second emergency department expert that contradicted defense counsel's remark. ***165** Defense counsel responded that the opinions of plaintiff's two emergency department experts were not consistent and that plaintiff had to "take [her] pick." The court stated it would review the expert reports and then rule on plaintiff's application.

At the conclusion of the trial day, the court denied plaintiff's request to allow Dr. Schechter to testify. The court described defense counsel's remark as "just hyperbole ... [a] passionate attorney losing his cool for ... two seconds." The court could think of no reasonable way to correct defense counsel's "one line that may have misrepresented a fact" and believed the jury would not be affected by the remark. Describing Dr. Schechter's testimony as "duplicative," the court ruled that plaintiff would not be permitted to "bring in another expert because he says basically the same thing that your current expert says." The court also commented that plaintiff probably would not want to call Dr. Schechter before the jury because he disagreed with part of Dr. Bagnell's opinions and the latter expert provided "more deviation testimony" in support of plaintiff's case. Having been rebuffed, plaintiff proceeded at trial with only Dr. Bagnell's testimony on the subject of defendant's alleged deviation from accepted standards of medical care and treatment.

****928** We now hold that the trial court erred in limiting expert witnesses to only one per side for each relevant field of medicine, in particular, on the crucial issue of deviation from accepted standards of medical care. The court's pretrial ruling was a mistaken exercise of its discretionary authority to control the presentation of evidence at the trial. *See N.J.R.E.* 611(a) ("court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence"). Nothing in our rules of evidence, or other laws or rules, gives a trial court authority to balance the number of witnesses presented by each side at the trial. Nor is the trial court authorized by *N.J.R.E.* 403 or any other rule or law to bar *crucial* evidence merely on the ground that it duplicates another witness's testimony.

***166** A trial court would likely abuse its discretion if it imposed a limitation of only one witness for each side to testify on a factual matter that is vital to the resolution of a disputed issue. To illustrate the point with a hypothetical example, in a typical car accident case where the driver's negligence is disputed, the trial court would err if it barred testimony on the ground of duplication by a second eyewitness, who would testify essentially identically to another eyewitness, that the traffic light was red or that the driver was speeding or driving erratically. In the general charge to the jury, courts often instruct that the number of witnesses is not controlling in deciding whether a party has met its burden of proof. *See Model Jury Charge (Civil),* 1.12I, "Preponderance of Evidence" (2012). But at the same time, the jury is not prohibited from considering whether more than one witness has attested under oath to a fact that is important to deciding a contested issue. Corroboration of a fact by more than one witness can be very important in seeking the truth. *See, e.g., N.J.S.A.* 9:6–8.46(a); *State v. Walker,* 417 *N.J.Super.* 154, 165, 8 *A.*3d 844 (App.Div.2010).

We see no reason that expert testimony should be treated wholly differently from factual testimony with respect to vital opinions that go to the heart of the disputed issues in the case. Especially in a case such as this where the jury's truth-finding function required choosing between the opinions of experts, the parties should have been permitted to corrobor-

ate the testimony of their experts with other experts who reached similar conclusions.

Expert testimony may be more complex and time-consuming than factual testimony, such as the facts we referenced in our hypothetical example. The trial court has discretion to exclude expert testimony under *N.J.R.E.* 403 that may unduly delay or complicate the trial without sufficient probative value. Such a ruling, however, must be made formally, on the record, and in accordance with the rules of evidence. We disapprove of the procedure employed in this case by which the trial court informally*167 perhaps off-the-record during conference with the attorneys in chambers—restricted the witnesses that a party may call to testify.[FN4]

> FN4. To be fair, it is also the function of counsel to make a record of any pretrial ruling with which a party disagrees.

[2] Under *N.J.R.E.* 403, the trial court may exercise its discretion to exclude evidence because "its probative value is substantially outweighed by the risk of (a) ... confusion of issues ... (b) undue delay, waste of time, or **needless** presentation of **cumulative** evidence." *See Green v. N.J. Mfrs. Ins. Co.,* 160 *N.J.* 480, 495, 734 *A.*2d 1147 (1999). The burden lies with the **929 party seeking **exclusion** of the evidence to show that the probative value is substantially outweighed by one or more of the factors listed in *Rule* 403. *State v. Morton,* 155 *N.J.* 383, 453, 715 *A.*2d 228 (1998).

A leading practice manual on the New Jersey Rules of Evidence states: "Although clause (b) of *N.J.R.E.* 403 cites 'undue delay, waste of time, or needless presentation of cumulative evidence' as reasons for excluding evidence under the Rule, it is difficult to find reported decisions which rely on such reasons alone." Biunno, Weissbard & Zegas, *Current N.J. Rules of Evidence,* comment 4 on *N.J.R.E.* 403 (2012). Cases relying on this portion of the Rule often involve issues tangential to the central dispute in the case. *See Showalter v. Barilari, Inc.,* 312 *N.J.Super.* 494, 514, 712 *A.*2d 244 (App.Div.1998) (evidence of the plaintiff's blood alcohol content in a dram shop case, offered to prove that the defendant served him alcohol, was **needlessly cumulative** where other evidence established the fact); *State v. Taylor,* 226 *N.J.Super.* 441, 451, 544 *A.*2d 883 (App.Div.1988) (evidence of witness's character for truth and veracity was properly excluded, since admission would have required time for prosecution to locate rebuttal witnesses, and the collateral dispute about general credibility of the witness may have confused the jury).

Here, the testimony that plaintiff wished to present went to the heart of her case: whether defendant deviated from accepted *168 standards of care for an emergency department physician. Although a second expert would have taken more time at the trial, it might have been time well-spent. In the field of medicine, second opinions are often sought to test the accuracy of a diagnosis or the benefits and risks of proposed treatment. Surely it cannot be said that additional expert testimony in a case that involved complicated issues of emergency and diagnostic medicine had such low probative value as to be substantially outweighed by its partially repetitive nature.

We note that *Rule* 403 does not refer to "duplicative evidence" but to " **needless** ... **cumulative** evidence" that might cause undue delay in the trial and a waste of time. By our holding today, we do not preclude a trial judge from excluding expert evidence when its **cumulative** nature substantially outweighs its probative value. We hold, however, that two expert witnesses on the central issue of liability in a medical malpractice case do not per se reach the level of **needless cumulative** evidence that substantially outweighs its probative value. The trial court mistakenly exercised its discretion in granting defendant's pretrial motion to limit expert witnesses to one on each side on a central disputed issue in the case.

[3][4] In addition, whatever discretionary authority the trial court theoretically may have had to limit each side to a single emergency department

expert, that authority dissipated once defense counsel misused the court's pretrial ruling and falsely told the jury that no emergency medicine expert save one would have considered an infection as the cause of Kevin's symptoms. An attorney may not take advantage of a favorable evidentiary ruling and make statements that are "contrary to facts which [the other party] was precluded from adducing." *State v. McGuire,* 419 *N.J.Super.* 88, 144, 16 *A.*3d 411 (App.Div.) (quoting *State v. Ross,* 249 *N.J.Super.* 246, 250, 592 *A.*2d 291 (App.Div.), *certif. denied,* 126 *N.J.* 389 (1991)), *certif. denied,* 208 *N.J.* 335, 27 *A.*3d 948 (2011). Having successfully moved before trial to exclude one of plaintiff's two emergency department experts, defense counsel ***169** made an inaccurate statement to the jury that plaintiff ****930** was powerless to disprove because of the court's ruling.

The trial court recognized the impropriety of the remark, but it concluded that it was "not critical" to the plaintiff's case. Plaintiff's case was that a doctor performing up to the accepted standard of care would have considered an infection as a potential cause of Kevin's otherwise undiagnosed back and leg pain, and the doctor would have ordered additional tests to confirm or exclude that potential cause. Defense counsel's false assertion succinctly summarized the defense position that such a diagnosis was not warranted. The remark struck at the core of the dispute. It required a response, which plaintiff was prepared to give before the trial began. The court should have reconsidered the limitation it placed on expert testimony and allowed plaintiff to present Dr. Schechter as an expert witness. His testimony would not have been a waste of time and would not have *unduly* delayed the trial.

Any concern about the divergence in the opinions of plaintiff's liability experts was for plaintiff and her attorney to weigh in deciding whether to call Dr. Schechter before the jury. Plaintiff's attorney might have argued in summation that the differences in the opinions of plaintiff's experts showed that they performed their evaluations independently and, in fact, bolstered their credibility. A trial judge must avoid infringing on the parties' right to present their proofs through their chosen witnesses, which is "an essential element in the conduct of a trial." *Cardell, Inc. v. Piscatelli,* 277 *N.J.Super.* 149, 155, 649 *A.*2d 107 (App.Div.1994) (internal quotation mark omitted); *accord Peterson v. Peterson,* 374 *N.J.Super.* 116, 125, 863 *A.*2d 1059 (App.Div.2005).

Because the excluded testimony of Dr. Schechter was crucial to plaintiff's allegations of malpractice and might have affected the jury's verdict, it was reversible error to exclude it. Plaintiff is entitled to a new trial.

III.

[5][6] Plaintiff also contends that the trial court erred in denying her motion at the end of all evidence for a directed verdict on ***170** apportioning of damages between defendant's alleged negligence and the pre-existing infection. Defendant responds that it presented evidence from which the jury could conclude that Kevin's injuries and death would have occurred even if defendant had ordered additional diagnostic tests. Furthermore, defendant contends that the jury never reached issues of proximate cause and its apportioning between Kevin's pre-existing condition and defendant's alleged negligence. The jury's deliberations ended upon its finding that defendant was not negligent. Additionally, plaintiff did not object to the jury instructions the court gave on a pre-existing condition and proximate cause.

The issue is moot because the jury did not reach any question on the verdict form on proximate causation and its apportioning. We nevertheless comment upon the issue because it may again be presented on a retrial. We conclude that the trial court did not err in denying plaintiff's motion for a directed verdict, as it was presented. But the court should not have asked the jury on this trial record to apportion proximate causation in terms of percentages between the pre-existing condition and defendant's alleged negligence.

In *Scafidi v. Seiler,* 119 *N.J.* 93, 574 *A.*2d 398 (1990), the Court addressed causation and damage questions in cases in which a plaintiff suffered from a pre-existing condition that combined with the defendant's medical malpractice to cause **931 harm. In such situations, practical realities require that the standard for proximate causation be modified. To succeed in such a case, the plaintiff must show that: (1) the defendant deviated from the applicable standard of care; (2) the deviation increased the risk of harm to the plaintiff from a pre-existing condition; and (3) the increased risk was a substantial factor in producing the ultimate result. *Id.* at 108, 574 *A.*2d 398. The defendant should only be held responsible for the portion of the harm attributable to his or her conduct, but the defendant bears the burden of proving that the plaintiff's damages can be apportioned between the defendant *171 and the pre-existing condition. *Id.* at 110, 574 *A.*2d 398; *accord Fosgate v. Corona,* 66 *N.J.* 268, 272–73, 330 *A.*2d 355 (1974).

Here, plaintiff alleged that Kevin was suffering from a pre-existing MRSA infection when defendant examined him on November 9th and 11th. Plaintiff had the burden of proving that negligent diagnosis and treatment by defendant on one or both dates increased the risk of the injuries and death caused by the infection, but defendant had the burden of proving an appropriate apportionment of proximate causation in terms of percentages. *See Verdicchio v. Ricca,* 179 *N.J.* 1, 24, 843 *A.*2d 1042 (2004); *Reynolds v. Gonzalez,* 172 *N.J.* 266, 282, 798 *A.*2d 67 (2002); *Scafidi, supra,* 119 *N.J.* at 108, 574 *A.*2d 398.

Although Dr. Smialowicz testified for the defense that the infection was not present on or before November 11th, he also testified that defendant's alleged deviation from the standard of care would have made no difference in Kevin's condition. On cross-examination, plaintiff's attorney asked Dr. Smialowicz to assume that blood had been taken on November 11th, that the MRSA infection was discovered, and that antibiotics were started immediately. Dr. Smialowicz stated that starting antibiotics at that point "would not have changed anything." Similarly, on re-direct examination, defense counsel asked Dr. Smialowicz if the outcome would have been different had antibiotics been started promptly after November 11th. Dr. Smialowicz said no. This testimony amounts to the defense's denial that the alleged negligence of defendant increased the risk of harm to Kevin. Dr. Smialowicz's testimony permitted the jury to conclude that the alleged negligence of defendant was not a substantial factor in bringing about Kevin's injuries and death and that the pre-existing infection was the sole proximate cause. The trial court appropriately viewed the defense case as contending that the jury should allocate 100% proximate causation to the pre-existing condition and zero to defendant's alleged negligence. Consequently, the court correctly denied plaintiff's motion for a directed verdict *172 on whether the pre-existing condition was the proximate cause of Kevin's injuries and death.

Defendant presented no evidence, however, to satisfy the defense burden of proof on apportionment of proximate cause in any different percentages. In *Verdicchio, supra,* 179 *N.J.* at 37–38, 843 *A.*2d 1042, the Court held that the defense expert's testimony that the "ultimate outcome" would have been the same if cancer had been diagnosed and treated earlier was insufficient to carry the defendant's burden of proving apportionment between the pre-existing condition and the misdiagnosis.

Plaintiff is correct in arguing that a question asking the jury to determine percentages of proximate causation was not warranted in this case based on the evidence presented. Instead, the jury should only have been asked whether plaintiff proved that the increased risk of harm **932 resulting from defendant's negligence was a substantial factor in causing Kevin's injuries and death. *See Reynolds, supra,* 172 *N.J.* at 285–86, 798 *A.*2d 67; *Scafidi, supra,* 119 *N.J.* at 108–09, 574 *A.*2d 398. In the context of that question, the court would also instruct the jury that defendant asserted the infection

was the sole proximate cause and defendant's alleged deviation was not a substantial factor in causing the injuries and death.

On retrial, the court should consider again the issue of an appropriate jury charge and tailor the charge to the proofs as presented.

IV.

For purposes of completeness in the event of further appeal, or as further guidance for a retrial, we add the following brief comments to address other issues plaintiff has raised.

We reject plaintiff's argument that the jury's verdict was against the weight of evidence. The defense experts testified that Kevin's symptoms were inconsistent with an infection and that defendant had no reason to conduct tests to determine whether an ***173** infection was causing Kevin's back pain. Dr. Smialowicz testified that the virulent infection that paralyzed Kevin did not occur until after Kevin's second visit to Greenville Hospital on November 11th. The jury could credit the testimony of defendant's experts and conclude that defendant did not deviate from accepted standards of care.

Nor did the trial court abuse its discretion in concluding that the jury's verdict was not the product of improper influence, such as undue sympathy for defendant, or on impatience in seeking to reach a verdict. Those arguments of plaintiff do not warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

[7] We also conclude that the trial court correctly granted defendant's application for redaction of small parts of the medical records admitted in evidence. Plaintiff offered in evidence records from St. Joseph's Medical Center and the convalescent hospitals to which Kevin was later admitted. The records contained statements that attributed the MRSA infection to the September 2005 stabbing injuries, conclusions that conformed to the opinion of plaintiff's infectious disease expert, Dr. Klein, and were contradicted by defendant's expert in the same field, Dr. Smialowicz. Although the bulk of the medical records were admissible pursuant to *N.J.R.E.* 803(c)(6) (business records) and *N.J.R.E.* 803(c)(4) (statements made for the purpose of medical diagnosis or treatment), disputed opinions about Kevin's diagnosis, the cause of his infection, and the length of time that the infection existed were properly excluded from the records in accordance with *N.J.R.E.* 808. *See Nowacki v. Cmty. Med. Cntr.*, 279 *N.J.Super.* 276, 652 *A.*2d 758 (App.Div.) , *certif. denied,* 141 *N.J.* 95, 660 *A.*2d 1194 (1995); *see also Agha v. Feiner,* 198 *N.J.* 50, 63, 965 *A.*2d 141 (2009) (while experts may refer to a medical report from a non-testifying expert to apprise the jury of the basis of an opinion, *N.J.R.E.* 703 "was not intended as a conduit through which the jury may be provided the results of contested out-of-court expert reports").

***174** Next, plaintiff argues that defendant's emergency department expert, Dr. VanRooyen, was permitted to change his testimony at trial without adequate notice to plaintiff, contrary to *McKenney v. Jersey City Medical Center,* 167 *N.J.* 359, 771 *A.* 2d 1153 (2001). Dr. VanRooyen had stated in his deposition that defendant had ordered a blood test on November 9th. Shortly before the trial began, he corrected that mistake and eventually testified ****933** that he meant defendant had ordered a urinalysis, not a blood test. Plaintiff's attorney sought to cross-examine Dr. VanRooyen as to whether a blood test should have been ordered. The trial court sustained defendant's objection and ruled that no expert for plaintiff had testified that a blood test should have been ordered, and so, that alleged form of negligence was not a relevant issue before the jury.

On retrial, Dr. Schechter will presumably testify consistently with his report that a blood test should have been ordered on November 11th. The factual predicate for the trial court's ruling will no longer be present, but a ruling on whether Dr. VanRooyen may be asked about the need for a blood test must await the circumstances presented at the

retrial. The tardy correction of Dr. VanRooyen's deposition error is now moot as an issue of fair notice to plaintiff. Presumably, Dr. VanRooyen can be cross-examined again at the retrial regarding his error as relevant to his credibility as an expert witness.

Reversed and remanded for a new trial.

N.J.Super.A.D.,2013.
McLean v. Liberty Health System
430 N.J.Super. 156, 62 A.3d 922

END OF DOCUMENT

EXHIBIT E

Westlaw.

885 S.W.2d 450
(Cite as: 885 S.W.2d 450)

Court of Appeals of Texas,
Corpus Christi.

B.C. SIMS, Appellant,
v.
Fred B. BRACKETT, M.D., et al., Appellees.

No. 13–92–575–CV.
April 7, 1994.
Rehearing Overruled May 26, 1994.

Patient filed medical malpractice action against surgeons, nurses and pharmacists following colon surgery for injuries resulting from intestinal leak. The 94th District Court, Nueces County, Jack Hunter, J., entered verdict in favor of defendants. Patient appealed. The Court of Appeals, Dorsey, J., held that: (1) bench conference was sufficient to preserve error; (2) exclusion of expert medical witness' testimony as to cause of patient's postsurgery intestinal leak as merely cumulative was improper; (3) exclusion of nurse as expert witness was improper; (4) failure to make timely offer of proof as to what nurse, as excluded expert witness, would have testified resulted in failure to preserve error on appeal; and (5) exclusion of expert medical witness' testimony as to cause of patient's postsurgery intestinal leak was harmful error.

Reversed and remanded.

West Headnotes

[1] Trial 388 ⚿43

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k43 k. Admission of Evidence in General. Most Cited Cases
When trial court makes decision to admit or exclude evidence in which it weighs competing legitimate factors in reaching decision, court exercises discretion.

[2] Appeal and Error 30 ⚿970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
Reviewing court will not disturb trial court's decision to exclude or admit evidence unless trial court abuses its discretion to choose among legitimate and legal alternatives.

[3] Appeal and Error 30 ⚿181

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k181 k. Necessity of Objections in General. Most Cited Cases

Appeal and Error 30 ⚿1026

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In General. Most Cited Cases
In reviewing claim of trial court error, Court of Appeals first determines whether claimed error was preserved for review, whether trial court committed error, and finally, whether error was harmful.

[4] Trial 388 ⚿45(1)

388 Trial
388IV Reception of Evidence

388IV(A) Introduction, Offer, and Admission of Evidence in General
388k44 Offer of Proof
388k45 In General; Necessity and Sufficiency
388k45(1) k. In General. Most Cited Cases

Bench conference, held outside hearing of jury that apprised trial court of nature of expert evidence and was recorded by court reporter, was informal offer of proof as to excluded expert's testimony and was sufficient to preserve error. Rules App.Proc., Rule 52(b).

[5] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

In medical malpractice action, exclusion of expert medical witness' testimony as to cause of patient's postsurgery intestinal leak as merely cumulative was improper; although patient had already called a first medical expert who had testified as to same issue, first expert's credibility had been diminished due to fact that first expert was personal friend of patient and was not board certified in specialty, while second expert did not know patient personally and possessed different credentials, including board certification in specialty. Rules of Civ.Evid., Rules 403, 611.

[6] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

In deciding whether to exclude witness' testimony as cumulative, test is not merely whether evidence to be adduced from two witnesses is similar, but also whether excluded testimony would have added substantial weight to offering party's cause. Rules of Civ.Evid., Rules 403, 611; Rules App.Proc., Rule 52(b).

[7] Pretrial Procedure 307A ⚿45

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases

Exclusion of nurse as expert witness was improper, where opposing party's objection that witness was not designated as soon as practicable was based solely on length of time case had been pending, which by itself did not establish lack of due diligence. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 6, par. b.

[8] Pretrial Procedure 307A ⚿45

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases

Party opposing witness has burden of producing evidence to show that designation was not made as soon as possible. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 6, par. b.

[9] Appeal and Error 30 ⚿230

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 k. Necessity of Timely Objection. Most Cited Cases

Failure to make timely offer of proof as to what

nurse, as excluded expert witness, would have testified resulted in failure to preserve error on appeal; counsel made no informal offer of proof and offer of deposition while jury was deliberating was untimely. Rules App.Proc., Rule 52(b).

[10] Appeal and Error 30 ⇐1056.1(11)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)11 Exclusion of Evidence
30k1056 Prejudicial Effect
30k1056.1 In General
30k1056.1(11) k. Particular Types of Evidence. Most Cited Cases
(Formerly 30k1056.1(3), 299k18.130 Physicians and Surgeons)

Appeal and Error 30 ⇐1056.1(10)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)11 Exclusion of Evidence
30k1056 Prejudicial Effect
30k1056.1 In General
30k1056.1(4) Particular Actions or Issues
30k1056.1(10) k. Negligence and Torts in General. Most Cited Cases

Health 198H ⇐820

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk820 k. Admissibility. Most Cited Cases
(Formerly 299k18.70 Physicians and Surgeons)
In medical malpractice action, exclusion of expert medical witness' testimony as to cause of patient's postsurgery intestinal leak was harmful error; excluded testimony was critical in and of itself, as it was material to issues hotly contested throughout trial and error probably did cause rendition of improper judgment. Rules App.Proc., Rule 81(b)(1); Rules of Civ.Evid., Rules 403, 611.

[11] Trial 388 ⇐43

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k43 k. Admission of Evidence in General. Most Cited Cases
If party is denied right to make fair presentation to jury, trial court has not acted reasonably and has abused its discretion.

*451 Bill Youngkin, Jack W. Dillard, Michele P. Esparza, Youngkin, Catlin, Bryan & Stacy, Bryan, and Ken Dahlberg, Law Offices of Ken Dahlberg, Corpus Christi, for appellant.

Guy Allison, Rose Vela, Allison & Huerta; Thomas F. Nye, Brin & Brin; Carlos Villarreal, Ken Fields, Hunt, Hermansen, McKibben & Barger; and Michael K. Marsh, Clay E. Coalson, Ben A. Donnell and Jeffrey A. Lacy, Meredith, Donnell & Abernethy, Corpus Christi, for appellees.

Before KENNEDY, DORSEY and FORTUNATO P. BENAVIDES [FN1], JJ.

FN1. Assigned to this Court by the Chief Justice of the Supreme Court of Texas Pursuant to Tex. Gov't Code Ann. § 74.003 (Vernon 1988).

OPINION

DORSEY, Justice.

B.C. Sims, plaintiff below, appeals a take-nothing judgment in a medical malpractice case. By eight points of error, he complains of adverse rulings by which the trial court excluded his expert witnesses and limited the presentation of evidence.

We reverse and remand.

I. Facts

Sims entered Spohn Hospital for colon surgery, during which Dr. Fred Brackett removed a cancerous portion of Sims's colon. Following surgery, Sims developed intestinal blockage which Dr. Brackett treated by non-surgical methods, including administering large doses of Reglan, a drug used to increase intestinal motility. The non-surgical measures were unsuccessful at relieving the blockage, and doctors Brackett and Appel performed a second operation. The surgeons relieved the obstruction by passing a tube with a balloon-type tip through the length of the intestine. While doing this, they examined the intestine and noted no signs of leakage.

However, despite the second surgery, Sims's condition continued to deteriorate. Within a day, he was placed in intensive care where he remained for over forty days. Sims suffered intense pain, high fever, redness on the right leg, decreased flexion in the right foot, and a green, bilious discharge from his incision. He claimed that these *452 signs indicated an intestinal leak and infection. The infection became so severe that Sims went into shock. Because of his weakened condition, he was treated conservatively with large doses of Flagyl (an antibiotic) and painkillers. Treatment of the infection was overseen by Dr. Michael Bullen, a specialist in infectious diseases. Dr. Jack Cortese, a kidney specialist, was also brought in to prevent kidney failure .

The conservative treatment succeeded in strengthening Sims generally, but he continued to experience problems. Exploratory surgery was performed. This third operation revealed an abscess in Sims's abdomen, which Dr. Brackett corrected surgically. Sims had also developed gangrene in his right leg, which the doctors had to amputate. Further, he now suffers from brain damage which he had not suffered before his entry into Spohn Hospital for the colon surgery.

II. General Procedural Facts

Sims sued all of the doctors, Spohn Hospital, and its nurses and pharmacists for negligence. He alleged and produced evidence that during the first operation, Dr. Brackett "nicked" the bowel, the hole was not closed, and bowel fluids leaked into his abdominal cavity, causing infection and severe pain. The infection was not timely discovered by any of the doctors, and it eventually spread to the lower extremities, resulting in gangrene and requiring necessitating the leg's amputation. The large doses of medication he received, especially of Flagyl, Sims claimed, led to nerve and brain damage. Sims further alleged that the doctors failed to get the Sims's informed consent on treatment, that Spohn's nurses failed to properly chart his condition and to compel the doctors to take note of his symptoms. He faults Spohn's nurses and pharmacists for administering the unusually large doses of Flagyl and Reglan without question or verification.

The defendants presented a united front at trial, maintaining that there had been no acts or omissions constituting negligence and that Sims's problems resulted from his own health conditions and the known risks of surgery. They all agreed that Sims was too weak to undergo more surgery after the second operation and that the conservative treatment he received was the best course. They attributed the gangrene to Sims's pre-existing circulation problems and low blood pressure. The nerve and brain damage, they argued, was due to a stroke. They produced evidence that the large amount of medications given was proper according to recent medical publications.

From the outset of trial, examination of the witnesses was very time-consuming. By the second day, the trial judge, frustrated by the pace, forbad all redirect and re-cross examination of witnesses. Trial continued in the following way: appellant would examine his witness then each of the four defendants would cross-examine. When a defendant called a witness, that defendant would conduct his direct examination, appellant would cross-examine, and then the three remaining defendants would

cross-examine. The record shows that in the six days it took appellant to present his case-in-chief, Sims presented nine witnesses, and much trial time was consumed by motions and objections from all the parties.

III. Exclusion of Expert Testimony

By points one and two, Sims claims that the trial court abused its discretion by excluding two of his expert witnesses. Dr. Charles Felger was excluded on the grounds that his testimony was cumulative of a prior expert and Nurse Riley on the grounds that although she was designated thirty days before trial, she was not designated as soon as practicable.

[1][2] The court has the authority to exclude testimony to avoid the needless presentation of cumulative evidence. TEX.R.CIV.EVID. 403, 611. Evidence that is relevant may properly be excluded under Rule 403 if its probative value is substantially outweighed by considerations of undue delay or needless presentation of cumulative evidence. When a trial court makes a decision to admit or to exclude evidence in which it weighs competing legitimate factors in reaching his decision, the court exercises discretion. *See Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241–42 (Tex.1985). The trial ***453** court has discretion to choose among only legitimate and legal alternatives. *Landon v. Jean–Paul Budinger, Inc.,* 724 S.W.2d 931, 935 (Tex.App.—Austin 1987, no writ) . . A reviewing court will not disturb the ruling unless the trial court abuses that discretion. *Lorusso v. Members Mut. Ins. Co.,* 603 S.W.2d 818, 821 (Tex.1980); *Ponder v. Texarkana Memorial Hosp., Inc.,* 840 S.W.2d 476, 479 (Tex.App.—Houston [14th Dist.] 1991, writ denied).

[3] In reviewing a claim of trial court error, we conduct a three-stage review. First, we determine whether the claimed error was preserved for our review, then, whether the trial court committed error, and finally, whether the error was harmful.

[4][5] Sims's first expert medical witness was Dr. Keith Fannin, a doctor board certified in general surgery. Dr. Fannin testified to various acts and omissions on the part of the defendants that led to Sims's complications. During rigorous cross-examination, the defendants challenged Dr. Fannin's opinions because he was a friend of Sims [FN2] and he lacked board certification in a more particularized specialty.

> FN2. Dr. Fannin was a friend of Sims's and stated that the two of them had sometimes gone fishing together.

Appellant also called Dr. Charles Felger, formerly a teaching physician at Austin's Brackenridge Hospital and board certified in internal medicine. Soon after appellant began his direct examination of Dr. Felger, the trial judge called a bench conference. After a lengthy discussion, the court determined that Dr. Felger's testimony would be wholly cumulative of Dr. Fannin's. The court ruled that Felger would not be allowed to testify and that appellant must proceed with other witnesses.

At the first stage, we determine whether the error was properly preserved. To preserve a complaint that the trial court improperly excluded evidence, the complaining party must make an offer of proof as to what the excluded witness would have testified. Such an offer must be made before the court's charge is read to the jury. TEX.R.APP.P. 52(a) & (b); TEX.R.CIV.EVID. 103(b). Appellees argue that Sims's offer of proof as to Dr. Felger's testimony was untimely because Sims did not make his bill of exceptions until after the jury began deliberating. However, Sims made an informal offer of proof that was sufficient under appellate rule 52(b) which states:

> No formal bills of exception shall be needed to authorize appellate review of the question whether the court erred in excluding the evidence.... A transcription of the reporter's notes showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling thereon, when included in the

record certified by the reporter, shall establish the nature of the evidence, the objections, and the ruling.... *No further offer need be made.*

TEX.R.APP.P. 52(b) (emphasis added).

Before excluding Felger's testimony, the trial judge *sua sponte* ordered a bench conference in which he questioned counsel regarding the substance of Felger's testimony. That conference was recorded by the reporter and is part of the statement of facts. Counsel emphasized that Felger is board certified in internal medicine and specializes in gastroenterology. His testimony would have shown "a separate, independent view of what transpired." Dr. Felger would have given specific testimony on the standard of care for recovery, operative notes, and hospital charting procedures. After a long bench conference in which counsel continued to describe Dr. Felger's expected testimony, the judge excluded the evidence as cumulative. The court could not properly have so ruled unless he knew the essential substance of Dr. Felger's testimony. We hold this bench conference, outside the hearing of the jury that apprised the court of the nature of the evidence and was recorded by the court reporter, was an informal offer of proof and was sufficient to satisfy the requirements of rule 52(a). *See generally Ledisco Fin. Serv., Inc. v. Viracola,* 533 S.W.2d 951, 959 (Tex.Civ.App.—Texarkana 1976, no writ) . Finding *454 the record sufficient to preserve error, we next look to whether the court erred.

The cause of Sims's intestinal leak was a contested issue. Defendant Brackett gave several different explanations for its cause, including an inadvertent surgical nick. Dr. Fannin, the general surgical expert for the plaintiff, had the firm opinion that the leak was caused by a surgeon's nick; however, his credibility was diminished because he was a friend of the plaintiff and not a specialist. In contrast, Dr. Felger was a board certified internist, specializing in gastroenterology and had taught at a large metropolitan hospital. The difference in the two expert's credentials and Felger's lack of a personal relationship with Sims in all likelihood would have enhanced Felger's credibility compared to Fannin's.

[6] In a medical malpractice trial expert medical testimony is a necessity, and the matters at issue are addressed by opposing experts. In order for the trial court to exclude Dr. Felger's testimony it must have found that its probative value was " *substantially outweighed* by ... [the] needless presentation of cumulative evidence." TEX.R.CIV.EVID. 403 (emphasis added). To exclude evidence under Rule 403, the trial court must conduct a balancing test and only when the balance weighs significantly on the side of judicial efficiency may relevant evidence be excluded as cumulative. The excluded evidence here had great probative value and was not merely cumulative of Dr. Fannin's testimony. *See In re Watson,* 720 S.W.2d 806, 808 (Tex.1986) (trial court erred in excluding 81 letters holding they were not "merely cumulative" and were the strongest rebuttal evidence available); *Ponder,* 840 S.W.2d at 479 (error in excluding part of expert witness' testimony on causation, a hotly contested issue, alleged to be merely cumulative); *see also Jones v. Colley,* 820 S.W.2d 863, 866–67 (Tex.App.—Texarkana 1991, writ denied). The test is not merely whether the evidence to be adduced from the two witnesses is similar, but also whether the excluded testimony would have added substantial weight to the offering parties' case. If so, it is error to exclude it. *Bohmfalk v. Linwood,* 742 S.W.2d 518 (Tex.App.—Dallas 1987, no writ) (trial court improperly excluded disinterested witness whose testimony corroborated testimony of interested witness).

We hold that the trial judge abused his discretion in excluding Dr. Felger's testimony on the hotly contested issues in this case.

[7] Appellant complains of the court's exclusion of Nurse Riley as an expert witness by point two. Sims designated Nurse Riley and a pharmacist as expert witnesses on the thirtieth (30) day before trial. Spohn Hospital moved to strike on grounds she was not designated "as soon as practicable" un-

der rule 166b. *See* TEX.R.CIV.P. 166b(6)(b). Further, in response to appellant's designation, Spohn designated nurse and pharmacist experts seventeen days before trial. Appellant pointed out that Spohn designated a nurse and two doctors as experts (which they decided not to call) the day appellant designated their nurse. The trial court struck all of those experts as a sanction against both parties' "gamesmanship."

[8] The party opposing a witness has the burden of producing evidence to show that the designation was not "as soon as practical." *Mentis v. Barnard,* 870 S.W.2d 14, 16 (1994). Spohn claimed that appellant never designated Nurse Riley in answers to the interrogatories it propounded shortly after suit was filed in 1989. The objection is the same as that found to be inadequate in *Mentis. Id.* at 15. Simply advising the court how long the case had been pending does not by itself establish as lack of due diligence. *Id.* at 16.

[9] We hold that the trial court erred in striking Riley; however, appellant cannot demonstrate harm because Nurse Riley's deposition testimony is not properly before us. Counsel made no informal offer of proof and the deposition was not timely offered. [FN3] We overrule point two.

> FN3. The deposition was offered while the jury was deliberating.

In order to determine whether the error excluding Felger was harmful, we review the entire proceedings and briefly outline the procedural context in which both Riley's and *455 Felger's testimony were excluded. *Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex.1989); *Ponder,* 840 S.W.2d at 479.

IV. Conduct of the Trial

[10] The trial judge has the power and obligation to control his courtroom for the purposes of ascertaining the truth, promoting judicial economy, and protecting witnesses. TEX.R.CIV.EVID. 611(a) . Rule 611 states:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation *effective for the ascertainment of the truth,* (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Id. (emphasis added). The court has some leeway in the order of proceedings in multi-party cases. *See* TEX.R.CIV.P. 265 (not specifically addressing the order of cross-examination when there are multiple "adverse" parties). However, Rule 611 and other rules governing conduct of a trial, must be construed to the end that the truth may be ascertained and proceedings justly determined. TEX.R.CIV.EVID. 102. We consider the trial court's conduct of this trial as background for appellant's complaints.[FN4]

> FN4. Appellant makes this complaint by point of error four, however, the point is not preserved for our separate review.

On day two of trial, the court, in the interest of speed of presentation of the case, denied the parties redirect and recross examination of witnesses except on leave of court.[FN5] Re-direct is intended to permit the witness to explain answers given on cross-examination and to amplify new material elicited for the first time. The intent is to prevent the jury from being left with a false and incomplete picture created by the latitude counsel is afforded on cross-examination and counsel's ability to use leading questions. It is sometimes said that re-direct examination for this purpose is a matter of right. *See Southland Life Ins. Co. v. Norwood,* 76 S.W.2d 166, 167–68 (Tex.Civ.App.—Fort Worth 1934, writ dism'd); *Martini v. Power Banking Co.,* 33 S.W.2d 466, 469 (Tex.Civ.App.—Fort Worth 1930, writ dism'd); *see generally* RAY, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 621 (Texas Practice 1980).

> FN5. The trial judge refused Sims's request to redirect Fannin to rebut new material the

defendants elicited on cross.

The prohibition on re-cross and re-direct examination continued in force during the defendants' case-in-chief. Doctors Cortese and Bullen each testified during his own case-in-chief. Doctors Cortese and Bullen each testified during his own case-in-chief, Sims cross-examined, and the remaining defendants then followed, "cross-examining" an essentially friendly witness. Therefore, the appellees were able to use each other as experts to exonerate themselves, with no opportunity for rebuttal by appellant. Appellant's counsel attempted to alleviate the disparity by requesting a different order of examination, but he was denied. Finally, Brackett and Appel only presented evidence consisting of answers to written interrogatories from several individuals Dr. Fannin claimed to have consulted while preparing for the case. This evidence came in after the trial court recessed the trial for one month following the plaintiff's and two defendants' case-in-chief.

[11] The control given the trial judge must be exercised reasonably; a party must be given a fair opportunity to present its case so the jury may ascertain the truth. *Prezelski v. Christiansen,* 775 S.W.2d 764, 766 n. 2 (Tex.App.—San Antonio 1989), *rev'd on other grounds per curiam,* 782 S.W.2d 842 (Tex.1990). If a party is denied the right to make a fair presentation to the jury, the court has not acted reasonably and has abused its discretion. The exclusion of Felger's testimony as well as the denial of redirect and recross examination denied appellant the opportunity to meet and rebut appellees' defenses and to present his case.

While we need not determine whether the aforementioned procedures were proper, they suffice to establish the context in which the exclusion of Dr. Felger's testimony occurred. These procedures magnified the harmful effect of the exclusion of Felger's testimony. Even allowing that rules 403 and 611 somewhat limit the right to re-direct and re-crossexamination, considerations of due *456 process and fundamental fairness require us to conclude that the trial court's orders here overstepped the bounds of reasonability, denied appellant his right to re-direct, and compounded the harm appellant suffered. The excluded testimony was critical in and of itself, as it was material to issues hotly contested throughout the trial. *Mentis,* 870 S.W.2d at 16. Moreover, we are convinced that the error here amounted to such a denial of appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment. TEX.R.APP.P. 81(b)(1). Felger's exclusion, combined with other procedural rulings made the trial materially unfair and therefore constituted harmful error. *See generally Soefje v. Stewart,* 847 S.W.2d 311, 315 (Tex.App.—San Antonio 1992, writ denied). We sustain appellant's first point of error.

The exclusion of Riley's testimony, which we have held to be abuse of discretion, was not preserved. We overrule point two.

Because of our disposition of point one, we do not address appellant's additional points of error. TEX.R.APP.P. 90(a). Accordingly, we REVERSE the trial court's judgment and REMAND the cause for a new trial.

FORTUNATO P. BENAVIDES not participating.

Tex.App.–Corpus Christi,1994.
Sims v. Brackett
885 S.W.2d 450

END OF DOCUMENT

EXHIBIT F

Westlaw.

768 P.2d 534
(Cite as: 768 P.2d 534)

Supreme Court of Wyoming.

Michael Robert KOBOS, a minor child two years of age, By and Through Michael KOBOS and Rebecca Kobos, his parents and next friends; Michael Kobos and Rebecca Kobos, Appellants (Plaintiffs),

v.

Charles EVERTS, M.D.; Richard G. Sugden, M.D.; Kenneth L. Lambert, M.D.; Kenneth L. Lambert, M.D., P.C., a Wyoming professional corporation; Teton Radiology Associates, P.C., a Wyoming professional corporation; James R. Little, M.D.; Thomas Pockat, M.D.; Jackson Pediatrics, P.C., a Wyoming professional corporation; John Does I-X; and Doe Partnerships, Corporations and/or Other Entities I-X, Appellees (Defendants).

No. 86-12.
Jan. 17, 1989.
Rehearings Denied Feb. 28, 1989.
Appellants' Motion for Costs on Reversal Granted in Part and Denied in Part Feb. 28, 1989.

Medical malpractice action was brought against five physicians alleging improper hip treatment of osteomyelitis and septic arthritis of one-year-old child. The District Court, Teton County, John D. Troughton, J., entered judgment on jury verdicts in favor of four defendant physicians and directed verdicts for all five. Plaintiffs, child and his parents, appealed. The Supreme Court, Urbigkit, J., held that: (1) instruction defining circumstances in which physicians were liable for acts or omissions involving exercise of judgment was reversible error when negligence claims involved misdiagnosis nonaction thesis; (2) fact that after x-rays were taken in clinic immediate medical attention was found to be required belied adequacy of earlier care given to patient by defendant radiologist at least to extent of creating question of fact for jury; and (3) record would not support exclusion of expert testimony from pathologist and pediatrician on behalf of plaintiffs.

Reversed and remanded for retrial.

Cardine, C.J., and Thomas, J., filed specially concurring opinions.

Brown, J., retired, filed opinion dissenting in part and concurring in part.

West Headnotes

[1] Appeal and Error 30 ⇐1064.1(8)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(2) Particular Cases
30k1064.1(8) k. Negligence and torts in general. Most Cited Cases
(Formerly 299k18.130 Physicians and Surgeons)

Health 198H ⇐827

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk827 k. Instructions. Most Cited
(Formerly 299k18.100 Physicians and Surgeons)

Instruction in medical malpractice prosecution-that physicians or surgeons were not liable if acts or omissions upon which plaintiffs' claims were predicated involved exercise of honest judgment derived after careful and necessary investigation and that judgment was approved by respectable portion of competent and respectable physicians or surgeons in same line of practice and there was nothing to indicate that approval was not honestly made or that approval, judgment, or acts or omissions were unreasonable-was reversible error in action in which negligence claims were based on misdiagnosis or nonaction thesis; the phraseology given

did not define duty of due care, but spoke of responsibility for moral decision and honesty.

[2] Negligence 272 ⚿201

272 Negligence
272I In General
272k201 k. Distinction or relationship between negligence and intentional conduct. Most Cited Cases
(Formerly 272k1)
Intent is not factor in negligence, since negligence precludes intended conduct.

[3] Health 198H ⚿708

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk708 k. Radiology, ultrasound, and other medical imaging. Most Cited Cases
(Formerly 299k15(17.1), 299k15(17) Physicians and Surgeons)
Radiologists have responsibilities to patients and to other physicians which are similar to those of pathologists-accurate diagnosis.

[4] Health 198H ⚿825

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk824 Questions of Law or Fact and Directed Verdicts
198Hk825 k. In general. Most Cited Cases
(Formerly 299k18.90 Physicians and Surgeons)
Fact that after x-rays were taken in clinic immediate medical attention was found to be required belied adequacy of earlier care given to patient by radiologist at least to extent of creating question of fact regarding radiologist's negligence.

[5] Health 198H ⚿825

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk824 Questions of Law or Fact and Directed Verdicts
198Hk825 k. In general. Most Cited Cases
(Formerly 299k18.90 Physicians and Surgeons)
Directed verdict should not have been granted for defendant radiologist in medical malpractice action involving claims of improper hip treatment of osteomyelitis and septic arthritis of one-year-old child at time when physician who had specialized in diagnostic radiology and forensic medicine had testified adversely as to defendant radiologist's compliance with due care standard; issue of negligence had been presented.

[6] Evidence 157 ⚿538

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k538 k. Due care and proper conduct in general. Most Cited Cases
Orthopedic surgeon was competent to express opinion concerning whether x-ray and bone scan analysis done by radiologist was negligent and that defendant orthopedic surgeon should have read bone scan himself, in medical malpractice action against physicians involving claims of improper hip treatment of osteomyelitis and septic arthritis of one-year-old child.

[7] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative evidence in general. Most Cited Cases
Record did not support exclusion of expert testimony from pathologist and pediatrician in medical malpractice action as cumulative; two of the

defendant doctors were pediatricians, and defense was postured on approach to lay blame for medical problems suffered on nondefendant operating surgeon through defendant's pathological testimony.

[8] Trial 388 ⚿110

388 Trial
388V Arguments and Conduct of Counsel
388k110 k. Presentation of evidence. Most Cited Cases

Medical malpractice plaintiffs should not have been precluded from inquiring of office secretary regarding number of telephone calls received regarding child's medical problems and discussion with acquaintance of deposition testimony to lay foundation for impeaching secretary with testimony from acquaintance that she lied at her deposition when she stated she did not know how many times parent had called; trial court order insulated secretary from testimony about her subsequent comment regarding her deliberate misstatement on relevant issue and that action could not be justified on expectation secretary would reiterate impeachable testimony.

[9] Appeal and Error 30 ⚿971(3)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k971 Examination of Witnesses
30k971(3) k. Cross-examination. Most Cited Cases

Supreme Court had no basis for disagreeing with discretional decision of trial court sustaining irrelevancy objection to cross-examination question of defendant doctor, where there had been no offer of proof at trial and materials furnished in discovery which might have shown relevancy of question were not contained in record on appeal.

*535 Lawrence B. Hartnett, Jackson, for appellants.

J.E. Vlastos of Vlastos, Brooks & Henley, P.C., Casper, for appellees Everts and Teton Radiology Associates, P.C.

Frank D. Neville and Michael Golden of Williams, Porter, Day & Neville, P.C., Casper, for appellee Sugden.

Paul B. Godfrey of Godfrey, Sundahl & Jorgenson, Cheyenne, for appellee Lambert.

Carl L. Lathrop of Lathrop, Rutledge & Boley, Cheyenne, for appellee Little.

Lawrence A. Yonkee of Redle, Yonkee & Arney, Sheridan, for appellee Pockat.

Before CARDINE, C.J., THOMAS, URBIGKIT and MACY, JJ., and BROWN,[FN*] J., Retired.

FN* Retired June 30, 1988.

URBIGKIT, Justice.

Presented for appellate review is a six week medical malpractice trial against five physicians involving claims of improper hip treatment of osteomyelitis and septic arthritis of a one year old child, which resulted in verdicts in favor of four defendants and directed verdicts for all. The issues encompass excluded witnesses, denied cross-examination, directed verdicts and contended erroneous negligence instruction.

We reverse and remand for retrial.

I. ISSUES

Although variously stated by appellants and the five separate appellees who are differently affected, the appellate issues presented include:

*536 1. Basic medical malpractice negligence instruction;

2. Directed verdict for the radiologist;

3. Subsequent directed verdicts for other appellees after they secured *a favorable jury verdict;*

4. Trial court decision denying appellants the right to call the appellee doctors as adverse witnesses during their case in chief; and

5. Contested witness exclusion and evidentiary decisions of the trial court:

a. Limitation on testimony of appellants' expert radiologist to consider standard of care as contributory to the injury sustained;

b. Limitation of testimony of expert witnesses regarding standard of care of radiologist which was rejected either as cumulative or not competent;

c. Denied use of Michael Lagios, M.D. as an expert witness on the basis that his testimony would be cumulative; and

d. Denied use of Lawrence Madoff, M.D. as an expert witness on the basis that his testimony would be cumulative.

II. FACTS

Appellants include Michael Robert Kobos, a young child, and his parents of Jackson, Wyoming. In 1981, as the date of these events, the one year old developed a right hip pain. The patient was first evaluated in office and through telephone contact by Jackson doctors, James R. Little, M.D. and associate intern, Thomas J. Pockat, M.D. With the young child's condition producing "essentially normal x-rays," he was then seen by a general pediatrician, appellee Richard G. Sugden, M.D., whose office was in the same building as Dr. Little's. Consultation followed with yet another doctor, appellee Kenneth L. Lambert, M.D., a Jackson orthopedic surgeon. In this period of regular examinations as the child's problem continued, x-rays were taken and reviewed by appellee radiologist Charles Everts, M.D., with the continued finding of an essentially normal condition for the medical evaluation.

After about two and one-half months of this course of action with care limited to continuous office visits and no improvement, medical reference was made by Dr. Sugden for the child to be evaluated at the University of Utah Medical Center in Salt Lake City, Utah. The serious condition as diagnosed in Utah required apparent surgery, which was done by return to Jackson and performed by Dr. William Mott. Following surgery, the diagnosis was made of chronic osteomyelitis (infected bone).

As a result of either a developmental infected bone condition or surgical misadventure by Dr. Mott, growth plate damage resulted to the femur which will bring about significant future hip growth and use problems for the child. The broad character of factual issues considered at trial was whether the delayed medical attention while the infected bone condition developed precipitated the recognized injury or whether Dr. Mott, in final curative surgery, caused the permanent injury damage during the surgical process. Consequently in litigative approach, appellees denied diagnosis delay or treatment fault and blamed Dr. Mott as the surgeon who operated. The record of the lengthy trial can be summed up as including complicated evidence and a significant number of expert witnesses. Qualification of appellants' expert witnesses at trial was particularly painstaking in time, detail and opposition.

III. PROPER INSTRUCTION

[1] A principal issue in this appeal is appellants' challenge to the instructions, which included Instruction No. 18 as subject to the most detailed objection at trial and upon appeal. Instruction No. 18 states:

> You are instructed that physicians and surgeons are not liable for mere errors of judgment, provided there has been a careful examination and ordinary care and skill has been exercised.
>
> In other words, if, from all the evidence it appears by a preponderance that the acts or omissions of the defendants, each or all of them, upon which plaintiffs' claims are predicated clearly involved *537 and constituted an exercise of an honest judgment, arrived at after careful and necessary investigation, and

a. The judgment is approved by a respectable portion of competent and reputable physicians or surgeons in the same line of practice, and

b. There is nothing to indicate that the approval is not honestly made, or that the approval, the judgment or the acts or omissions are unreasonable,

Then, the defendants, each or all of them, are not liable.[FN1]

FN1. Eight other specific medical malpractice instructions were given, which included in general text:

INSTRUCTION NO. 8

The Plaintiffs contend that Michael Robert Kobos was at different times a patient under the care and treatment of each of the Defendant doctors. Plaintiffs claim that the Defendants, each or all of them, were negligent in their care and treatment of Michael Robert Kobos, which negligence was the proximate cause of injuries and damages suffered by Plaintiffs.

Each Defendant denies the Plaintiffs' claim asserted against him.

The Plaintiffs have the burden of proving their claims against each Defendant by a preponderance of evidence.

(The factual basis for the denial of patient-doctor status implicit in the instruction is not demonstrable from trial evidence.)

INSTRUCTION NO. 9

In this action, the Plaintiffs have the burden of proving by a preponderance of the evidence with respect to *each* Defendant the following:

1. The Defendant was negligent; and

2. The negligence of the Defendant was the proximate cause of the injury to the Plaintiffs; and

3. The nature and extent of the injuries claimed to have been so suffered, the elements of Plaintiffs' damage and the amount thereof.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it. The existence of such proposition must be more probable than its nonexistence. [Emphasis in original.]

INSTRUCTION NO. 10

Generally, negligence means the failure to use ordinary care.

Negligence as that term is used in these instructions with respect to the Defendant physicians means the failure to exercise the skill, diligence and knowledge, and to apply the means and methods which would reasonably be exercised and applied under similar circumstances by members of the profession in good standing and in the same line of practice.

The burden is upon the Plaintiffs to show by a preponderance of the evidence that each Defendant failed to exercise the degree of care and skill required from him.

INSTRUCTION NO. 11

It is the duty of a physician or surgeon who holds himself out as a specialist in a particular field of medical, surgical or other healing science, to have the know-

ledge and skill ordinarily possessed, and to use the care and skill ordinarily used, by reputable specialists practicing in the same field and under similar circumstances.

One who holds himself out as a specialist in that field and who undertakes diagnosis or treatment in his speciality is required to use the skill and care required of such a specialist.

INSTRUCTION NO. 12

In order to prove negligence, it is necessary for Plaintiffs to prove by a preponderance of expert medical testimony that a Defendant doctor failed to use the standard of care given to you in the foregoing instructions and such failure was a proximate cause of the injury complained of.

INSTRUCTION NO. 13

If the origin of the alleged injuries is obscure and not readily apparent, or if there are several equally probable causes of the condition, it is the burden of the Plaintiffs to prove by a preponderance, through competent expert medical testimony, that among the possible causes of the alleged injuries there is a reasonable probability (that is to say, the most likely cause was) the negligence, if any, of each Defendant.

INSTRUCTION NO. 16

You are instructed that in rendering medical services to a patient, a physician does not impliedly warrant or guarantee the success of his treatment or operation. The physician does impliedly warrant that he possesses and will exercise such professional skill and learning as are ordinarily possessed by medical practitioners practicing in the same field and under similar circumstances.

INSTRUCTION NO. 17

The law presumes that a physician or surgeon has carefully and skillfully treated or operated on his patient. There is no presumption of negligence from the fact of an injury or adverse result. However, this presumption is rebuttable and may be overcome by a preponderance of the testimony and evidence which establishes negligence or lack of reasonable care on the part of a physician or surgeon in his medical diagnosis, his performance of surgical procedures, and his care and treatment of patients.

***538** Appellants assert that Instruction No. 10 was a correct articulation of the law and that Instruction No. 18 was improper as contrary to *Vassos v. Roussalis,* 625 P.2d 768 (Wyo.1981) (*Vassos I*) and *Vassos v. Roussalis,* 658 P.2d 1284 (Wyo.1983) (*Vassos II*). We agree.

In *Vassos I,* 625 P.2d at 772-73, as recognizing that a malpractice action is usually a form of negligence litigation, this court observed:

> [T]he existence of the physician-patient relationship established the duty. The standard is fixed as that which is required of a reasonable person in light of all the circumstances. * * * A malpractice contention is also one of those circumstances. The more specific standard for malpractice actions is that a physician or surgeon must exercise the skill, diligence and knowledge, and must apply the means and methods, which would reasonably be exercised and applied under similar circumstances by members of his profession in good standing and in the same line of practice. * * *
>
> The skill, diligence, knowledge, means and methods are not those "ordinarily" or "generally" or "customarily" exercised or applied, but are

those that are "reasonably" exercised or applied. Negligence cannot be excused on the grounds that others practice the same kind of negligence. Medicine is not an exact science and the proper practice cannot be gauged by a fixed rule. * * *

* * * such circumstances are not of such common knowledge, the jury must depend upon testimony of experts to explain the standard and thus prevent a conclusion based on conjecture and speculation. * * * In other words, an additional question of fact must be answered when the circumstances are such that the reasonable person standard is not within the common knowledge of the jury.

[2] Furthermore, strict adherence to the so-called locality rule is not appropriate. *DeHerrera v. Memorial Hospital of Carbon County,* 590 P.2d 1342 (Wyo.1979); *Vassos II,* 658 P.2d 1284. We cannot accommodate acceptance of the instruction given within the criteria of the *Vassos* rule after the timely objection at trial that the instruction would confuse or mislead the jury as to the appropriate principle of law. *Cervelli v. Graves,* 661 P.2d 1032 (Wyo.1983). The phraseology given simply does not define a duty of due care but bespeaks in responsibility to moral decision and honesty, and as the principal instruction, constitutes reversible error. Intent is not a factor of negligence since negligence precludes intended conduct. *Globe Indem. Co. v. Blomfield,* 115 Ariz. 5, 562 P.2d 1372 (1977) ; 65 C.J.S. *Negligence* § 3 at 473 (1966); W. Prosser & W. Keeton, The Law of Torts § 31 at 169 (5th ed. 1984).

A leading authority has been identifiable within the Wyoming criterion which provides that there are two applicable standards of care to be applied in malpractice cases.

The first, which was correctly charged, holds the doctor to the standard of care measured by the knowledge and ability of the average physician or specialist in good standing in the community where he practices. This is the standard of reasonable care. Liability is premised upon the failure to exercise reasonable care, so measured. A doctor is also subject to a separate duty which requires him to use his best judgment, but which does not make him liable for mere error in judgment, provided he does what he thinks is best after careful examination. * * * "An error of judgment charged is appropriate in a case where a doctor is confronted with several alternatives and, in determining the appropriate treatment to be rendered, exercises his judgment by following one course of action in lieu of another."

1 S. Pegalis and H. Wachsman, American Law of Medical Malpractice § 2:9 at 69, 71-72 (1980) (quoting *Pike v. Honsinger,* 155 N.Y. 201, 49 N.E. 760 (1898)). It is noteworthy where a careful examination is given and clear alternative treatment courses exist, that an error of judgment charge may additionally be appropriate. Appellants were entitled to contend that the alternatives were not embraced in this *539 case since, generally speaking, nothing was done during the critical period as medical treatment which effectively addressed the physical problem as later disclosed by x-ray analysis and surgical intervention.

The instructions must be considered as a whole in order to determine whether the instructions as a whole are fair. But the introductions must clearly reflect the factual situation presented in the case as well as the applicable law.

1 D. Louisell and H. Williams, Medical Malpractice § 11.38 at 11-134 (1988) (footnotes omitted). The test of standard of care in a malpractice case is ordinary skill and diligence as possessed by members of the profession generally. "Reasonable and ordinary care, skill, and diligence" is the test denominated in 4 Reid's Branson Instructions to Juries, ch. 146, § 2442 at 473 (1987 Cum.Supp.). See similarly, PIK 2d 15.01 at 66 (2d ed. 1977) (although continuing to include some category of the locality rule). It is apparent that there is a difference in the concepts of the law between a bad result achieved with care and a less than careful bad

choice. Excluding the Wyoming deleted locality rule, the Illinois Pattern Jury Instructions properly inform:

> In [treating] * * * a patient, a [doctor] * * * must possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified [doctors] * * * in similar cases and circumstances. A failure to do so is a form of negligence that is called malpractice.
>
> IPI 2d 105.01 at 319 (1971).
>
> A physician's conduct * * * must be measured against what a physician having and using that knowledge, skill and care of physicians practicing in the same field of practice in the same or similar locality at the same time would or would not do under the same or similar circumstances.

CJI 2d 15:2 at 313 (1988). The mere error in judgment criteria as relied upon by the trial court for instruction comes from *Wright v. Conway,* 34 Wyo. 1, 241 P. 369 (1925). That concept is now subsumed within the modernized standards for present day professional practitioners invoking skill, diligence, knowledge, and application of means and methods reasonable under the circumstances by persons within the profession. Clearly, as we specifically stated in *Vassos I,* 625 P.2d at 772, "[n]egligence cannot be excused on the grounds that others practice [or approve of] the same kind of negligence." Under the misdiagnosis non-action thesis of appellants' claims of negligence, the jury instruction was improper.

IV. DENIAL OF RIGHT TO CALL APPELLEES AS ADVERSE WITNESSES IN APPELLANTS' CASE IN CHIEF

During trial, appellants were advised by the trial court, at a point which, as a consequence, was near the end of their case in chief, that:

> You will not be permitted to call the Defendant Doctors as adverse witnesses because it's the judgment of this Court if they are called for direct examination and you have the opportunity to cross-examine on the substance of their testimony, this case is going to go faster. That's based not only upon my experience, in general, that that is a quicker way to handle adverse parties but it's also based upon what I've observed in this courtroom concerning what's happened in this courtroom with respect to individual witnesses.
>
> You think the Court is unreasonable. The Court believes that the length of examination of most of the witnesses in this case has been unreasonable and that a good deal of time could have be[en] saved with respect to-could have be [en] saved with examination and cross-examination that was more directed and to the point.

Early the following week, the decision was reiterated:

> Now, for the record, the Court indicated last week that it would not allow the Plaintiffs to call the Defendants during their case in chief and would require the Defendants to put them on the stand. Now, the reason that the Court did that ***540** is because the testimony in the case is going slow. It was the Court's considered opinion that the testimony would go quicker if the direct examination brought out the testimony of the doctors, leaving the Plaintiffs with the right to cross-examine. And that that would go quicker in the considered opinion of the Court because the Court is of the opinion based upon several weeks of trial and several weeks of experience with witnesses that are either perceived as being adverse by the Plaintiffs or are adverse witnesses, in fact, to the Plaintiffs, that during cross-examination in Plaintiffs' case, the examination has gone slowly because Plaintiffs' Counsel finds himself in the position during the presentation of his case in chief of wanting to elicit from the adverse parties the testimony that is important to his case in chief but to avoid the testimony of the adverse parties, which is more related to the defense and which is adverse to the case in chief. And because the Court perceives that Counsel finds themselves in that position, Counsel perceives-or the Court perceives Counsel as going very slowly and care-

fully, attempting to avoid during his case in chief, the unfavorable aspects of the testimony of the adverse parties. In the attempts to avoid those unfavorable aspects, the examination goes slowly. The Court, in its judgment, thought that if the adverse nature of the testimony is laid out on the table quickly, that Counsel would then be-would be alleviated-or the problem that Counsel faces of trying to avoid that testimony would be alleviated because it would be out on the table and Counsel would not have to be so careful but could just come in and the whole process would go quicker.

The subject was again reanalyzed by the trial court after all other case in chief witnesses had been called as then closing that trial segment with continued adverse examination denial:

Well, it's very doubtful at this stage of the game that the Defendants are not going to be called to the stand. We'll know that after we handle the motions. Okay. So let's handle-We'll deal with the testimony of the Defendant Physicians offered in Plaintiffs' case in chief at the same time that we deal with the motions for directed verdict that are going to be made this morning. In other words, if it appears that testimony of the Defendant Doctor is going to be critical to any motion for a directed verdict insofar as the Plaintiff is concerned, then the Court is in a position of dealing with that by allowing that Doctor to be called. If it's not critical, then the Court can stand by its previous ruling that we'll do the * * * direct examination and you get your crack at them through cross-examination.

The status of the issue on appeal is problematical since although discussed, it is not generally addressed as a designated issue for appeal and is contested by only Dr. Everts in argument. None of the litigants in appellate brief have furnished citations that a trial court can or cannot, as a matter of discretion, generally deny to plaintiff the right to call an opposing party as an adverse witness. Cf. *Hall v. Hall,* 708 P.2d 416 (Wyo.1985), cited by appellants. In anticipation that the problem will not reoccur on retrial, this court need not presently explore whether any circumstance could occur which would justify this kind of a general restriction on trial development by a litigant.[FN2]

FN2. Within the penumbra between due process, *Boddie v. Connecticut,* 401 U.S. 371, 377, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971), and reasonable control over the presentation of evidence, *McCabe v. R.A. Manning Const. Co., Inc.,* 674 P.2d 699 (Wyo.1983), any restriction on rights of litigants to plan and present their case or for general evidentiary exclusion pursuant to W.R.E. 403 should tread softly.

V. DIRECTED VERDICT FOR RADIOLOGIST

Without being afforded the opportunity to call the physician radiologist as an adverse witness to determine what his activities and function may have been, the trial court granted a directed verdict in his behalf at the close of appellants' evidence. ***541** Thereafter, in appellees' case after trial court announcement of the directed verdict, the ex-litigant testified as an expert witness in behalf of the other appellees.[FN3] In consideration of appellants' evidence and cross-examination, the trial court justified by oral explanation to the attorneys why he would grant the directed verdict:

FN3. Appellants characterize the status of the directed verdict for Everts:

It must be emphasized that after Appellee Everts received a directed verdict in his favor he appeared at trial as an expert witness for the remaining Appellees, and while still glowing with the halo of innocence, damned Dr. William Mott as the cause of young Michael Kobos' devastating injuries.

And when you look at all of the evidence with respect to Dr. Everts in that sense and in that light, then the Court concludes that the evidence, in the light most favorable to the Plaintiffs, establishes

that not only did Dr. Everts not fail to properly read x rays but that evidence, at best, establishes that it was a judgment call for Dr. Everts. The beauty is in the eye of the beholder, so to speak.

Now, finally, the testimony clearly is that you can't diagnose osteomyelitis or septic hip in this case from the x rays. At least not the x rays-I can say it that way. You can't diagnose this by the x rays. You can diagnose changes but you cannot tell what the changes are. And even if one were to conclude that there were changes on October 14 and 15 at the time of the last x ray plate and the last bone scan of Dr. Everts, the evidence in the light most favorable to the Plaintiffs indicates that in order to diagnose septic hip and osteomyelitis, something more had to be done. And so even if there was a failure to properly read those two radiology materials, there's no evidence of any direct, proximate cause between that failure and the injuries that the Plaintiffs contend occurred, those injuries being from osteomyelitis and septic hip which was not treated, which conditions cannot be diagnosed by x rays.

[3][4] Intrinsic to appellants' case was evidentiary discussion of the duty of the radiologist to examine and report which is encompassed within a standard of due care to his patient. In earlier discussion before the directed verdict had been granted, the trial court had analyzed:

It would appear to the Court in this case that the uncontradicted evidence of all of the experts is that Dr. Everts had no duty to diagnose; that he had no duty to treat.

This characterization of the duty or lack thereof of the radiologist is directly contrary to common reasoning (to determine what may be seen) and contrary to general precedent. *Clayton v. Thompson,* 475 So.2d 439, 442 (Miss.1985) (quoting *Hall v. Hilbun,* 466 So.2d 856 (Miss.1985)):

[E]very doctor "has a duty to use his or her knowledge and therewith treat through maximum, reasonable, medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice *throughout the United States,* who have available to them the same general facilities, services, equipment and options." [Emphasis in original.]

[P]roximate cause arises when the omission of a duty contributes to cause the injury. *Gardner v. National Bulk Carriers, Inc.,* 310 F.2d 284 (4th Cir.1962) cert. denied, 372 U.S. 913, 83 S.Ct. 728, 9 L.Ed.2d 721 (1963). *Harvey v. Silber,* 300 Mich. 510, 2 N.W.2d 483 (1942). "Proximate cause here is implicit in the breach of duty. Indeed, the duty would be empty if it did not itself embrace the loss as a consequence of its breach." *Gardner,* supra, at page 287.

Id. at 445. We agree with appellants' position with reference to *Vassos II,* 658 P.2d 1284 that whether a duty exists and the scope of that duty are questions of law for the court. Id. at 1287. We would also agree with case law and text authority that radiologists have responsibilities to patients and to other physicians which are similar to those of pathologists-accurate diagnosis. 1 D. Louisell and H. Williams, ***542** supra, at § 3.23 at 3-82. See also, *Keen v. Prisinzano,* 23 Cal.App.3d 275, 100 Cal.Rptr. 82 (1972). Factually, the circumstance that after x-rays were taken in the Salt Lake City clinic and immediate medical attention found to be required, belies adequacy of the earlier care given to the patient by the Jackson radiologist to the extent at least that a question of fact for the jury was created. *DeHerrera,* 590 P.2d 1342.

[5] As an early witness, appellants called Dr. Maurice O'Connor who, after initial medical school graduation, spent time in general practice, then military service, and thereafter was trained for specialization in diagnostic radiology. While in that pursuit, he also graduated from law school and has since described his activity as 75% to 80% in pure medicine in the diagnostic radiology specialty and

20% to 25% or less in forensic medicine. Extended, detailed, and continued objection started from the first and continued to the last of his testimony during the two and one-half day session while he was a witness. The principal attack came by denial of appellees that the witness could properly state an opinion that the medical diagnosis for the small child should have come sooner and the treatment should have been better in regard to the service by all appellee witnesses. In broad category, the type of inquiry that developed has since been addressed by this court in *Oukrop v. Wasserburger,* 755 P.2d 233 (Wyo.1988).

Despite those constant objections by appellees, Dr. O'Connor specifically testified that in his opinion the standard of performance of radiologist Dr. Everts fell below the standard of appropriate care. An attempt was further denied in examining the witness to connect described insufficiency of radiology service by cause to the later discovered hip condition. In sustaining latter objections, the trial court stated that "[t]he Jury doesn't need assistance from an expert in that area. The objection is sustained." Subsequently, the following question was asked:

> Well, for the record, I have to ask you to put back on your radiologist hat and tell me whether you have an opinion as to whether or not the failure of Dr. Charles Everts as a radiologist to meet the standard of care required of him had any causal relation to the condition in Mikey Kobos' hip which ultimately resulted as you've described it on these films?

The question was answered yes, and the requested opinion floundered on a *lack of foundation objection* as well as *competency* as sustained. Inquiry of counsel followed and the trial court responded:

> THE COURT: Do you want me to tell you on the record, in front of the Jury?
>
> MR. ANDREW HARTNETT: Beg your pardon?
>
> THE COURT: Do you want me to tell me [sic] on the record?
>
> MR. ANDREW HARTNETT: May be I would rather you tell me off-the-record, out of the presence of the Jury.
>
> THE COURT: Okay. Then let's just leave it where it sits.

The thesis of the trial court was then later explained by the previously quoted order granting the directed verdict. Essentially, the record presents a legal determination in divergence with the factual record as to the responsibility of the medical doctor practicing in the specialty of radiology. The trial court denied to appellants the intrinsic expert witness opinion to completely define the standard of care required.

It is noteworthy how appellee Dr. Everts in brief describes the radiologist's participation in the medical practice:

> Everts read or interpreted the plain x-ray films and the bone scan films. In this regard Everts submitted written reports which are a part of the hospital records or chart. The actual procedure in taking the films, both the plain films and the bone scan films, is done by technicians and not by Everts. This is the usual method or procedure in taking and interpreting radiological tests or procedures. Everts did not see or touch Michael Kobos with respect to the plain films and did not actively participate in the procedure generating the bone scan films. Several of the exhibits offered by ***543** Appellants include copies of the reports of Everts; however, the same are within the hospital chart/record (Exhibit 2). The plain x-ray films are designated Exhibits 9-1 through 9-22 and the bone scan films are designated as Exhibits 11-7 through 11-10.

Therefore, the involvement of Everts consists entirely of his interpretation of the plain x-ray films taken on September 9, September 15, and

October 14, and the bone scan films made on October 15, 1981.

Surprisingly, it is questioned that Dr. Everts owed a duty to the patient. Clearly, that contention should not be in factual dispute from this record or within today's medical world. If the physician performing the service for a patient expects to be paid, he has the duty of a doctor to his patient. Dr. Everts was a doctor and Kobos was his patient for radiology purposes. Really at issue was due care of the medical practitioner. When the directed verdict was granted, the witness provided by appellants of unquestioned competence and medical experience had on this record testified adversely (to the extent permitted) as to compliance with that due care standard.

Both the duty of the radiologist to make and adequately communicate a correct diagnosis is discussed in *Phillips v. Good Samaritan Hospital,* 65 Ohio App.2d 112, 416 N.E.2d 646, 649 (1979), where summary judgment was reversed as that court said:

> Weighing the facts and competing inferences, as we must, in a light most favorable to the party opposing summary judgment, it is possible to find the existence of a causal relationship between a breach of duty and the injury suffered.
>
> * * * Once the physician-patient relationship has been found to exist, as could well be found here, the professional responsibilities and duties exist despite the lack of proximity, or the remoteness, of contact between the two as where a consulting physician is involved in the case in only a limited manner. Therefore, all physicians involved in a case share in the same duties and responsibilities of the primary care physician to the extent of their involvement.

It would seem in characterization that the ship had slipped sails somehow for directed verdict to be granted after the expert testimony had been given that the radiologist in performing a service of examining and reporting on x-rays did not meet the required standard of performance. An issue of negligence was presented. See a detailed analysis of liability, *Clayton,* 475 So.2d 439.

[6] Appellants' problem with medical testimony relating to the radiologist's standard of care did not yet end. Called as a principal witness for appellants was San Francisco, California orthopedic surgeon, Dr. Kevin Harrington. After inquiry developed by examination of when appellants started to present the opinion of the witness in regard to the standard of care of the radiologist, a very extensive in camera discussion followed after which the trial court ruled in open court statement to the jury:

> Ladies and Gentlemen of the jury. The Court has ruled that Dr. Harrington shall not be permitted to express an opinion, either directly or indirectly, concerning whether the x-ray and bone scan analysis done by Dr. Everts was negligent or careless or whether it was careful and prudent. Any further testimony by Dr. Harrington shall not be viewed or considered by you as applicable to the standard of care required of Dr. Everts. Dr. Lambert's objection at the testimony of Dr. Harrington to the effect that Dr. Lambert should have read the bone scan, himself, is without foundation and has been sustained by the Court.

What this meant in trial procedure by trial court ruling was that the orthopedic surgeon was not competent to express an opinion about x-rays, which would also serve to isolate that doctor from responsibility whether or not the radiologist had made a mistake. Furthermore, this standard of medical practice would establish that the orthopedic practitioner had no independent *544 responsibility to utilize his knowledge of x-rays in patient diagnosis and treatment.[FN4]

> FN4. The specific decision and ratio decidendi of the trial court was stated to counsel:
>
> The Court notes that [prior trial judge]

> required the Plaintiffs to designate the experts that Plaintiffs would require in this case to meet their burden of proof and among those experts [was] a radiologist. Also among those experts [was] an orthopedic surgeon. Two separate doctors; two separate physicians.
>
> The Court, therefore, rules under Rule 403 that because the testimony of Dr. Harrington in the area of radiology will be cumulative, it will not be received by considerations of undue delay and waste of time. If the Supreme Court believes that I have abused my discretion in such a discretionary ruling, knowing more about this difficult trial than I do sitting in it, losing hair and developing ulcers, then it is the ruling of the Court that Mr. Vlastos' objections are sustained. Sustained on the basis that there's no foundation indicating that this Witness either knows or is competent to establish what type of standard,-either knows or can establish those standards under which radiologists as opposed to orthopedic surgeons must practice.
>
> Obviously, the cumulative characterization cannot now be sustained in face of the subsequently granted directed verdict on the basis of failure of proof of a violated standard. Consequently, the justification, if one is to be perceived, must be found in a generalized principle that an orthopedic surgeon is not qualified to testify as to radiology standards, *as a matter of law.*

Finally, from the standpoint of appellants as the developments worsened in character, objection was taken to the way this trial evolution was to be orally presented to the jury:

> My concern is that any such instruction to the Jury, in and of itself, intends to reflect on the credibility of Dr. Harrington and is additionally prejudicial to the Plaintiffs case and that no instruction at this point in the evidence is necessary at all. He has not expressed an opinion regarding Dr. Everts nor has he expressed an opinion as to the failure of Dr. Lambert in any way in his interpretation. He is qualified to read them and interpret them himself and the instruction would be grossly prejudicial to the Plaintiffs.

The expressed concern was not without unjustified substance in case progression as a trial development. We conclude that the restriction on the witness' testimony was unjustified and constitutes an abuse of discretion. [FN5]

> FN5. It would not be totally dissimilar to consider that a jurist was not qualified to critique the academic analysis of his research assistant or the supervising architect to review the sufficiency of the contractor's work product.
>
> > Physicians who are not specially trained in diagnostic roe[n]tgenology may be capable of interpreting many X-ray films with reasonable accuracy, but as a general rule they should not rely exclusively upon their own interpretation, except in very simple cases or in cases coming within their own special field such as urology or *orthopedics.*
> >
> > 1 D. Louisell and H. Williams, supra, at 3-86 (emphasis added). As indicated, Dr. Harrington was an orthopedic specialist.

VI. OTHER ISSUES PRESENTED

In determination that a retrial is required, we would only consider other issues to the extent that a reoccurrence of question might again develop.

a. *Directed Verdicts Granted to Drs. Sugden, Lambert, Little and Pockat After the Entry of Defendants' Jury Verdict.*

The considerable discussion of this issue by the

litigants does not present any justiciable question for us to now determine. The case was submitted to the jury, which would not now presently justify our decision on a subsequent directed verdict after favorable verdict. We would, however, observe that citations to cases involving a judgment notwithstanding the verdict are misplaced, since a judgment notwithstanding the verdict is directed to adversely attack the verdict and not to serve as a compatible substitute. See *Baker v. Helms,* 527 So.2d 1241, 1243 (Ala.1988) for evidentiary test. In concluding that this particular problem will not likely reoccur upon retrial, a further review becomes unjustified since this result with another favorable verdict could not call for application of W.R.C.P. 50(b). *Mayflower Restaurant Co. v. Griego,* 741 P.2d 1106 (Wyo.1987); *Simpson v. Western Nat. Bank of Casper,* 497 P.2d 878 (Wyo.1972).

***545** The significance in perspective to appellants is only relative to the topic of the excluded medical witnesses as being "cumulative." The problem is presented of the trial court's decisions that first the testimony of expert witnesses on violated standards of care is cumulative, and then without the support of appellants' case by the proposed expert opinion testimony to foreclose recovery by directed verdict on the basis of insufficiency of proof. FN6

> FN6. This complex, heavily contested and argumentatively pursued record bespeaks to the conception of the trial court as accommodated by the usage of Instruction No. 18 and directed verdicts that judgmental mistake cannot create liability if that decision is either that nothing was wrong or not to do anything; so that only if something is done wrong can liability develop.

b. *Denied Testimony of Tendered Witnesses.*

[7] Appellants challenge the denial of tendered testimony to be elicited from three proposed witnesses. Appellants had planned to present expert testimony from Dr. Lawrence Madoff and Dr. Michael Lagios in addition to the adverse examination of the appellees. Both witnesses had been deposed by appellees at appellees' convenience pursuant to specific trial court order. Dr. Lagios was a pathologist at Children's Hospital in San Francisco, California and Dr. Madoff, a pediatrician. Originally, pretrial objection had been taken to the late designations. Then after being deposed by trial court order following a change in trial judges, the objection to trial presentation was sustained on the basis that their medical opinion testimony "would be cumulative." The issue of late designation will not reoccur with a new trial, and consequently, its tortuous pathway in this extended record will not be pursued. Our consideration of the cumulative issue as an exercise of discretion is colored by the subsequent decision of the trial court after verdict that a directed verdict emplacing inadequate proof was proper. We are also distressed in present decision by incomplete opportunity to evaluate the prospective testimony as "cumulative," since by its very nature, it would have been relevant and material if admissible. Under any circumstance in the contextual development of this case with the categorization pursued by counsel and the trial court, it would appear that with an appellee pediatrician and with other pediatricians listed as expert witnesses for the defense, that app effort to present a pediatrician expert witness to establish a standard of care and its violation would not likely be cumulative. Additionally, the relevance of the pathologist to contest testimony of a pathologist who placed the blame on the succeeding surgeon, Dr. Mott, seems extraordinarily confined. With retrial, the cumulative nature of prospective inquiry should be more clearly delineated by the record if rejection reoccurs.

From this record, support for the exclusion criteria carefully defined in *Towner v. State,* 685 P.2d 45 (Wyo.1984) is not established. This court there said that " Rule 403 [W.R.E.] is an extraordinary remedy which should be used sparingly since it allows the court to exclude evidence which is concededly relevant and probative." Id. at 49. In the in-

stant case, where two of the appellee doctors were pediatricians and appellants were disallowed the right to call a pediatrician as an expert witness, that rationale is hard to justify. Discretion, in any event, has its limits as we said in *Martin v. State,* 720 P.2d 894, 897 (Wyo.1986):

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

In a medical malpractice case, plaintiff requires expert testimony for proof. *Harris v. Grizzle,* 625 P.2d 747 (Wyo.1981). Denial of the pathologist's testimony is similarly questionable where the defense is postured on an approach to lay the blame onto the operating surgeon by defendant's pathological testimony. Availability of the tendered witness to plaintiff is similarly required to permit the litigant to have the same opportunity to have eleven men on ***546** the field of play. At the least, all witnesses reasonably available to provide substantive evidence should have been permitted to testify before the trial court executes or at least exiles plaintiffs' case to a never to be land. The general law is in accord. See *United States v. Davis,* 639 F.2d 239 (5th Cir.1981), cited by this court with approval in *Towner,* 685 P.2d at 49, where evidence was "independent corroborative testimony on a material issue." See likewise 2 D. Louisell and C. Mueller, Federal Evidence § 128 at 68 (1985). As is stated in J. Weinstein & M. Berger, Weinstein's Evidence § 403[06] at 403-95, 403-99 (1986):

> Certainly, Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value. If the evidence is crucial, the judge would abuse his discretion in excluding it.

In a case surprisingly similar as involving denied testimony of a pediatrician witness, the court in *Johnson v. United States,* 780 F.2d 902 (11th Cir.1986) reversed the trial court's decision and plaintiff's verdict when the witness was to testify for defendant. Quoting Weinstein with approval, the appellate court found the trial court's action to be an abuse of discretion. The testimony of the expert witness had been excluded as cumulative when presented to support the expert testimony of two other witnesses in the death case. The appellate court considered that the litigant had the right, in this case the United States government under the federal Tort Claims Act, to present testimony which was more comprehensive and at least partially non-cumulative through use of a pediatrician to testify in opposition to pediatricians who were presented by the plaintiff.

The involved principles are well-stated:

> Not all evidence which is entirely duplicative is therefore cumulative and excludable. Evidence may vary in degree of persuasiveness, and when an item of proof which is offered on a point is very different in character or persuasive impact from an item of proof previously received, the former cannot be considered merely "cumulative" of the latter. Moreover, at times it is entirely reasonable for a party to insist, "One witness is good, but two or three will make my case much stronger, even though all will testify in a similar vein." In short, the discretion of the trial judge to exclude cumulative evidence must be exercised in a discriminating fashion, and with wisdom, particularly where the evidence in question goes to issues of central importance in the case.

2 D. Louisell and C. Mueller, supra at 74-75 (footnote omitted). See *Hill v. Bache Halsey Stuart Shields, Inc.,* 790 F.2d 817 (10th Cir.1986); *Bower v. O'Hara,* 759 F.2d 1117 (3rd Cir.1985); and *United States v. Fessel,* 531 F.2d 1275 (5th Cir.1976).

The trial court retains considerable latitude even with admittedly relevant testimony in rejecting evidence which is cumulative or in requiring that evidence be brought to the jury's attention in a

manner least likely to cause confusion. However, the litigant "is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried." *Hamling v. United States,* 418 U.S. 87, 125, 94 S.Ct. 2887, 2911-12, 41 L.Ed.2d 590, reh'g denied 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974). Thus, evidence which in the context of the litigation is merely repetitious or time consuming may be excluded, but only if time consideration substantially outweighs the incremental probative value of the proffered evidence. M. Graham, Handbook of Federal Evidence § 403.1 at 179 (2d ed. 1986).

[8] The denied testimony of proposed witness Betty Perkinson (Perkinson) is substantively complex. In compliance with trial court orders, appellants had filed, as a notice of an additional witness, Perkinson's name. That witness would testify that Jane Fairbanks (Fairbanks), a receptionist in the office of Dr. Little, had told her that she had improperly answered deposition examination when asked if she recalled the number of times that Rebecca Kobos had telephoned the doctor's office. Following designation, appellee Dr. Little filed a motion in limine to prohibit Perkinson from being called as a witness and the motion ***547** was considered during trial and then rejected.

The sequence of developmental events on the issue is interesting. It is indicated in the record, although a copy of a deposition is not included, when appellants took the deposition of prospective witness Fairbanks as the office secretary for Dr. Little, that the witness testified she could not recall how many telephone calls were made to the office by the patient's mother during the defined period. As subsequently discovered evidence, appellants planned to tender testimony from an acquaintance of the witness, Perkinson, as noticed as an unexpected witness who would state that Fairbanks, the office secretary, had said to her sometime after the deposition, "I lied at my deposition." "The lawyers asked how many times Becky Kobos called over a specific period of time." "I told them I didn't know." "I wasn't about to help those lawyers." Then to conclude in the conversation between the two women, Fairbanks related "that woman called one hell of a lot."

For in camera trial inquiry, the office secretary Fairbanks was examined by appellants, after which a motion in limine was granted against use by appellants of any testimony from her which would invade the subject of the number of office telephone calls received and also the alleged discussion of her deposition testimony on the subject with Perkinson. Consequently, appellants contended that if she were to give the same testimony before the jury, she would again lie as she did in the deposition. The direction of the examination by appellants as denied by the motion in limine was to revisit the deposition inquiry of the witness, and if consistent, then impeach with subsequent statement of admitted untruth. As first approached by the trial court, the motion in limine to the initial inquiry of the office secretary was sustained as an attempt to prove the telephone calls through hearsay testimony offered under the guise of impeachment. The premise of the denial to appellants of this aspect of the examination of Fairbanks is unclear at this juncture on appeal. The foundational question for impeachment was excluded by the in limine decision as to Fairbanks so that the testimony of Perkinson was foreclosed in advance as lacking anything to impeach. The issue problem in present posture is found in justification for the motion in limine as limiting inquiry of a witness in regard to a prior inconsistent statement.[FN7] If, in fact, that would have been her sworn testimony before the jury as consistent with the deposition and inconsistent with statements to the acquaintance, then whether the in limine evidence would be properly emplaced to impeach as to the fact of the prior inconsistent statement would have a more justified structure for issue presentation. We need not presently assume how the witness might hereafter testify at trial and if she continues a course of denied recollection, whether the trial court has discretion to deny impeachment. The truth is to be found in either what the witness said

in deposition or what the other witness stated she subsequently said. We do not find a relevancy question since obviously the theory of appellants was to prove parental concern and continued effort to secure some more satisfying medical recognition of perceived increasing physical problems of their baby boy. Consequently, we do not necessarily determine whether the impeachment examination is subject to discretional exclusion by the trial court, but do *548 not find a basis submitted for denial to appellants of the foundational inquiry of the office secretary.

> FN7. We do not understand the argument of appellees in brief that the foundation question was never asked which is confusing in consideration of what the trial court said during the in camera questioning of both women:
>
> > If you have more questions for this witness [Fairbanks] on the substance of her testimony, then you certainly are going to be given an opportunity to ask her those questions. But this Court has ruled and there will be no questions asked of this witness concerning the foundations for impeachment through prior alleged inconsistent statements made to Mrs. Perkinson.
> >
> > Thereafter, the subject was finalized:
> >
> > Anything else, Andy [one of appellants' attorneys]? I'm just telling you how the cow ate the cabbage.
> >
> > MR. ANDREW HARTNETT: I understand that the cabbage has been eaten, your Honor.
> >
> > THE COURT: All right.
> >
> > MR. ANDREW HARTNETT: I respectfully disagree with the Court.

This court had occasion in *Channel v. State,* 592 P.2d 1145 (Wyo.1979) to consider the impeachment and direct evidence issues implicit in W.R.E. 607 and 802. Clear approval for the process undertaken by appellants is indicated provided that a subsequent limiting instruction is given. In specific decision, what we have here is that the trial court determined to protect the office secretary from the "travail" of impeachment by being faced with the contention of her later statement that she committed perjury in a deposition and then reiterated in the in camera examination which indicated her intent to continue that posture for the jury presentation. Denial of the opportunity to appellants to establish the foundation for the impeachment by the first of two limiting trial court orders cannot be justified by direct citation of authorities presented in appellate briefs.

Detailed review of the prior inconsistent statement inquiry in use and function is found in two recent A.L.R. annotations.[FN8] It is notable that this court in Channel cites the first annotation and then the second annotation cites Channel as part of the progressively developing concept that permits use of prior inconsistent statements as evidence in defined circumstances. The not dissimilar subject of use of hearsay to prove prior statements if the witness is now unavailable by lost memory was considered by the United States Supreme Court in the 1988 term in approving usage for criminal prosecution, see *United States v. Owens,* 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988).

> FN8. First, Annotation, *Use of Prior Inconsistent Statements for Impeachment of Testimony of Witnesses Under Rule 613, Federal Rules of Evidence,* 40 A.L.R. Fed. 629 (1978) and the later Annotation, *Use or Admissibility of Prior Inconsistent Statements of Witness as Substantive Evidence of Facts to Which They Relate in Criminal Case-Modern State Cases,* 30 A.L.R. 4 414 (1984). The subject has presented problems since not without conflict in the federal courts. To be compared

> are *United States v. Garcia,* 530 F.2d 650 (5th Cir.1976) (approved and failure to give a limiting instruction was not plain error); *United States v. Rogers,* 549 F.2d 490 (8th Cir.1976), cert. denied 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977) (under fairness inquiry and with limiting instruction was admissible); and *United States v. Morlang,* 531 F.2d 183 (4th Cir.1975) (inadmissable). See comment and included citations of text authorities, 120 F.R.D. 299 (1987), relating to W.R.E. 607.

Although the application in Owens is different as involving substantive testimony rather than impeachment, the characterization which it afforded is relevant:

> It would seem strange, for example, to assert that a witness can avoid introduction of testimony from a prior proceeding that is inconsistent with his trial testimony, see Rule 801(d)(1)(A), by simply asserting lack of memory of the facts to which the prior testimony related.

Owens, 108 S.Ct. at 845. The witness here, by statement that she could remember the number of telephone calls, was isolated by trial court order from testimony about her subsequent comment of deliberate misstatement.

Appellees' tailored their defense to the impeachment denial decision on an abuse of discretion concept as not clearly wrong in citing *Waldrop v. Weaver,* 702 P.2d 1291 (Wyo.1985); *Brockett v. Prater,* 675 P.2d 638 (Wyo.1984); and *Bacon v. Carey Co.,* 669 P.2d 533 (Wyo.1983). None of those cases involve impeachment of contended perjurious testimony. *Canyon View Ranch v. Basin Elec. Power Corp.,* 628 P.2d 530 (Wyo.1981) as also cited presents a relevancy question. The one case of somewhat similar character, *Diamond Management Corp. v. Empire Gas Corp.,* 594 P.2d 964 (Wyo.1979) addresses impeachment denial as harmless error since the compared testimony was not essentially dissimilar.

The record establishes that the perjury contention was a concern that the trial court did not want to be presented to the jury-even if true. [FN9]

> FN9. As appellee Little quotes in his brief, the trial court's reasoning related:
>
> "THE COURT: I heard argument on it last night. I made a special trip to the Teton County Law Library and secured from that library legal materials which I then took home, along with the depositions of Mrs. Fairbanks. And after dinner last night, I did my own reading on the law. I read the deposition of Mrs. Fairbanks; I studied the statement of the proposed testimony; came back into Court this morning; heard more argument on the issue. The Court doesn't feel the need for any further legal reference. So thank you very much, Mr. Hartnett, but I don't want them.
>
> MR. ANDREW HARTNETT: I take that as an order that I should not address the Court with legal argument?
>
> THE COURT: Yes, because it's a matter now of the law, not of the facts, and you can bring up the law with this or the Supreme Court at any time you want. Now, the Court has listened carefully to the testimony of Mrs. Perkinson. The uncontroverted-the uncontroverted evidence in this case will be that Mrs. Kobos called Dr. Little's office in late August and early September of 1981 to express her concerns about her child. The proffered testimony will not impeach any evidence to the contrary. The evidence doesn't impeach Mrs. Fairbanks, her testimony being that she doesn't recall. She has no recollection and that's not surprising. I couldn't tell you who called me last

> week. I know I had some telephone calls earlier this week but I can't tell you who called me. Thus, if it doesn't have the purpose or the affect of impeaching the credibility of Mrs. Fairbanks and thereby discrediting the weight to be given her testimony, the only testimony being Mrs. Kobos' testimony that I called, then, the only other purpose for the testimony is to prove the truth of the hearsay asserted, which hearsay would be otherwise inadmissible.
>
> Now, this proffered testimony does something else in this case. This proffered testimony injects into the case an inference, an implication, that Dr. Little's a bad man being surrounded by those who would commit perjury. Now, it is the judgment of this Court after watching Mrs. Perkinson carefully and after considering all of the aspects of this case that if I were a Plaintiff's lawyer in this case, I would like to have the Jury think that on the other side of me are a bunch of perjurers and people who would be surrounded by perjurers. Now, if there are perjurers, there are remedies for that. But the remedies are not in this courtroom at this time with this Judge or with this Jury. Those remedies are with the Teton County Prosecuting Attorney, probably a Judge other than John Troughton, perhaps Judge Ranck and perhaps other Defense Counsel than those that are seated in this courtroom and, clearly, a different Jury.

***549** [9] Yet another conflict on testimony is presented in this appeal. In cross-examination of Dr. Little, appellants' counsel inquired about his experience in the treatment of children who had osteomyelitis or septic arthritis. An irrelevancy objection was sustained. The inquiry followed an earlier motion to compel discovery which had required the doctor to answer questions concerning his treatment of MB, a specific patient with a similarly diagnosed condition. The relevancy may be indicated if we were to review the documents and file as furnished with discovery, but it is not in this record. Without an offer of proof at trial, this record fails to afford us a justification for disagreement with the discretional decision of the trial court. Assumption of fact in brief are not exchangeable for an adequately presented offer of proof in trial. *Nicholls v. Nicholls,* 721 P.2d 1103 (Wyo.1986); *Majority of Working Interest Owners in Buck Draw Field Area v. Wyoming Oil and Gas Conservation Com'n,* 721 P.2d 1070 (Wyo.1986).

We reverse and remand for retrial.

CARDINE, C.J., and THOMAS, J., filed special concurrence opinions.

BROWN, J., Retired, dissented in part and concurred in part and filed an opinion.

CARDINE, Chief Justice, specially concurring.

I concur in the opinion of the court and, with respect to instruction number 18, strongly urge that this kind of instruction should not be given a jury. It is argument, and it is confusing. Thus, it is incorrect to say that physicians and surgeons are not liable for mere errors of judgment. They are liable for error of judgment if those errors result from negligence, that is "the failure to exercise the skill, diligence and knowledge * * * reasonably * * * exercised * * * by members of the profession in good standing and in the same line of practice."

The balance of instruction number 18 seems to say that if the acts and omissions of the defendants are an exercise of honest judgment, and not unreasonable, defendants are not liable. This likewise is misleading and a questionable statement of law. The question is not whether the judgment ***550** of the physician and surgeon was honest or dishonest but whether the physician failed to exercise the skill, diligence, and knowledge reasonably exercised by others. Instruction number 18 states as a matter of law that a physician who acts honestly and reasonably is not liable. What if he acts hon-

estly and unreasonably-or acts dishonestly and reasonably? This kind of instruction is exceedingly confusing. More than that, the instruction as a whole seems to say in lay terms that a physician who acts honestly in reaching a judgment is not liable. That is not a correct statement of the law.

In the vast majority of these kinds of cases, it is enough to define for the jury negligence and cause in simple terms, as stated in instruction number 10 and other instructions found in the court's opinion.

Where a significant portion of the responsible medical community approves two different treatments for the same injury or condition, it is not negligence for a physician to choose one treatment over the other. For me, that does not involve an error of judgment at all. It is simply not negligence to choose either treatment. An example of two medical procedures for treating the same condition is the treatment of a ruptured disc. Neurologically the disc is removed without fusion. Orthopedically the vertebrae are fused. Both courses of treatment are common, accepted by the responsible medical community, and it generally is not negligence to treat a ruptured disc in either fashion.

An error is a mistake. A mistake may or may not result from negligence. But what is gained by telling the jury that an error carefully made does not result in liability? It is argumentative. It is confusing. It is a clever play on words which implies to the jury that a physician is not liable for an error in judgment. To balance the instructions, if number 18 is given, the court ought to advise the jury that a mere error in judgment is negligence for which a physician or surgeon is liable if such error results from negligence. As stated, it is better that neither instruction be given but that the term negligence be simply defined for the jury.

THOMAS, Justice, concurring specially.

I am in accord only with the result reached by the majority opinion. I have some views of my own with respect to the difficulties engendered by Instruction No. 18, and those views may accommodate more closely to the objection to that instruction by the plaintiffs as quoted in the separate opinion of Justice Brown. I perceive Instruction No. 18 as requiring the jury to accept the approval of the defendants' conduct by expert witnesses so long as that approval was honestly made and was reasonable. In his separate opinion, Chief Justice Cardine has pointed out some internal inconsistency in that instruction.

Beyond its inherent departure from established legal rules, my perception of the instruction is that it does create a standard for recovery which conflicts with other instructions which were given by the court and are quoted in the majority opinion. Particularly, it appears to me to be antithetical to Instruction No. 12.

Furthermore, it is not consistent with the general instruction, Instruction No. 1, which addresses the jury's role with respect to credibility of all witnesses. It is even more inconsistent with Instruction No. 6 relating to expert witnesses which reads as follows:

> "A person is qualified to testify as an expert if he has special knowledge, skill, expertise, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.
>
> "Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.
>
> "You are not bound to accept such an opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such *551 opinion if you find it to be unreasonable."

This court has articulated clearly the proposition that it is the prerogative of the trier of fact to determine what evidence is most dependable. E.g.,

State ex rel. Wyoming Worker's Compensation v. Colvin, 681 P.2d 269 (Wyo.1984); *Cederburg v. Carter,* 448 P.2d 608 (Wyo.1968); *Cimoli v. Greyhound Corporation,* 372 P.2d 170 (Wyo.1962). The vice in Instruction No. 18 is that, subject to the conditions attached, the jury is required by the instruction to accept the expert testimony. That is not, and should not, be the law. The jury is not required to accept it even if they find it to be honest and reasonable.

In addition, this court also has assigned specifically to the jury the evaluation of expert witnesses, suggesting that their testimony need not be accepted. E.g., *Oukrop v. Wasserburger,* 755 P.2d 233 (Wyo.1988); *Thomas v. Metz,* 714 P.2d 1205 (Wyo.1986); *Reed v. Hunter,* 663 P.2d 513 (Wyo.1983). An additional vice in Instruction No. 18 is the statement that the jury must find for the defendants based upon the approval of the "respectable portion of competent and reputable physicians or surgeons." The tenor of the instruction is antithetical to the function heretofore assigned to the jury by our cases.

These problems with Instruction No. 18 were exacerbated by other rulings of the district judge. His limitation on the use of expert witnesses by the plaintiff and the limitation of testimony by some of those witnesses was troublesome. The members of the jury could have concluded that, in addressing these matters as he did, the trial judge clearly indicated his position that the expert witnesses called by the plaintiff were not among that "respectable portion of competent and reputable physicians or surgeons." The demand for a "respectable portion of competent and reputable physicians or surgeons" also is contrary to the judge's ruling with respect to cumulative testimony. These matters, together with the refusal of the court to permit the plaintiffs to call the defendants as adverse witnesses in presenting their case in chief which was then followed by directed verdicts for lack of proof, all made painfully obvious the deprivation of a fair trial so far as the plaintiffs were concerned.

I add that denying the plaintiffs the right to call the defendants as adverse witnesses in presenting their case in chief is not a neutral ruling. When called in the case presented by the defendants, counsel have a clear opportunity to tailor the testimony in chief. Cross-examination then can be severely limited to the scope of the direct examination, and it may turn out to be impossible for the plaintiffs to present the significant points supporting their theory. Furthermore, a substantial difference exists between the presentation by the plaintiffs, through questions permitted on cross-examination of salient points followed by an explanation, and the converse in which the defendants first of all present their story and counsel for the plaintiffs must then try to attack a prepared and planned presentation. In the context of weighing testimony, the latter is far less favorable to a plaintiff, which is why a plaintiff is permitted to call a defendant as an adverse witness in his case in chief.

BROWN, Justice, Retired, dissenting in part and concurring in part.

The majority holds that giving Instruction Number 18 was reversible error. It states that appellants' challenge to instructions is the principal issue on appeal. The court was particularly wroth because the trial court used the terms "honest judgment" and "honestly" in its instruction, and states that the instruction "bespeaks in responsibility to moral decision and honesty."

In the context of Instruction Number 18 and the other eight malpractice instructions, it is inconceivable that the jury could have been misled and thought defendants' conduct would be excused as long as their judgment was not fraudulent or morally improper.

Webster's Third New International Dictionary 1086 (1971), defines "honest" in part as: "candid presentation of the facts," *552 "free of ostentation or pretense," "of a creditable nature." Honesty is defined on the same page as "adherence to the facts." In context, the words "honest" and

"honesty" used in Instruction Number 18 could only mean adherence to the facts and the jury could not have rationally thought otherwise.

Arguably, terms more precise than "honest" and "honestly" could have been used in the instruction. However, these terms are not novel. In *Smith v. Beard,* 56 Wyo. 375, 110 P.2d 260, 270 (1941) (quoting *Staloch v. Holm,* 100 Minn. 276, 111 N.W. 264, 267 (1907)), this court said: " 'It would be * * * unreasonable to hold a physician responsible for an *honest error of judgment* on so uncertain problems as are presented in surgery and medicine.' " (Emphasis added.)

Appearing on the same page of the opinion in Smith, the terms "honest judgment" and "honestly made" are used. Justice Blume certainly was not using the terms honest and honestly as opposed to the terms fraudulent, lying, larceny or some other moral deficiency.

The Supreme Court of Minnesota wrote that at least twenty-nine other jurisdictions follow the rule that physicians are not liable for honest errors in judgment. In *Ouellette by Ouellette v. Subak,* 391 N.W.2d 810 (Minn.1986), the court stated:

> "Cases of malpractice may be within the exception. A physician entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent *upon an honest mistake or an error of judgment* in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved or as to what should have been done, in accordance with recognized authority and good current practice. * * *
>
> " * * * Most professional men are retained or employed in order that they may give the benefit of their peculiar and individual judgment and skill. A lawyer, for example, does not contract to win a lawsuit, but to give his best opinion and ability. He has never been held to liability in damages for a failure to determine disputed questions of law in accordance with their final decision by courts of appeal. It would be just as unreasonable to hold a physician responsible for an *honest error of judgment* on so uncertain problems as are presented in surgery and medicine."

[Staloch,] 100 Minn. at 280-283, 111 N.W. at 266-67.

Moreover, in protecting a physician from liability for mere errors in judgment in choosing between alternate diagnoses or treatments, this court has followed a rule recognized by at least 29 other jurisdictions. See also W. Keeton, D. Dobbs, R. Keeton and P. Owen, Prosser & Keeton on the Law of Torts 186 (5th Ed.1984).

Id. at 814 (emphasis added and footnote omitted).

In *Watson v. Hockett,* 107 Wash.2d 158, 727 P.2d 669, 673 (1986), the court stated:

> The "error of judgment" instruction unanimously upheld by this court in Miller, and also proposed by Dr. Hockett in this case, is also proper:
>
> "A physician or surgeon is not liable for an *honest* error of judgment if, in arriving at that judgment, the physician or surgeon exercised reasonable care and skill, within the standard of care he was obliged to follow."

(Italics ours.) *Miller,* 91 Wash.2d at 160 n. 4, 588 P.2d 734. Henceforth, however, the italicized word "honest" should not be used in those cases where it is appropriate to give this instruction. This is because the use of the word "honest" imparts an argumentative aspect into the instruction which, as discussed above, does not coincide with current jury instruction practice.

See also *Perkins v. Walker,* 406 N.W.2d 189 (Iowa 1987); *Miller v. Kennedy,* 91 Wash.2d 155, 588 P.2d 734 (1978) ("honest" *553 error of judgment instruction upheld). In 61 Am.Jur.2d, Physicians & Surgeons, § 209 (1981), the term "honest error" is used in discussing professional judgment.

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.* " W.R.C.P. 51 (emphasis added). At the instruction conference, counsel for appellants objected to giving Instruction Number 18, stating:

> In the first instance, your Honor, I think that *Vassos v. Roussalis,* where it defines what negligence is,-I mean, what standard of care is, impliedly overrules any case that would additionally instruct on the issue of error of judgments on the first instance. Probably the vast majority of any case in the exercise of medicine requires judgment. The question-and that evidence comes into the trial. It's up to the Jury to determine if, from the facts of the case, that's excused by knowledge, skill and diligence in the evidence. To instruct about judgment, particularly, calls the attention to the Jury of one of many issues that they've heard in the evidence and in certain circumstances, could-could be tantamount to issuing a directed verdict in our judgment.
>
> Two, I don't think anything in *Conway v. Wright* suggests that the language of the decision should be given as an instruction. And I think that, clearly, this sets up a situation where a professional judgment being exercised, in almost any case, requires the Plaintiffs to almost prove, you know, beyond a reasonable doubt or prove some kind of burden far greater than the law requires. The instruction, in my judgment, simply,-you know, it's unnecessary to give and it does tend to direct a verdict against because, you know, all I have to say is while this was a judgmental issue, that's for the Jury to decide.

It is most difficult to determine precisely what appellants are complaining about. At the instruction conference, they talk about the instruction imposing on them a burden of proof "beyond a reasonable doubt" and a tendency to "direct a verdict against them." It is noted in appellants' objection that they do not complain about the use of the terms "honest judgment" and "honestly." This latent concern about these terms apparently developed on appeal.

W.R.C.P. 51 is designed to assist the trial court to correct potential errors in the instructions. The purpose of the rule is defeated if alleged errors are asserted for the first time on appeal. Perhaps if appellant had properly objected, the court would have deleted the terms "honest" and "honestly" or substituted acceptable terms. Appellants' objection to Instruction Number 18 does not minimally comply with Rule 51, and they should not now be heard to complain.

In its opinion, the majority addresses other issues raised by appellants, and is critical of many of the trial court's rulings and determinations. However, the majority's reversal is not based on those additional issues. Those issues are discretionary matters with the trial court. I see no abuse of discretion and would therefore affirm the trial court in its determinations.

With respect to granting a directed verdict in favor of Charles Everts, M.D., the radiologist, I concur only in the result determined by the majority. I agree with the trial court that there was not competent evidence of any direct, proximate cause between the conduct and actions of Dr. Everts and the injuries appellants contend occurred. The trial court, however, improperly granted the directed verdict without allowing appellants to call Dr. Everts as an adverse witness in their case in chief. Had Dr. Everts testified as an adverse witness, it is highly unlikely that he would have made appellants' case, but appellants had a right to try to cure the deficiencies in their proofs through the testimony of appellee Everts.

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(Cite as: 768 P.2d 534)

I would reverse the trial court in granting a summary judgment to Dr. Everts and affirm in all other respects.

Wyo.,1989.
Kobos By and Through Kobos v. Everts
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END OF DOCUMENT

EXHIBIT G

780 F.2d 902, 19 Fed. R. Evid. Serv. 1434
(Cite as: 780 F.2d 902)

United States Court of Appeals,
Eleventh Circuit.

Kenneth JOHNSON, as Personal Representative of the Estate of Carlos Clintell Johnson, a deceased minor, and Kenneth Johnson, individually and Brenda Johnson, individually, Plaintiffs-Appellees,
v.
UNITED STATES of America, Defendant-Appellant.

Kenneth JOHNSON, as Personal Representative of the Estate of Carlos Clintell Johnson, a deceased minor, and Kenneth Johnson, individually and Brenda Johnson, individually, Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.

Nos. 84–5308, 84–5347.
Jan. 21, 1986.

Parents of infant who died of iron poisoning brought medical malpractice action against United States. The United States District Court for the Southern District of Florida, Alcee L. Hastings, J., entered $2,000,000 judgment for plaintiffs, and United States appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) exclusion of testimony of Government's expert as cumulative was abuse of discretion; (2) record did not justify award of $2,000,000; and (3) plaintiffs were not entitled to award of attorney fees.

Vacated and remanded.

Kravitch, Circuit Judge, filed specially concurring opinion.

West Headnotes

[1] Federal Civil Procedure 170A ⚿2011

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In General. Most Cited Cases

Exclusion of testimony of Government's expert, who was professor of pediatrics at medical school and director of poison control center, as cumulative was abuse of discretion in medical malpractice action brought against United States by parents of infant who died of iron poisoning after being transferred to another hospital from air force base hospital where parents had taken him after he had consumed a number of iron tablets; the expert's testimony would have been based in part on evidence not relied upon by Government's two other experts, his analysis was somewhat different and his testimony more comprehensive, and he had different, and arguably better qualifications than the other experts. 28 U.S.C.A. §§ 1346, 2671 et seq.; Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[2] Federal Courts 170B ⚿644

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk644 k. Motions for New Trial. Most Cited Cases

Issue of excessiveness of damages, raised during trial without a jury and ruled on by trial court, did not have to be raised again in motion for new trial in order to be preserved for review on appeal.

[3] Death 117 ⚿93

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k93 k. Exemplary Damages. Most Cited Cases

Death 117 ⚿95(4)

117 Death

117III Actions for Causing Death
117III(H) Damages or Compensation
117k94 Measure and Amount Awarded
117k95 In General
117k95(4) k. Loss of Services of Child. Most Cited Cases

Evidence which consisted of mortality table and parents' testimony did not justify award of $2,000,000 in medical malpractice action brought against United States by parents of 21–month-old infant who died of iron poisoning after being transferred to another hospital from air force base hospital where parents had taken him after he had consumed a number of iron tablets; award was to be restricted to mental pain and suffering and was not to include any punitive consideration. 28 U.S.C.A. §§ 1346, 2671 et seq., 2674; West's F.S.A. § 768.21(1, 4); F.S.1971, § 768.03.

[4] Evidence 157 ⚿350

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k350 k. Unofficial Writings in General. Most Cited Cases

Exclusion of "risk management report" prepared by insurance adjuster on behalf of hospital under its state statutory duty to maintain such a report was within federal district court's discretion in medical malpractice action brought against United States by parents of infant who died of iron poisoning after being transferred to another hospital from air force base hospital where parents had taken him; the report was prepared 18 days after the child's death and contained, among other things, informal physicians' opinions, and, although not controlling in federal court, the statute requiring the report [West's F.S.A. § 768.41(1)(d), (4)] provides that the report is not admissible. Fed.Rules Evid.Rule 803(6, 8), 28 U.S.C.A.

[5] Federal Courts 170B ⚿901.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk901 Exclusion of Evidence
170Bk901.1 k. In General. Most Cited Cases
(Formerly 170Bk901)

Exclusion of letter, offered by Government as admission against interest by authorized agent of party opponent, sent by plaintiffs' counsel to physician at hospital where plaintiffs' infant son died of iron poisoning after being transferred there from air force base hospital where parents had taken him after he had consumed a number of iron tablets, which letter related to number of pills ingested and swiftness of the parents' response, if error at all, was harmless, since the letter and its essential contents were used for impeachment and since the trial judge, who was the trier of fact, examined the let- ter.

[6] Health 198H ⚿812

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk812 k. Parties. Most Cited Cases
(Formerly 204k8 Hospitals)

Parent of infant who died of iron poisoning after being transferred to another hospital from air force base hospital where parents had taken him after he had consumed a number of iron tablets was proper party in medical malpractice action brought against the United States. Fed.Rules Evid.Rule 615, 28 U.S.C.A.; West's F.S.A. §§ 768.16–768.27.

[7] Federal Civil Procedure 170A ⚿2019

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2017 Objections
170Ak2019 k. Failure to Object; Waiver. Most Cited Cases

Federal Courts 170B ⚿904

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk904 k. Trial in General. Most Cited Cases

Defendant's failure to object, during trial of medical malpractice action, to trial judge's "outside research" which consisted of consulting medical journals not in evidence prior to hearing expert testimony apparently in order to familiarize himself with the subject matter and to put technical testimony into context, constituted procedural default; in any event, trial judge stated he did not rely on those outside sources in reaching his conclusions.

[8] Federal Courts 170B ⚿705

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(G) Record
170Bk701 Questions Presented for Review
170Bk705 k. Verdict, Findings or Decision; Amount of Recovery, Costs. Most Cited Cases

Court of Appeals was without jurisdiction to entertain appeal on issue of award of costs where record on appeal did not indicate that district court had ruled on defendant's motion to vacate clerk's award of costs. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.; 28 U.S.C.A. § 1920.

[9] United States 393 ⚿147(13)

393 United States
393IX Actions
393k147 Costs
393k147(11) Nature of Action or Proceeding
393k147(13) k. Torts. Most Cited Cases
(Formerly 393k147)

Parties who prevailed in medical malpractice suit against the United States were not entitled to attorney fee award even though state statute [West's F.S.A. § 768.56] provides that prevailing party in medical malpractice suit is entitled to attorney fees. 28 U.S.C.A. §§ 2412, 2412(b).

*903 Stanley Marcus, U.S. Atty., Jeffrey D. Fisher and Linda Collins Hertz, Asst. U.S. Attys., Miami, Fla., for defendant-appellant.

Charles Stack, High, Stack, Lazenby, Bender, Palahach & Lacasa, P.A., and Philip J. Cole, Coral Gables, Fla., for plaintiffs-appellees.

Appeals from the United States District Court for the Southern District of Florida.

904 Before RONEY and KRAVITCH, Circuit Judges, and THOMAS [FN], District judge.

FN* Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

RONEY, Circuit Judge:

In this medical malpractice action brought under the Federal Torts Claims Act (FTCA), the United States appeals from a $2 million judgment awarded to the plaintiffs, parents of an infant who died of iron poisoning. Plaintiffs cross-appeal the denial of attorney's fees. The Government challenges a variety of evidentiary rulings, certain "outside research" of the trial judge, numerous factual findings, the taxing of costs, and the amount of damages. We vacate and remand because a Government expert witness was erroneously precluded from testifying and because the verdict is excessive and appears to be based on considerations inappropriate in a tort claims case. The denial of attorney's fees is affirmed because this Court has recently decided that attorney's fees may not be awarded against the United States in a case of this kind.

Early on the morning of November 2, 1980, plaintiffs' twenty-one-month-old son, Carlos, consumed a large quantity of iron tablets. Carlos be-

came ill and was taken by his parents to Homestead Air Force Base Hospital (Homestead) where he was treated for acute iron intoxication. At approximately 2:00 p.m. he was transferred to Jackson Memorial Hospital (Jackson Memorial) where he died shortly after midnight.

Many facts in this case were vigorously disputed: the number of pills the child ingested, the time at which he ingested them, the date on which the mother received the pills which would indicate the number of pills left on the date of ingestion, the amount of time that elapsed between the parents' discovery of the child's illness and their arrival at Homestead, and the accuracy of a lab slip indicating a "free iron level" of 9170 micrograms per deciliter (mg/dl). These disputed facts bear on the degree of iron toxicity in the child's system present at various times, whether Carlos' life might have been saved given proper and timely treatment, and what party, if any, was at fault for not correctly identifying or treating the condition. The trial court concluded that at least ten specific actions by Homestead fell below the standard of care required of that type of medical facility, and that its more than three-hour delay in administering deferoxamine (an iron antidote) and its failure to transfer him to a higher care facility sooner, caused Carlos' death. The Government contended that Carlos would have died regardless of the treatment that could have been given him.

I. *Exclusion of the Expert Witness*

The Government contends that the trial court abused its discretion in excluding the testimony of Dr. Albert Rauber, professor of Pediatrics at Emory University Medical School in Atlanta, and director of the Poison Control Center.

When the Government sought to produce Dr. Rauber as its third expert witness, counsel became involved in a vigorous dispute over whether the Government had waived its right to call Dr. Rauber when it allegedly stipulated regarding experts. The trial court was obviously troubled over this dispute and stated that counsel had put the court in a difficult position. At the end of the colloquy, the court indicated that it would exclude Dr. Rauber's testimony because of the stipulation but then stated that it would also exercise its discretion to limit the number of witnesses under Fed.R.Evid. 403. After that, Government counsel was permitted to proffer Dr. Rauber's expected testimony.

Our review of the record leads us to the conclusion that the alleged stipulation relied on by plaintiffs was in fact limited to an agreement that each party would allow two experts to be deposed without subpoena. It does not appear that the Government explicitly waived its right to call more ***905** than two experts at trial, nor did it ever explicitly waive its right to call Dr. Rauber.

Analysis of this issue, therefore, turns on Rule 403. Under Rule 403, relevant evidence may be excluded for considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The power to conduct orderly trials includes the power to exclude or limit expert testimony. *United States v. Thevis,* 665 F.2d 616, 633–34 (5th Cir. Unit B 1982) (criminal trial); *Campbell Industries v. M/V Gemini,* 619 F.2d 24, 27 (9th Cir.1980) . " Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value. If the evidence is crucial the judge would abuse his discretion in excluding it." Weinstein's Evidence, Para. 403[06] at 403–59–60 (1982).

The propriety of excluding Dr. Rauber's testimony under Rule 403 turns on whether his testimony would have been cumulative. Two expert witnesses testified at trial for the Government. Dr. James Hillman, Director of Pediatric Emergency Care Center, Tampa General Hospital, and Medical Director of the Tampa Bay Medical Poison Control Center was of the opinion that it would have made no difference whatsoever if Carlos had begun receiving intravenous (I.V.) desferal (an iron antidote) the minute he entered Homestead because it would, even then, not have been possible to bind (neutralize) all the free iron in his blood fast

enough to save him. In his opinion the only chance of saving Carlos' life would have been to begin treatment within twenty minutes of ingestion. Dr. Hillman testified that Homestead did as good a job as they could have, given the facility and the circumstances. Despite seeming to acknowledge that the deferoxamine and the I.V. treatments could have begun somewhat earlier, and the Homestead medical records could have been more complete, he was still of the opinion that this had no impact whatsoever on Carlos' death. When responding to the court's questions about dialysis or transfusions as a mode of treatment, Dr. Hillman responded that the problem was that transfusions only provide access to circulating blood while the poison, here iron, is in the tissues and in "many different spaces." Therefore, although iron might be removed from the blood, there is no corresponding clinical improvement in the patient. Similarly, he believed deferoxamine would have been of limited, if any, help because it only binds one iron tablet every three hours, while the intestines and tissues continue to absorb the iron. When questioned about Carlos' serum iron level, free iron level, total iron level and binding capacity, Dr. Hillman testified that because Carlos' iron level was over 9000 mg/dl at 3:00 p.m. by a conservative estimate, it was 25% to 30% what it had been within two to three hours of ingestion. This figure "peaks out" early, within two to three hours of ingestion, then "decays" rapidly. For this reason, Dr. Hillman surmised that if Carlos' iron level was 9,000 at three o'clock at least eight hours after ingestion, then it must have been 20,000 or 30,000 at peak value. According to Dr. Hillman, a 1000 mg/dl level is potentially lethal. Dr. Hillman was aware of no child or adult who had survived an iron level in excess of 9,000. He believed Carlos must have ingested "above 40," pills, and "in the 50's at least," to explain the very high iron level so late in the day, that the distribution of pills through the small intestine goes to a long period of ingestion, and that the pills were ingested "very early" in the day.

The second Government expert witness was Dr. Eugene Gitlin, director of medical services, Parkway Regional Medical Center, director of the Emergency Department of that hospital, associate clinical professor at the University of Miami School of Medicine, associate medical director of Dade County Fire Rescue, teacher of Emergency Medicine at the VA hospital and board certified in internal medicine and emergency medicine. Dr. Gitlin was of the opinion that Homestead was within the standard of care required of that type of facility. He concluded that Carlos had ingested a "huge" amount of iron, 50–60 pills was not inconceivable, a lethal dose according to *906 Dr. Gitlin. A blood iron level over 9000 mg/dl was an "extraordinary level." He testified that even if treatment had been started within an hour of ingestion, Carlos could not have been saved. After reviewing all the documents which were furnished to him, including medical records and statements of the various treating physicians at Jackson Memorial Hospital, Dr. Gitlin concluded that the child could not have been saved even if he had been brought to Jackson Memorial under the conditions specified.

The district court would not admit the testimony of Dr. Albert Rauber. According to the proffer of Government counsel during trial, Dr. Rauber has been a full professor of Pediatrics at Emory University Medical School since 1971. He is the director of the Georgia Poison Control Center and would have been the only expert board qualified in Medical Toxicology. He is also board qualified in Pediatrics.

He would have testified, based on his expertise in Child Behavior, that it is unlikely that Carlos sat down and ate 40–50 pills "at one sitting." This would indicate that the child consumed the pills over a long period of time, allowing more time for absorption prior to arrival at Homestead. In addition, Dr. Rauber was going to "draw on" certain evidence not discussed at trial: medical records, s-g-o-t and s-g-p-t, which are measures of liver and kidney functions. In Dr. Rauber's view, the deterioration in those vital organ functions would not

have occurred as rapidly had the child eaten the pills at 7:00 or 7:30 a.m.

Dr. Rauber, like the other Government experts, believed that Homestead's treatment was reasonable and within the standard of care. He would testify that the blood iron level was accurate and very important in that it is a basis from which to go back and "determine the amount of iron that was absorbed, as opposed to ingested." He would also have testified that iron is stored in many places in the body, not just in the blood, so "the absorption of free iron in the blood is not in the process of absorbing iron. It flows in from the tissues and must first be absorbed from the bloodstream."

"Basically," Dr. Rauber's testimony would have been "that drawing free iron out of the blood does not end the absorption of iron, [t]hat it also comes out of the tissues [, and that] the mother's delay in presenting the child in the early time of ingestion was in fact the cause of death...."

It appears Dr. Rauber's testimony would have been based in part on evidence not relied upon by the other experts, namely the liver and kidney function tests. His analysis was somewhat different. His testimony concerning the biochemistry of iron absorption and treatment would have been more comprehensive than that of the other Government experts and was, therefore, at least partially noncumulative. Dr. Rauber had different, and arguably better qualifications than the other experts.

[1] Our review of the record leads us to the conclusion that the Government should be able to submit the testimony of Dr. Rauber to the court. Liability in this case turns on a proper analysis of highly technical material and the highest qualified expert should be available to the court. Inasmuch as this is a trial without a jury, no new presentation of the other evidence before the court need be made, but the court must reconsider all of the evidence in light of Dr. Rauber's testimony, and reconsider its decision as to liability.

Although the case is remanded for further evidentiary proceedings and reconsideration of liability, it is appropriate for this Court to rule upon the other issues raised on appeal for guidance to the district court on remand.

II. *Damages*

[2] Although the judgment for $2,000,000 is vacated because of the problems at the liability stage, this Court would have vacated the judgment as excessive in any event. Plaintiffs contend the Government is foreclosed from challenging the amount of damages on appeal because it was not challenged in the motion for new trial. *907 Where, as here, damages are set by the judge instead of a jury, issues raised during trial and ruled on by the trial court need not be raised again in a motion for new trial in order to preserve them for review on appeal. *United States v. Harue Hayashi,* 282 F.2d 599, 601 (9th Cir.1960). The district court awarded each parent $1 million for "future loss of support and services [and for] past and future mental pain and suffering for the duration of their respective lives."

This Circuit has held that the "components and measure of damages in FTCA claims are taken from the law of the state where the tort occurred...." *Harden v. United States,* 688 F.2d 1025, 1029 (5th Cir. Unit B 1982) (quoting *Ferrero v. United States,* 603 F.2d 510, 512 (5th Cir.1979)); 28 U.S.C.A. § 2674. Under Florida law, Fla.Stat.Ann. §§ 768.21(1) and (4), the parents of a deceased minor child may recover as follows:

> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the dura-

> tion of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered....
>
> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury.

The predecessor statute to this statute was Fla.Stat.Ann. § 768.03 (1963), repealed in 1972, which stated in pertinent part: "[T]he father of such minor child, or if the father be not living, the mother may maintain an action ... and may recover, not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may access." Case law interpreting the predecessor statute has been held applicable to cases arising under the new damages statute. *Smyer v. Gaines,* 332 So.2d 655, 659 (Fla. 1st DCA 1976).

Florida appellate courts rely heavily on the damages awarded by juries in similar cases. In *Gresham v. Courson,* 177 So.2d 33 (Fla. 1st DCA 1965), the Florida appellate court reduced the jury damage award to a father for the death of his eleven-month-old son (1) for lack of evidence upon which to predicate the high damages, and (2) because the award was very high compared to the "trend" in the jurisdiction. The court said:

> [T]he appellate courts have been and always will be unable to devise a measure or scale by which to fix with mathematical certainty the minimum and maximum limits of the verdict which a jury may lawfully return in the suit of a surviving parent for the wrongful death of his child under the facts and circumstances peculiar to a particular case. In appeals testing the amount of the verdict and judgment there is no better criterion available than as stated by Mr. Justice Terrell in Florida Dairies Co. v. Rogers, supra, and it must of necessity be applied here. In that context, if the verdict and resulting judgment do not bear a reasonable relation to the philosophy and general trend of prior decisions in such cases, the judgment must be either set aside and a new trial awarded or a remittitur imposed reducing it to an amount which the appellate court in the exercise of its discretionary powers and in good conscience deems sustainable.

Id. at 39–40. The court had previously noted what Mr. Justice Terrell said in *Florida Dairies Co. v. Rogers,* 119 Fla. 451, 161 So. 85, 88 (1935), as follows:

> In cases where damages for mental pain and suffering are allowed, it must bear some reasonable relation to the facts, the status of the parties, the ***908** amount allowed as compensatory damages, and the philosophy and general trend of decisions effecting such cases. When we say that the amount allowed must bear some reasonable relation to such factors, we do not mean that it must be equal to, be twice these, or bear any other arbitrary relation to them, but what we do mean is that these and other cognate factors are proper elements on which the allowance may be predicated. It cannot be predicated on the basis of restitution.
>
> 177 So.2d at 37–38.

[3] In this case, a mortality table and the parents' testimony were offered as evidence of damages, and nothing more. There is nothing in this record to show the base upon which this large judgment rests. There was no evidence regarding the value of services or support. *Gresham* said that "unless the deceased child had some extraordinary income-producing attributes, the cost of maintaining it to maturity would normally exceed the value of any services which might likely be rendered by the child to the parent." *Id.* at 37. It seems quite apparent that the award here must be restricted to mental pain and suffering.

In showing excessiveness, the party challenging damages may show that the amount is unsupported by the evidence. *Bould v. Touchette,* 349

So.2d 1181, 1184 (Fla.1977). A verdict must be set aside if it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the trier of fact may properly operate.

Although excessiveness may be tested by comparing the verdict to those damage awards determined not to be excessive in similar cases, *Sanders v. Nabisco, Inc.,* 359 So.2d 46 (Fla. 1st DCA 1978); *Loftin v. Wilson,* 67 So.2d 185 (Fla.1953), we have been unable to find any reported case in Florida with an award this high. Perhaps some research or compilation of similar cases tried in Florida is available that could be submitted to the court and could thus be made a part of the record to furnish a basis for the amount that should ultimately be awarded.

Nothing has been presented to us, however, and there is nothing in the record before the district court to justify the amount of damages awarded in this case. A plaintiff has the burden of justifying the amount of damages that can be awarded even though the loss of an infant child can be so devastating that monetary damages are incalculable. The determination of liability was a close call, at best, and there is no base upon which to permit any punitive consideration to become involved in a damage award. In any event, the FTCA specifically prohibits an award of punitive damages. Courts should guard against punitive and emotional considerations influencing awards of damages under the FTCA. If liability is found on remand, the district court should conduct a further hearing on damages and set a damage award consistent with the opinion.

Several other evidentiary issues were raised on appeal. We affirm the district court's ruling in each instance, with the following point-by-point discussion.

III. *Exclusion of The Risk Management Report*

[4] The district court excluded from evidence a "risk management report" prepared by an insurance adjuster on behalf of Jackson Memorial under its statutory duty to maintain such a report, Fla.Stat.Ann. § 768.41(1)(d). The report was prepared November 20, 1980, eighteen days after the child's death, and contained, among other things, informal physicians' opinions. In argument over the correctness of the district court's ruling, neither party has noted that the statute which requires the preparation of the risk management report specifically provides that those reports are not admissible in evidence:

> The incident reports shall be considered to be part of the work papers of the attorney defending the establishment in litigation relating thereto and shall be subject to discovery, but not be admissible as evidence in court....

*909 Internal Risk Management Statute, Fla.Stat.Ann. § 768.41(4).

Florida has thus made a legislative judgment that in order to insure the reliability and efficacy of the required reports, they should not be subject to use in litigation. *See also Palmer v. Hoffman,* 318 U.S. 109, 113, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Although not controlling in federal litigation where the Federal Rules of Evidence apply, the statute undergirds the decision of the trial court. After reading the document, the district court found that it was not admissible under either the business records or public records exception to the hearsay rule, Fed.R.Evid. 803(6) and (8).

Given the circumstances under which the report was prepared and the inclusion in it of non-contemporaneous unofficial statements, when viewed in the context of the above cited statute, it was within the district court's discretion to exclude the report from evidence.

IV. *Exclusion of Letter From Counsel to Expert*

[5] The district court excluded a letter sent by plaintiffs' counsel, Mr. Cole, to Dr. Holzman, an employee at Jackson Memorial. Plaintiffs assert Dr. Holzman was a potential plaintiffs' expert witness and that the letter was written to him in that capacity. In the letter, Cole stated that "the child con-

sumed 30 to 50" iron pills, that the bottle of pills was purchased "approximately October 25, 1980," and that plaintiffs discovered the ingestion at 7:00 a.m. on November 2, 1980. The letter, bearing on the number of pills ingested and the swiftness of the parents' response, is relevant to the issue of fault. After reading the letter and hearing argument concerning its admissibility, the district court permitted its use for purposes of impeachment, but would not admit it into evidence for the truth of the matter stated.

Defendant, asserting that the exclusion constitutes reversible error, views the letter as an admission against interest by the authorized agent of a party opponent, Mrs. Johnson. According to plaintiffs, however, Cole had never met or spoken with Mrs. Johnson at the time the letter was written and the letter was protected under the attorney work product rule. It is apparent that any possible error arising from exclusion of the letter, if error at all, was harmless. *First,* the letter and its essential contents were used for impeachment. *Second,* the trial judge, here the trier of fact, examined the letter.

V. *No Exclusion of Mrs. Johnson*

[6] Reiterating an argument raised and rejected in pre-trial motions, the Government contends Mrs. Johnson is not a proper party and that the district court therefore erred in refusing to exclude her from the courtroom during trial under Fed.R.Evid. 615.

Under the Florida Wrongful Death Statute, survivors or parents of deceased minor children are not explicitly excluded from joining as parties. Fla.Stat.Ann. §§ 768.16 – 768.27. Mr. and Mrs. Johnson were both individually listed on the complaint as parties and were awarded damages in their individual capacities. The district court did not err in allowing Mrs. Johnson to remain in the courtroom during trial.

VI. *Trial Judge's "Outside Research"*

This case involved extended and complex medical and scientific testimony on the nature of iron poisoning. The appropriate treatment, survival rates, and etiology are a matter of dispute in the medical community. The trial judge, apparently in order to familiarize himself with the subject matter and to put technical testimony into context, consulted medical journals not in evidence prior to hearing the expert testimony. On at least two occasions his questioning of expert witnesses referred to the journals or reflected his familiarity with the literature.

On appeal the Government alleges the trial court abused its discretion in denying a new trial because the "outside research" deprived it of the right to trial by an impartial factfinder and to challenge adverse facts made known to the factfinder. The trial judge denied the motion for a new trial because (1) the Government had failed ***910** to object during the trial, (2) he did not rely on those "outside sources," and (3) any error was harmless.

It is a matter of common knowledge that courts occasionally consult sources not in evidence, ranging anywhere from dictionaries to medical treatises. *See, e.g., Roe v. Wade,* 410 U.S. 113, 129–162, 93 S.Ct. 705, 715–731, 35 L.Ed.2d 147 (1973). A trial judge's findings are not necessarily tainted simply because he brings his "experience and knowledge to bear in assessing the evidence submitted at trial." *Hersch v. United States,* 719 F.2d 873, 879 (6th Cir.1983). The trial judge may not, however, undertake an independent mission of finding facts "outside the record of a bench trial over which he [presides]." *Price Brothers Co. v. Philadelphia Gear Corp.,* 629 F.2d 444, 447 (6th Cir.1980).

[7] It was obvious at trial that the trial judge had done "outside research." The Government's failure to object during trial constitutes procedural default. In any event, the trial judge stated he did not rely on those outside sources in reaching his conclusions and this appellate court relies on those representations.

VII. *Taxing of Costs*

On March 5, 1984, the Clerk of Court for the Southern District of Florida, pursuant to 28 U.S.C.A. § 1920, taxed the Government $14,238.90 for plaintiffs' costs under Fed.R.Civ.P. 54(d), which provides that "[o]n motion served within 5 days thereafter, the action of the Clerk may be reviewed by the court." The Government, which prior to March 5th had prematurely filed itemized objections, filed a "Motion to Vacate Clerk's Award of Costs and Memorandum" on March 8, 1984, incorporating its previous itemized objections, wherein it asked the court to "vacate the Clerk's award of costs pending a ruling on defendant's objections to the items of cost sought by plaintiffs."

[8] This record does not indicate that the district court has ruled on the Government's March 8, 1984, Motion to Vacate. We are, therefore, without jurisdiction to entertain an appeal on the issue of costs at this time. Upon remand, the district court will have an opportunity to rule on the cost issue.

VIII. *Attorney's Fees Under FTCA*

After the district court awarded $2 million in damages to the plaintiffs, the plaintiffs filed a petition for attorney's fees. The court, asserting discretion under the Equal Access to Justice Act (EAJA), 28 U.S.C.A. § 2412(b), declined to make a specific fee award, indicating that the $2 million in damages was intended to include attorney's fees: "Plaintiffs' recovery [is] adequate to allow for the payment of attorneys' fees from that recovery, not to exceed the statutory limit of 25% of the Final Judgment."

[9] In Florida, a prevailing party in a medical malpractice suit is, by statute, entitled to attorney's fees. Fla.Stat.Ann. § 768.56. This Circuit, however, recently held that the Florida medical malpractice attorney's fee provision does not entitle prevailing parties to a fee award against the United States under either the Federal Torts Claims Act or under the Equal Access to Justice Act (EAJA). *Joe v. United States,* 772 F.2d 1535, 1536 (11th Cir.1985).

The Court in *Joe* found nothing in either the FTCA or the EAJA to indicate that courts should diverge from the " 'American rule' " which "refers to the tradition in the United States that litigants must bear their own attorney's fees." *Id.* at 1537. The district court, therefore, had no authority to separately award attorney's fees against the United States and should not have included in its damage judgment any amount "for the payment of attorney's fees." Thus, the denial of a separate judgment for fees is affirmed. Although we have already reviewed the excessiveness of the damage award, it would in any event have to be reconsidered because the district court included in it an amount for attorney's fees.

VACATED and REMANDED.

KRAVITCH, Circuit Judge, specially concurring:

Although concurring in the result, I would admit in evidence the letter from Mr. Cole to Dr. Holzman as an admission against interest by the authorized agent of a party. Rule 801(D)(2)(D), Federal Rules of Evidence. The letter in question was written by one of plaintiff's counsel of record during the course and within the scope of his authority as counsel. The plaintiff contends that the Rule does not apply because the attorney had never, at that time, spoken to Mrs. Johnson. I see no merit to this argument.

The plaintiff also contends that the letter is privileged as being the work product of the lawyer. While the document in question was prepared by the lawyer in anticipation of litigation, I do not believe it to contain privileged information, nor was it a work product as contemplated by the Rules.

C.A.11 (Fla.),1986.
Johnson v. U.S.
780 F.2d 902, 19 Fed. R. Evid. Serv. 1434

END OF DOCUMENT

EXHIBIT H

Westlaw.

626 So.2d 467
(Cite as: 626 So.2d 467)

H

Court of Appeal of Louisiana,
Third Circuit.

Anthony FREDERICK, et al., Plaintiffs-Appellants,
v.
WOMAN'S HOSPITAL OF ACADIANA, et al.,
Defendants-Appellants.

No. 93-187.
Nov. 3, 1993.

Parents brought medical malpractice action to recover for injuries sustained by their daughter prior to birth. The Fifteenth Judicial District Court, Parish of Lafayette, Don Aaron, J., entered judgment on jury verdict for attending physician and hospital, and parents appealed. The Court of Appeal, Saunders, J., held that: (1) cumulative expert testimony was properly admitted; (2) evidence supported finding of no negligence on part of attending physician; (3) trial court was justified in excluding videotape sought to be admitted by parents to establish bias of defense expert; and (4) improper reference to collateral source benefits did not necessitate mistrial or new trial.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿1008.1(8.1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(8) Particular Cases and Questions
30k1008.1(8.1) k. In General. Most Cited Cases

Trial court's failure to articulate basis for permitting multiple experts to testify as to standard of care practiced by physician meant that reviewing court was unable to offer usual deference attributed to such findings.

[2] Evidence 157 ⚿146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Provision of Evidence Code dealing with exclusion of relevant evidence requires balancing probative value of evidence against not only unfair prejudice, but against considerations of undue delay or waste of time as well. LSA-C.E. art. 403.

[3] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

Admitting cumulative expert testimony not excludable on other grounds requires its fulfilling three conditions: (1) relevance of testimony to be elicited; (2) that fact finder will be aided by testimony; and (3) balancing of probative value of testimony against substantial prejudice, confusion, or inefficiency; want of any condition is fatal to admission of expert's unbridled testimony. LSA-C.E. arts. 403, 702.

[4] Evidence 157 ⚿99

157 Evidence
157IV Admissibility in General
157IV(A) Facts in Issue and Relevant to Issues
157k99 k. Relevancy in General. Most Cited Cases

All relevant evidence is admissible in Louisiana except as otherwise provided by specific constitutional or legislative pronouncements, including Code of Evidence. LSA-C.E. art. 402.

[5] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

Condition for admissibility, that otherwise nonexcludable cumulative testimony aid fact finder, applies only to expert testimony. LSA-C.E. arts. 403, 702.

[6] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

Condition for admissibility of otherwise nonexcludable cumulative evidence, that probative value outweigh risk of substantial prejudice, confusion, or inefficiency, applies to all evidence, fact or expert, and permits exclusion of testimony whose probative value is substantially outweighed by certain dangers that threaten validity of fact-finding or by considerations of judicial economy; such condition requires that testimony or evidence in question is relevant and probative. LSA-C.E. arts. 403, 702.

[7] Evidence 157 ⚿546

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k546 k. Determination of Question of Competency. Most Cited Cases

Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

Essentially same concerns articulated for giving latitude to trial judges in their factual findings justify leaving largely to their discretion admission of cumulative evidence, and giving them great discretion in deciding which witnesses are qualified as experts, breadth and scope of expert testimony, and probative value of expert testimony.

[8] Appeal and Error 30 ⚿1008.1(7)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(7) k. Manifest or Obvious Error. Most Cited Cases

Jurisprudential rule of practice that trial court's factual findings will not be upset absent manifest error is predicated upon there being evidence before trier of fact that furnishes reasonable factual basis for trial court's finding.

[9] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

Trial court in medical malpractice action was justified in admitting cumulative expert testimony presented by defendants; as to two experts, their testimony was offered on behalf of different defendants and each expert's testimony supplemented that of the other; as to three other experts, each expert differed in background and specialty;

moreover, plaintiffs failed to establish that probative value of such testimony was substantially outweighed by risk of unfair prejudice, jury confusion, or considerations of judicial economy. LSA-C.E. arts. 403, 702.

[10] Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

As general rule, party in medical malpractice action has fundamental right to elicit medical expert testimony of one witness on any point of significance to resolution of issues presented and probably second witness as well, for added perspective; as to whether third or subsequent expert should be permitted, factors to be considered include background and testimonial nature of witnesses, whether trier of fact is jury or judge, whether either of parties is pauper whose lack of means would otherwise result in lack of due process, amount in controversy, costs in time and money that would attend inclusion of cumulative testimony, and express willingness of parties seeking to elicit testimony to bear costs of experts, regardless of case's eventual outcome. LSA-C.E. arts. 403, 702.

[11] Evidence 157 ⚿571(3)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(3) k. Due Care and Proper Conduct. Most Cited Cases

Evidence supported finding of no negligence on part of obstetrician-gynecologist who attended mother and delivered child born with profound brain injuries, notwithstanding expert's testimony that majority of child's injuries could have been prevented and that child would have been better off had she been delivered even one-half hour sooner, and of another expert that failure to assess situation sooner was deviation from standard of care.

[12] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases

Trial court in medical malpractice action was justified in refusing to permit plaintiffs to impeach defense expert for purpose of showing his bias by introducing either isolated moments of his videotaped lectures to claims adjusters or entire tapes; court sustained objection to introduction of only isolated moments on ground that expert's words might be misconstrued, and court reviewed transcript and determined that tape would confuse jurors and that it would take at least three hours for jury to put tape in proper context, resulting in undue waste of time.

[13] Trial 388 ⚿133.6(8)

388 Trial
388V Arguments and Conduct of Counsel
388k133 Action of Court
388k133.6 Instruction or Admonition to Jury
388k133.6(3) Statements as to Facts, Comments, and Argument
388k133.6(8) k. Reference to Insurance or Indemnity. Most Cited Cases

Trial court in medical malpractice action was justified in denying mistrial or new trial based on defense counsel's brief reference to fact that certain services needed by patient as result of her alleged negligent treatment were generally provided by government; although such reference amounted to improper reference to collateral source benefits, reference was brief and question was withdrawn, and trial court admonished jury to disregard question and not to speculate as to what answer might have been.

[14] Appeal and Error 30 ⚿969

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k969 k. Conduct of Trial or Hearing in General. Most Cited Cases

Appeal and Error 30 ⚿977(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(5) k. Refusal of New Trial. Most Cited Cases

In absence of clear abuse, trial judge's sound discretion in denying mistrial or new trial will not be disturbed on appeal, especially where there is no actual evidence in record that might prejudice plaintiffs and trial judge's error, if any, is harmless in light of all evidence presented.

*469 Lawrence N. Curtis, Lafayette, for Anthony Frederick etc.

Donald S. Zuber, Baton Rouge, for Woman's Hosp. of Acadiana, et al.

Marc W. Judice, Lafayette, for Michael Boos, M.D.

Before STOKER, DOUCET and SAUNDERS, JJ.

SAUNDERS, Judge.

This medical malpractice action was brought by plaintiffs-appellants, Anthony and Sherie Frederick, to recover damages for devastating personal injuries suffered by their minor daughter, Adrien Rene, prior to birth. The remaining defendants were Dr. Michael Boos, the obstetrician-gynecologist who attended Mrs. Frederick and delivered the child, and Women's and Children's Hospital, where the child was born.

Plaintiffs' claims were tried before a jury which returned a verdict absolving defendants of any liability for plaintiffs' damages. From that verdict and the district court's judgment in accordance therewith, plaintiffs perfected this timely devolutive appeal. For the reasons which follow, we affirm the conclusions reached by the lower court.

FACTS

The mother, Sherie Frederick, was originally a patient of two codefendant physicians, since dismissed, for her pregnancy with Adrien Rene Frederick. Sometime in the evening of December 20, 1985, the evening before she presented herself to the hospital, Mrs. Frederick noted some minor leakage of fluid. Evidently her water bag had burst. One day or more prior to that time, she had noted some unusual movement of her unborn child. Due to the leakage the evening before, Mrs. Frederick presented herself to the Women's and Children's Hospital at about 10:00 a.m. on December 21, 1985. Dr. Michael Boos was on call and attended Mrs. Frederick for her original physicians. After admitting Mrs. Frederick, her principal nurse applied an external fetal monitor to monitor the child's heartbeat. Mrs. Frederick was then moved to the labor and delivery area for observation. Dr. Boos first examined her approximately one half hour after her arrival at the hospital and followed up with additional testing twice over the next hour. With no progression in the pregnancy apparent, he ruptured Mrs. Frederick's membranes and noted thick meconium and amniotic fluid, then applied a scalp electrode *470 to the fetus, which showed an unfavorable beat to beat variability in the child's heartbeats. A routine Caesarian Section was decided upon rather than an emergency or "crash" one.

The baby, Adrien Rene Frederick, delivered at approximately 3:30 p.m. December 21, 1985, developed seizures and was diagnosed as having suffered from severe fetal maternal transfusion. The resultant transfusion of blood into the mother depleted the ability of Adrien's blood to carry oxygen to her brain, causing seizures and profound brain injuries.

ISSUES RAISED

Plaintiffs-appellants assign as principal error the trial judge's refusal in this case to limit cumulative expert testimony. They also assign as reversible error the trial judge's refusal to permit plaintiffs to admit into evidence a video tape of one of the defense witnesses teaching a course to claims adjusters and his failure to declare a mistrial after one of the defendants alluded to collateral source benefits available to plaintiffs. Finally, plaintiffs argue that the jury erred in finding no negligence on the part of defendants and in failing to award damages.

For their parts, defendants counter that the trial judge did not abuse his considerable discretion in his evidentiary rulings and, citing *Rosell v. ESCO,* 549 So.2d 840 (La.1989) and related authority, that neither judge nor jury committed manifest error in their factual determinations that young Adrien Rene's injuries arose independent of any negligence on the part of defendants.

CUMULATIVE TESTIMONY

The principal issue raised in this appeal revolves around the new Code of Evidence, specifically the application of articles 403 and 702, and the proper level of appellate review required of courts of appeal in cases where the trial judge does not make known the basis upon which he or she allows one party to introduce into evidence, over the objections of opposing counsel, the testimony of a significant number of expert witnesses as to one or more identical elements of the case.

We are, thus, asked to determine the point at which a parade of expert witnesses called by one party becomes counterproductive to the necessary twin goals of fairness and judicial economy. Such an inquiry necessarily leads to consideration of the Code of Evidence.

[1] When to exclude expert testimony in a civil context on grounds of cumulation is apparently *res nova* among reported cases, at least since the Code of Evidence became effective January 1, 1989, pursuant to § 12 of Acts 1988, No. 515. The trial court did not articulate the precise basis for its conclusion permitting multiple experts to testify as to the standard of care practiced by physician Boos. Therefore, we are unable to offer the usual deference attributed to such findings. *Bloxom v. Bloxom,* 512 So.2d 839, 843 (La.1987); *Thompson v. Petrounited Terminals, Inc.,* 536 So.2d 504 (La.App. 1st Cir.1988), writs denied, 537 So.2d 212, 213 (La.1989).

The facts peculiar to the case *sub judice* provide us with an opportunity to address several criteria among many that may be considered in determining whether to permit multiple expert testimony as to an element of the case. At the outset, except to give it more tone and broaden its fourth inquiry to take into account practical considerations of judicial administration, we generally adopt our brethren's pronouncement on the subject concerning the *intrinsic* value of expert testimony found in *Adams v. Chevron U.S.A., Inc.,* 589 So.2d 1219, 1223 (La.App. 4th Cir.1991), writs denied, 592 So.2d 414, 415 (La.1992):

> "The United States Fifth Circuit Court of Appeal has recently interpreted F.R.E. 403, after which the Louisiana rules on expert testimony are patterned. *Christophersen v. Allied-Signal Corp.,* 939 F.2d 1106 (5th Cir.1991). The court delineated the following four inquiries for determining the admissibility of expert testimony: (1) whether the witness is qualified to express an expert opinion, (2) whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field, (3) whether in reaching his conclusion the expert used well-founded methodology, and (4) assuming the expert's testimony ***471** passes these tests, whether the testimony's potential for unfair prejudice substantially outweighs its probative value under the relevant rules. *Id.* We adopt those standards as appropriate for evaluating the admissibility of expert testimony under Louisiana law."

[2] Plaintiffs having apparently conceded the first three *Adams* inquiries, our focus here is limited

by appellants' assignments of error to the fourth *Adams* inquiry, which must be broadened in the present context to concern the cumulative nature of the expert testimony to which plaintiffs direct their objection. Article 403 of the Code of Evidence requires balancing the testimony's probative value against not only unfair prejudice, see *Adams, supra,* but against "considerations of undue delay or waste of time" as well.

The specific provisions of the Code of Evidence of primary concern here read as follows:

Art. 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Art. 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[3] Admitting cumulative expert testimony not excludable on other grounds requires its fulfilling three conditions. The first condition questions the relevance of the testimony to be elicited. The second seeks to ascertain that the fact finder will be aided by the testimony. The third, balancing the probative value of this testimony against substantial prejudice, confusion, or inefficiency, guards against undue removal of reason from the fact finding process, as well as waste. Want of any of the three is fatal to admission of an expert's unbridled testimony.

[4] The first condition imposes only a minimal threshold since all relevant evidence is admissible in Louisiana except as otherwise provided by specific constitutional or legislative pronouncements, including the Code of Evidence. LSA-C.E. art. 402.

LSA-C.E. art. 401 reads as follows:

Art. 401. Definition of "relevant evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[5] The second condition applies only to expert testimony. Grounded in LSA-C.E. art. 702, it concerns whether the specialized knowledge elicited from the expert will assist the trier of fact to understand the evidence or to determine a fact in issue. The need to comply with this condition represents a significant departure from the law prior to enactment of the Code of Evidence, insofar as previously the inquiry was limited only to asking whether the evidence offered by the expert was "obtained only by means of special training or experience," not whether it would be of actual benefit to the fact finder. See LSA-C.E. art. 702, Comment (a) and 3 J. Weinstein and M. Berger, Weinstein's Evidence ¶ 702[02] (1981), which it cites. See also, e.g., *Hunnicutt v. Kent,* 434 So.2d 91, 94 (La.App. 5th Cir.1982), writ denied, 435 So.2d 442 (La.1983).

[6] The third condition, mandated by LSA-C.E. art. 403, is applicable to all evidence, fact or expert, and permits exclusion of evidence whose probative value is substantially outweighed by certain dangers that threaten the validity of fact finding or by considerations of judicial economy. It assumes, in fact *requires,* that the examined evidence is relevant and probative. Judicial administration concerns aside, the chief purpose of this condition is to ensure that the evidence does not deny the fact finder the ability to reach a conclusion based on rational grounds.

*472 This is not merely of academic or hypothetical concern. Article 1, § 22, of the Louisiana Constitution guarantees every citizen, plaintiff or defendant, an adequate remedy by due process of law, administered without partiality or delay. Improperly applied, the Code of Evidence and its interpretive jurisprudence could conspire to undermine both the Louisiana Constitution and the very purposes for the Code's enactment, "to secure fairness and efficiency in administration of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." LSA-C.E. art. 102. For most citizens, the only day in court of consequence is the one spent at the trial court level because:

> "It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable."

Rosell, supra, 549 So.2d at 844, and cites therein contained. "The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts." *Canter v. Koehring Company,* 283 So.2d 716, 724 (La.1973).

Discretion Limited

[7] Essentially the same concerns articulated for giving latitude to trial judges in their factual findings justify leaving largely to their discretion the admission of cumulative evidence, *Gormley v. Grand Lodge of State of Louisiana,* 503 So.2d 181 (La.App. 4th Cir.), writ denied, 506 So.2d 1227 (La.1987); *Varnell v. Service Merchandise Co., Inc.,* 613 So.2d 1042, 1044 (La.App. 3d Cir.1993), and in giving them "great discretion" in deciding which witnesses are qualified as experts, the breadth and scope of expert testimony, and the probative value of expert testimony, *Armstrong v. Lorino,* 580 So.2d 528, 531 (La.App. 4th Cir.), writ denied, 584 So.2d 1166 (La.1991); Comment (d), LSA-C.E. art. 702 and Weinstein and Berger, *supra,* ¶ 702 [02] (1981); 1 id. ¶ 104[03] (1982). (Broad, though not boundless, discretion is accorded the trial judge in his determinations as to whether expert testimony will be admissible.)

[8] While trial courts are given wide latitude, however, the Constitution of Louisiana does not permit appellate tribunals to abdicate their responsibilities in reviewing all findings of the lower courts as to either fact or law. To the contrary, the Constitution of 1974 provides in Article 5, § 10(B):

> "(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts."

As a consequence, the jurisprudential rule of practice that a trial court's factual findings will not be upset absent manifest error is predicated upon *there being evidence before the trier of fact which furnishes a reasonable factual basis for the trial court's finding. Arceneaux v. Domingue,* 365 So.2d 1330, 1333 (La.1978); in accord, *Rosell, supra; Canter, supra.* The Code of Evidence provides trial courts with the evidentiary rules of the road and deserves especial care in its application, if for no other reason than denial of a litigant's evidentiary rights removes the foundation upon which the deference called for in *Rosell, Arceneaux, Canter, Armstrong, Gormley* and *Varnell, supra,* rests and can be grounds for reversal.

[9] Applying these precepts to the present facts, we find no basis for finding that the trial judge abused his great discretion in admitting the cumulative expert testimony. Defendants offered the sworn testimony of two pediatric neurologists, physicians who specialize in treating medical diseases of chil-

dren's nervous systems. The two attended different medical schools; one is now principally a hospital administrator, the other a private practitioner. The trial judge therefore was correct in permitting each to testify, as each one's testimony added dimensional *473 perspective to the testimony of the other, and the testimony was offered in behalf of different parties who could conceivably prove adverse to one another.

Similarly, the trial judge did not abuse his much discretion in permitting the testimony of three obstetrician-gynecologists in addition to the opinion of the Medical Review Panel. Each differed in background and speciality. One graduated from LSU medical school, is chief of OB/GYN at a Dallas hospital and specializes in fetal-maternal medicine, which includes caring for the mother and fetus in high risk pregnancies (i.e., those most likely to have complications). Another attended the University of Tennessee Medical School, is board certified in OB/GYN, surgery, and perinatology, and is an academic at the University of Mississippi Medical Center. This expert has followed closely the development of babies like Adrien after birth and can claim credit for a number of awards and published articles. The third OB/GYN called by defendants trained at the University of Oregon, chaired the Department of OB/GYN at Tulane Medical Center, co-authored a handbook on obstetrics and gynecology published in 1992, and has performed years of antenatal diagnosis and treatment of birth defects, in addition to contributing to two books and several articles pertaining to this subject.

Nor can we say that the probative value of the expert testimony provided by defendants was outweighed, let alone ***substantially*** outweighed, by any of the concerns articulated in LSA-C.E. art. 403 . Plaintiffs were free to and did cross-examine opposing witnesses and present expert testimony supporting their case. Indeed, a greater danger to these proceedings could have arisen had the trial court denied defendants the ability to adduce the limited volume of expert testimony allowed in this case.

[10] Neither we nor the legislature can issue broad guidelines for applicability in every case. As a general rule, however, it would be safe to say that a party has a fundamental right to elicit the medical expert testimony of one witness on any point of significance to resolution of the issues presented and probably a second witness as well, for added perspective. As to whether a third or subsequent expert should be permitted, a number of factors appear pertinent, among them: the background and testimonial nature of the witnesses; whether the trier of fact is a jury or judge [FN1]; whether either of the parties litigant is a pauper whose lack of means would otherwise result in a lack of due process; the amount in controversy; the costs in time and money which would attend inclusion of the cumulative testimony; and the express willingness of the party seeking to elicit the testimony to bear the costs of the experts, regardless of the case's eventual outcome. Obviously, these considerations are most likely to arise when, as here, a party timely objects to another's introduction of cumulative testimony under LSA-C.E. art. 403.

> FN1. "Because in a bench trial the judge will often be able to evaluate the testimony of an expert without a significant risk of unfair prejudice, confusion of issues, etc., in applying this balancing test greater receptivity to expert testimony may properly be shown in a bench trial than in a jury case." Note 1, LSA-C.E. art. 702, citing Weinstein and Berger, *supra,* at ¶ 701[01], et seq.

Because such decisions necessarily must be made on a case by case basis, we attempt here to fashion neither a hard and fast rule on the subject, nor an exhaustive list of factors which the trial judge, whose broad discretion is unaffected by this decision, may draw upon. Nevertheless, parties ***are*** occasionally justified in their concern that a well-heeled party can obtain its version of justice at the trial court simply by retaining an arsenal of "hired guns" to prove its case, particularly in the context

of a jury trial, then rest on the *Canter-Arceneaux-Rosell* line of defense. Protections against such a travesty can be found in the Code of Evidence. A party might seek to limit the number of experts permitted to testify in jury trials, LSA-C.E. art. 403, a difficult maneuver least likely to achieve the end sought. The concerned litigant may wish to have the trial judge instruct the jury that it is not the number of experts, but the relevance, credibility and probative value of their testimony which is of primary concern.

***474** Another possibility would be to request under LSA-C.E. art. 706 that the trial court appoint an unbiased expert and disclose to the jury the expert's special court-appointed status. This underutilized provision enables litigants of modest means to have the court use *its* leverage to distinguish court-appointed neutral observers who are beyond reproach from "hired guns" retained by the highest bidder, reducing the perceived need and advantage of litigants to hire the most (and most expensive) experts to counter (or preempt) those that will (or might) be called by their opponents, thus offering parties to judicial proceedings greater assurance that findings of fact are indeed grounded on a reasonable factual basis.

MANIFEST ERROR

[11] Plaintiffs also complain that the triers of fact erred in finding no negligence on the part of defendants and in refusing to award damages to plaintiffs, but our thorough review of the voluminous transcript does not support these assertions. We cannot say that the triers of fact were clearly wrong in determining, consistent with the opinions expressed by several witnesses, that young Adrien would have been no better off had she been delivered immediately upon arrival at the hospital. Plaintiffs' expert, Dr. Shelburne, concluded that a majority of the injury to young Adrien could have been prevented and, further, that the baby would have been better off had she been delivered even a half hour sooner. His testimony, however, differs with Dr. Fleischmann's testimony that it would be difficult to tell whether delivery a half hour or more sooner would have made any difference. Even though both concluded that young Adrien would have been better off had she been delivered just two to four hours sooner, this testimony was refuted by that of other witnesses, including some who actually treated Adrien after birth, who testified that the unfortunate child sustained her injuries days, or even weeks before birth. According to both Dr. Burris and Dr. Chalub, the young baby suffered seizures as evidenced from twitching, stiffening, and changes in breathing several days prior to birth, making young Adrien's personal injuries inevitable upon birth, when the maternal life support of the fetus was severed. For this reason, according to Dr. Chalub, it would have made no difference whether Adrien was born at 9:00 a.m. or at 3:30 p.m. on the day Mrs. Frederick arrived at the hospital.

The trier of fact apparently was unconvinced that Dr. Boos was negligent for failing to pursue any of the options suggested by plaintiffs' expert, Dr. Chevernak, because it concluded that the young fetus was injured before birth. In addition, after hearing all of the evidence, the jurors apparently determined that the initial symptoms of mother and child called for the more cautious approach chosen by Dr. Boos and the other medical care providers. Another expert produced by plaintiff, neonatologist Dr. Fleischmann, concluded that the failure of Dr. Boos to assess the situation sooner by rupturing the membrane and taking fluid was a deviation from the standard of care. The probative value of Dr. Fleischmann's testimony, however, was foreshadowed by his admission that he had not delivered a baby since 1968 and was never an OB/GYN.

OTHER ASSIGNED ERRORS

Exclusion of Videotape

[12] Plaintiffs also complain of the trial judge's refusal to permit them to impeach defense expert, Dr. Morrison, by showing his bias. When plaintiffs sought to introduce isolated moments of his taped lectures to claims adjusters in 1984, defendants objected and expressed their concern that, unless the

taped lectures were played in their entirety, Dr. Morrison's words might be misconstrued. The trial judge sustained defendants' objections and refused to permit playing several hours of tapes over plaintiffs' objection that the tapes would demonstrate Dr. Morrison's bias.

"The admissibility of a videotape is largely within the discretion of the trial judge. *LaFleur v. John Deere Co.,* 491 So.2d 624, 632 (La.1986); *United States Fidelity & Guaranty Co. v. Hi-Tower Concrete Pumping Service,* 574 So.2d 424, 438 (La.App.2d Cir.), *writs denied,* 578 So.2d 136, 137 (La.1991); *475*Ashley v. Nissan Motor Corp.,* 321 So.2d 868, 872-873 (La.App. 1st Cir.), *writ denied,* 323 So.2d 478 (La.1975). Determination of the admissibility into evidence of videotapes must be done on a case-by-case basis depending on the individual facts and circumstances of each case. *Douglas v. G.H.R. Energy Corp.,* 463 So.2d 5, 7 (La.App. 5th Cir.1984). The trial court must consider whether the videotape accurately depicts what it purports to represent, whether it tends to establish a fact of the proponent's case, and whether it will aid the jury's understanding. Against those factors, the trial court must consider whether the videotape will unfairly prejudice or mislead the jury, confuse the issues, or cause undue delay. The trial court may exclude the evidence if the factors favoring admission are substantially outweighed by the factors against admission. Louisiana Code of Evidence articles 401-403; *Hi-Tower,* 574 So.2d at 438; *Burk v. Illinois Central Gulf Railroad Co.,* 529 So.2d 515 (La.App. 1st Cir.), *writ denied,* 532 So.2d 179 (La.1988)."

Malbrough v. Wallace, 594 So.2d 428, 431 (La.App. 1st Cir.1991), writ denied, 596 So.2d 196 (La.1992).

A careful review of the trial judge's reasons shows that he did not abuse his discretion. First, he concluded that the tape would take at least three hours for the jury to put it in the proper context, and this would be an undue waste of time. Second, even after reading the transcript several times, the trial judge concluded that the testimony, subject to different interpretations, might confuse the jury no matter how much videotape was played. Finally, the trial judge concluded that taken out of context, introduction of only excerpts from the taped lecture would result in unfair prejudice.

Collateral Source Benefits

[13] Finally, plaintiffs complain that the hospital's wrongful introduction of collateral source benefits is alone grounds for reversal.

"Under the 'collateral source' rule, a tort-feasor may not benefit, and an injured plaintiff's tort recovery may not be diminished, because of benefits received by the plaintiff from sources independent of the tort-feasor's procuration or contribution. This rule has been applied to hold that the plaintiffs' recovery cannot be diminished by amounts paid by Medicare. *Womack v. Travelers Insurance Company,* 258 So.2d 562 (La.App. 1st Cir.1972), writ denied, 261 La. 775, 260 So.2d 701 (1972); *Weir v. Gasper,* 459 So.2d 655 (La.App. 4th Cir.1984), writ denied 462 So.2d 650 (La.1985)."

Williamson v. St. Francis Medical Center, 559 So.2d 929, 934 (La.App.2d Cir.1990).

Our review of the transcript removes any question that the hospital did, in fact, seek to introduce such evidence during cross-examination of plaintiffs' expert, Dr. Shelburne:

"Q You mentioned that during the examination-I think you said there was a certain standardized or plug-in procedure for long-term care of children with Adrien's condition. I think you said it was something you just sort of plug in, and I'm trying to refresh your memory-

A I know what you're-I understand, and I think that's exactly what I said. There are certain needs that handicapped children with this degree of severity of problems have, and there's certain ser-

vices that are generally utilized.

Q And in fact aren't these services generally provided by state and local and federal government-"

Immediately after the recited colloquy, plaintiffs objected and a bench conference was held outside the presence of the jury. Defendants argued briefly that the line of inquiry was admissible because the Disabilities Education Act of 1990, 20 U.S.C. Sections 1400 and 1409, requires assistance for education of all handicapped individuals, but then agreed to withdraw the question to avoid confusion. Plaintiffs asked for a mistrial or, alternatively, instructions to the jury that they disregard the previous exchange. The trial court acceded to the wishes of the parties with the following words to the jury:

"THE COURT: Please be seated. Ladies and Gentlemen of the Jury, the last *476 question that was asked by Mr. Zuber was a question in which he asked, "In fact, aren't these services generally provided by state and federal government?"

Mr. Zuber has agreed to withdraw his question at this time, so I want you to disregard the question entirely. You are not to consider the question nor speculate as to what the answer might have been if this witness was allowed to answer the question. Does everybody understand?

THE JURORS: [Indicate "yes"].

THE COURT: Okay."

The trial judge declined to grant plaintiffs' motion for a mistrial on two grounds:

"THE COURT: The court is going to deny the motion for a mistrial, finding that the mere question was asked, but there was no answer in response to the question before the jury was removed, and that the court has admonished the jury not to speculate as to the answer to the question; so I feel that the plaintiffs are not prejudiced as a result of the asking of the question, and particularly in view of the admonition given to the jury by the court, and I will deny your motion and note for the record your objection to the ruling of the court."

[14] We are unable to conclude that the trial judge erred in declining to order a new trial. The trial judge was in the best position to assess the prejudicial effect, if any, of the hospital's allusion to collateral benefits, and in the absence of clear abuse, the trial judge's sound discretion in denying a mistrial or new trial will not be disturbed on review, *DeRosier v. South Louisiana Contractors,* 583 So.2d 531, 538 (La.App. 3d Cir.), writ denied, 587 So.2d 700 (La.1991); *Luquette v. Bouillion,* 184 So.2d 766, 771 (La.App. 3d Cir.1966); *Begnaud v. Texas & New Orleans Railroad Company,* 136 So.2d 123, 129-130 (La.App. 3d Cir.1961), especially where, as here, there is "no actual evidence in the record" that might prejudice plaintiffs, *Luquette, supra* at 770, and the trial judge's error, if any, was harmless in light of all of the evidence presented.

CONCLUSION

In light of the foregoing, we affirm the judgment of the trial court and tax plaintiffs with the costs of these proceedings.

AFFIRMED.

DOUCET, J., concurs.

La.App. 3 Cir.,1993.
Frederick v. Woman's Hosp. of Acadiana
626 So.2d 467

END OF DOCUMENT

EXHIBIT I

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF

ABDUL YOONAS, Plaintiff, vs. ARDEAN J. EDIGER, M.D., Defendant.	Case No. CVPI0000249D

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the above-entitled matter came on regularly for hearing on Defendant's Motion to Compel and Plaintiff's Motion to Limit Experts before the Honorable Joel D. Horton, District Judge, on Wednesday, April 10, 2002, in a courtroom of the Ada County Courthouse, in Boise, Idaho.

APPEARANCES:

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cumulative evidence. It is not just that the evidence may be cumulative. It is that the -- whether the evidence is also needless.

The brief has attempted to show that the evidence is not cumulative. The brief goes through the fact that the experts' knowledge of the community standard is different; that they have different experience in laparoscopic cholecystectomies, particularly in comparison to the plaintiff's two expert witnesses, who have very little experience in those two subjects; that they have very little difference regarding the ability to visualize during one of these procedures. And this is important to the opinion regarding whether it was within the standard of practice to decide not to convert to an open procedure.

The experts have different opinions with respect to whether it is the, quote/unquote, standard of care that applies or the standard of health care practice or standard of practice, which are the -- which is the terminology used in 6-1012 and 6-1013. The experts have different opinions as to whether Dr. Ediger put a clip on the common bile duct and also with respect to the number of clips that were used, and this is very relevant in this

case.

The experts have different opinions as to the risk of future problems for Mr. Yoonas. Indeed, Dr. Sheppard, who is a professor at Oregon Health Sciences University, says there's absolutely no risk for Mr. Yoonas.

And they also have differing experience as expert witnesses. Dr. Celli, for example, was procured by Mr. Yoonas through an expert witness service. Many of the defense experts have absolutely no experience as expert witnesses.

Your Honor, given the status of this case, given where we're at, given all of this information, the court should exercise its discretion here to wait until the time of trial, allow plaintiffs to make their case and then determine at that time if the testimony is cumulative.

There is no reason why Dr. Ediger should be penalized because there are a number of physicians who believe that he met the standard of health care practice and the plaintiffs could only find one who is willing to come into court and say that. It's not fair, Your Honor, and as long as that testimony is not needlessly cumulative and not

a drag on the court's understandably limited resources in time, that should be permitted and this motion should be denied. Thank you, Your Honor.

THE COURT: Thank you, Mr. Stubbs.

Your response, Ms. Cunningham.

MS. CUNNINGHAM: Your Honor, I think this issue is likely to come up in jury selection and opening argument because as we talk about what we expect the evidence to show, you need to know whether or not there's going to be one witness or four or five. So that's the reason that I've made the motion pretrial.

I also think that given your order in this case about disclosure and the fact that the discovery deadline cutoff has passed, everyone's opinions have been fully disclosed. So you do have the information that you need in order to make this decision because what you have is the complete disclosures that we were given and, obviously, all the portions of the depositions that defense counsel thinks are relevant and show some distinctions between these. And I think that upon reviewing these, you can see that distinctions are minor.

Of course they're going to have performed a different number of laparoscopic cholecystectomies

and of course they're all going to use slightly different words when they talk about it, but the bottom line is they all have very similar credentials and the same opinion and how many times do you need to put that opinion in front of the jury?

Very briefly, I don't think it's accurate to say that we have two expert witnesses who are going to testify about the same thing. Dr. Dayton is a treating physician who performed the surgery on Mr. Yoonas and he was disclosed as an expert in case there was going to be some kind of foundational problem or objection to his credentials. That was it. He wasn't asked about causation or anything else. He was asked about treating things. There is only one expert.

I think that it would have been nice if we had been able to have a hearing on this before the depositions were taken, and I attempted to do that, but we all have busy schedules and this was simply the earliest I could have that hearing held.

I kept the depositions to a minimum but was able to ascertain that everyone does have the same opinion. I think the bottom line is Rule 403 isn't specific as to when you can exercise your

judgment and there is no real show... or good cause that we should wait and exercise that at trial after there has been additional time and everything expended in preparation for trial. The fact is, you have all the information that I have and all the information that should exist about the opinions of these doctors and I think that you should be able to tell whether or not the probative value outweighs the prejudicial effect.

Every piece of evidence has some probative value. I'm not saying that three of these doctors have nothing worthwhile to say. What I'm saying is how many times do you need to say the same thing.

Thank you, Your Honor.

THE COURT: Thank you, Ms. Cunningham.

Well, I'll say this. In ruling on the motion, I recognize the question, particularly under 403 rather than most areas of the rules that discretion of the trial court gets called into play, there is no doubt at a certain point the trial court has an ability to say enough is enough.

Taking the case completely out of the context of a medical malpractice case, if there was a case involving an automobile accident where on our

25th witness to say it was a clear and sunny day before getting ready to sit down and there was no dispute as to whether it was clear nor whether it was sunny, the court would undoubtedly probably long before the 25th witness start exercising its authority under 403, even though in general my view of the Rules of Evidence is that they are, for the most part, inclusive rather than exclusive of the admissibility of relevant evidence.

There's no question in my mind but that these proposed subjects of exclusion are relevant testimony to present. I cannot conclude that the presentation of four defense experts in this case would be needlessly cumulative. I do not think that it would necessarily result in unfair prejudice to the plaintiff in this action, which is the touchstone for exclusion. Not only does it have to be unfair prejudice, but there has to be a substantial danger that the unfair prejudice, which I'm having difficulty identifying, outweighs the probative value of the testimony.

As I view the testimony of these proposed experts, it goes to the heart of the litigation in this case, at least as to the question as to whether or not Dr. Ediger breached the appropriate standard

of care. It ap... ...rs there's also spill-over questions as to future prognosis which may affect damages.

But under the circumstances, I do not think it's appropriate to exercise my discretion in the fashion requested by the plaintiff. The motion for exclusion or limitation of expert witnesses will be denied.

I have not addressed the motion to vacate trial. I know you wanted to hear that, Ms. Cunningham, here today. I just received before we came into court, an objection to the proposed hearing. Honestly, I was not inclined to hear the motion to vacate the trial today. I would prefer and I'll direct that you simply notice it for hearing at the time presently scheduled for our pretrial conference.

Just for the parties' benefit, having reviewed the motion, there is one area that causes me concern and that is, inasmuch as there's indications that discovery didn't get fired up until December, about seven months after I entered the order governing proceedings, I'm not much moved by that grounds in terms of the later disclosure of the identity of the defense experts in this case.

What is more problematic to me is Mr. Gustavsen's status. I think you'll find I'm a lot more solicitous of the attorneys perhaps in this sort of situation than anything else. I don't know and I will be expecting to see an explanation of just what Mr. Gustavsen's situation is, just why it is that he won't be available to participate in this litigation.

It is fair to say, in terms of your discussions between yourselves, if there is a good reason that Mr. Gustavsen, who is lead counsel in this case, if there is a good reason he can't participate in this litigation, I am likely to grant the request over the objection of Dr. Ediger, mindful of the defendant's need and legitimate interest in getting this case promptly tried. Any continuance would likely be relatively short, but I'll let you just fold that into the hopper for discussion. We can address the merits of that motion on the date scheduled for pretrial conference.

Is there anything further that we should address at this point from the plaintiff's perspective, Ms. Cunningham?

MS. CUNNINGHAM: No, Your Honor.

EXHIBIT J

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

GAYLENE M STANDBAKKE,
Plaintiff,
vs.) CASE NO. CV 05-0002547
CHRISTOPHER C MORENO, MD,
Defendant.

MOTION TO LIMIT EXPERT WITNESSES
BEFORE THE HONORABLE CARL B. KERRICK
AT LEWISTON, IDAHO
JUNE 8, 2006, AT 1:05 P.M.

ORIGINAL

EXHIBIT

APPEARANCES

Terrance Jones, Attorney at Law, of the Law Firm of QUANE SMITH, LLP, P.O. Box 519, Boise, ID 83701, appearing for and on behalf of the Defendant.

Michael Kessinger, Attorney at Law, of the Law Firm of WHITEHEAD, AMBERSON & CALDWELL, P.O. Box 1319 Coeur d'Alene, ID 83814, appearing for and on behalf of the Plaintiff.

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THE COURT: Now take up the case of Strandbakke versus Moreno. Mr. Kessinger is present on behalf of the Plaintiffs Strandbakke; Mr. Jones is present on behalf of Defendant Moreno. This is before the Court on Plaintiff's Motion to Limit Defendant's Expert Witnesses.

And I have had an opportunity to review materials that have been presented by the parties relative to this issue. And with that, Mr. Kessinger, would you like to present argument in support of the motion at this time?

MR. KESSINGER: I would. Thank you, your Honor.

May it please the Court, Counsel. As you know, this is a medical negligence case, you have indicated you have had a chance to review the motion, so I won't spend a lot of time re-hashing what it says. A couple preliminary matters I would like to clear up though.

The Defendant's reply has indicated that the Plaintiff has retained twenty-seven experts and there's some clarification in Plaintiff's reply brief, but I would like to touch on that. The Plaintiff has two medical experts that have been hired to present testimony at trial, and there's one medical expert that's been hired by the Plaintiff to testify to the standard of care has been violated. And I just wanted to make sure that was made clear with the Court.

The other twenty some medical providers that have been listed as witnesses were just that, they are medical

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providers. They are not people who have been hired specifically for purposes of litigation. They are fact witnesses who happen to have expert opinions.

And Defendant is aware that those treating doctors are treating doctors or fact witnesses. In fact, one of the attorneys for Defendant Jeremiah Quane, in fact, contacted one of those expert witnesses without objection from the Plaintiff. And that letter from Jeremiah Quane has been attached to Plaintiff's reply brief.

This motion has been brought before the Court because the Defendant has listed four witnesses with -- in their witness -- in their expert disclosure with similar, if not identical, opinions. This is a concern to Plaintiff. Plaintiff concedes that the experts may have different education and they may have different experiences; however, that doesn't merit listening to the same opinion three or four times over and over again by the jury and by the Court.

The Defendant in their response makes limitation of expert witnesses sound foreign. The Court clearly has the right to do that under the civil rules based on the Court's discretion.

I would also note just as an example that the US District Court of Eastern Washington has local rules that limit a party to two expert witnesses on any given issue. That's just a -- the Court limits them to two. They need the Court's

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approval -- the party needs the Court's approval to even have more than two experts on any given issue, and that's the local rule 43.1 in the US District Court of the Eastern District of Washington.

The other thing mentioned in Defendant's reply is that we are moving to limit these witnesses because there are two paragraphs that are the same in their witness disclosure. And I feel I need to point out that the opinions aren't the same just on two paragraphs. The first -- the first three witnesses after Dr. Moreno who are listed in the disclosure are all vascular surgeons. There's Dr. Tullis, Dr. Murray and Dr. Olcott. Dr. Olcott's actually a professor of vascular surgery.

But their disclosures are the same, virtually identical. And Dr. Montalbano who is the fourth expert listed after Dr. Moreno, he does have one page of unique information, but the other ten pages of his opinion is just like the first three vascular surgeons.

So we have got four people saying virtually the same thing. Dr. Montalbano, I will concede, that he does have a little bit of different opinion information listed in that disclosure. Then the different information that I found was last paragraph of page 79, the last paragraph of page 87, and the first paragraph of page 89 do not appear to be in the disclosures of the other vascular surgeons; but other than

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that, all of Dr. Montalbano's opinion disclosures are the same. And I would -- I have gone through and I have -- I have tabbed the identical paragraphs with the identical information and I would be happy to go through that for the Court, and I doubt you want me to go through a hundred pages though. But that information, Dr. Tullis, Dr. Murray and Dr. Olcott, paragraph for paragraph have the same disclosure.

And if I were to start reading this, for instance, and to say paragraph 1 under Dr. Tullis reads XYZ, and then go to the next doctor and read his, my guess is you would probably cut me off and I would expect you to because I would be reading the exact same thing over and over again. And that's the concern that we have with the jury is that they are going to be hearing the exact same thing based on this disclosure over and over again with no variation. Literally no variation in the first three experts, those three vascular surgeons.

The testimony that they are proposing is cumulative. Once you have heard it one time, I don't see any reason to hear it again. The Defendants talk about needless reputation whether it's needlessly cumulative, once the jury's heard it, anything after that is cumulative and I -- when it's the exact same thing, I don't see any reason why that should be repeated.

Allowing the Defendants to march in four witnesses with identical opinions flies in the face of the rules of

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evidence and the rules of procedure. It's contrary to Rule of Procedure 1A, it's not speedy, it's not inexpensive to have these people come in and testify, to have the jury and the Court have to spend two days perhaps sitting through expert testimony that's repetitive.

I don't need to remind the Court, I'm sure that the Defendant will mostly likely testify as an expert on his own behalf that he didn't violate the standard of care. And so that all of his testimony will be on top of Defendant's testimony.

And we -- Plaintiff concedes that the first expert witness, whomever it might be that Defendant calls, that they will have probative value and they certainly should be allowed to call their expert, but they shouldn't be allowed to march in three more witnesses saying the same thing. It will confuse the issue and it will turn into a battle of the experts for the jury, and that's not the purpose of the trial. They are here to listen to the case and to try it on its merits. The repetition and accumulation of identical testimony would just fly in the face of that, and it would unduly delay these proceedings, and it's just -- it's a needless repetition. There is just -- there's -- based on the exact same disclosure, there's no reason to listen to these people over and over again.

We are not asking for exclusion of any specific

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witness. It doesn't matter to us who they pick. They should pick their best qualified expert witness, what we are asking for is that they can't bring them all in one after the other to say the same thing.

The Defendants should be limited to one expert to testify about the standard of care and one expert to testify about whether that was violated. Between the treating doctor and the expert, that will give them two witnesses who are testifying presumably that Defendant did not violate the standard of care. So we would move the Court to limit the witnesses pursuant to that motion.

Thank you, your Honor.

THE COURT: Alright, thank you. Mr. Jones.

MR. JONES: Thank you, your Honor.

Essentially what I'm hearing from the Plaintiffs is the pot calling the kettle black. Plaintiffs have, in my opinion, played games in their documentation that they have submitted and have maintained inconsistent positions for purpose of trying to gain a technical or strategical advantage. Essentially they are saying although they listed six standards of practice witnesses in their disclosure back in December when they were due by the Court's scheduling order, that now they really only mean to call two. They haven't withdrawn the others, but despite that fact, they seek to have the Defendant penalized because the Defendant went out of its way to provide

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an extremely detailed lengthy and thorough expert witness disclosure covering the facts, the opinions and the substance of the opinions for the experts on the various topics that they may offer testimony at trial. That's an operative word, "may," because there are various experts, they each have their own area of expertise as respects to the issues in this case, and so the fact that there are similarities between their lengthy disclosures does not mean they will all get up here and read their disclosures to the jury.

In fact, quite the contrary. This will be a fascinating trial for the jury up here and for the Court. In fact, I dare say, it will be one of the most fascinating trials that have gone on up here in a while. The jury will love the medicine in this case, and we have gone out of our way to try to find very well qualified and pertinent expert witnesses to bring up here and present to this Court and to this jury.

Now, I think it's worth pointing out that if the Plaintiffs are going to complain that the Defense disclosures are similar, then perhaps we should read the Plaintiff's disclosure which I submitted as an attachment as Exhibit letter C. If you look up what they have for all of their expert witnesses except for Dr. Johansen, it's identical, word for word identical.

And they have several statements about Dr. Thorne, for example, may testify concerning the local standard of care

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as it relates to this claim. They say the same thing for Dr. Stolanoff or Dr. Spencer or Dr. Moreno, my client, or Dr. Hedrick. Why is it okay for them to say the same thing with respect to the standard of practice and they don't even flesh out their opinions, they just claim they are going to talk about those topics. I go out of my way and provide extreme detail, and all of a sudden I'm cumulative and repetitious and therefore I should be limited, but it's okay for the Plaintiffs. They can violate the Court rules by not giving a detailed disclosure, and I'm the one that's subject to being limited. That doesn't make sense to me.

Now, the facts in this case are complicated medically. The bottom line is did my client violate the standard of practice, but it's a long road between the beginning and the end with respect to the medical issues in this case.

We will offer testimony from our experts that will vary with respect to their opinions on whether or not the inferior mesenteric artery should have been ligated, whether or not it should have been left where it was, and all the supporting data that goes in favor and against. We will offer varying opinions from our expert as to whether or not the perfusion of the colon needed to be checked by pulse Doppler, by visual inspection or by touch which will vary amongst the various expert witnesses that we have.

We will offer varying opinions with respect to the issue of causation and whether or not it was a cord infarct due to lack of blood supply from one of the spinal arteries that was ligated as a matter of course when the aorta is severed for purposes of performing the bypass. We have causation theories on whether or not the artery of Adamkiewicz which was located in a different anatomical position with respect to this patient.

We have causation theories dealing with whether or not it was an episode of thrombus or a clot that caused this spinal cord infarct with respect to this patient, and all of our expert will testify differently on these issues and they will not be needlessly repetitious.

Now, today is an important day in this case not just because we were here but because it's June 8, and actually it plays well that we are here on the 8th and not the 5th. Today is the discovery cutoff in this case. As a result of that, this matter is no longer subject to being resolved by Rule 16(d). This matter is now subject solely to Rule 403 because discovery is closed, Rule 16(d) in the Defense's opinion does not apply for purposes of limiting the Defense experts.

Plaintiff's counsel has never asked to take any depositions of the Defense experts in this case. As a result and the fact that discovery will be closed in about three and a

half hours, that issue is now off the table. So the only grounds upon which to address this motion from the Defense prospective is Rule 403. The arguments that have been advanced thus far by Plaintiff's counsel address solely the issue of whether testimony is cumulative, whereas Rule 403 specifically says "needlessly cumulative."

An example is where you line up twelve witnesses and they all come in and say the light was green. By the time you get to the sixth one, you don't need the seventh one to know that they are going to say the light was green. That's not the case in a medical malpractice case.

The issue that was raised by Plaintiff's counsel about a battle of experts and how that's a bad thing, well, that may be a bad thing in some people's opinions, but when the Idaho Legislature passed Idaho Code Section 6-1012, that's what they established. Medical malpractice cases are a battle of experts. Plaintiff has the ability to hire as many experts witnesses as they want. In fact, I dare say if they had hired four experts and we had eight, they would be here today saying we should only have four.

I find it odd and somewhat unfair that it's up to the plaintiffs to dictate how many expert witnesses the Defense should be allowed to utilize. They are seeking millions of dollars in this case, and they are hoping that they can convince this Court to screw the Defense, to limit the number

of expert witnesses the Defendant can have in hopes that they can gain a tactical advantage in what will be a very medically complicated trial.

Now, it's our contention that based on our disclosures, based on the information contained within our brief, that there has not been a showing that the testimony of these four witnesses will be needlessly cumulative. And I think there are some ways that we can analyze this, and I tried to lay some of that out in my brief. One is just the sheer numbers. Plaintiffs listed twenty-seven, we have listed fourteen. They challenge four of ours.

Now, if you look at their disclosure, they show six standard of practice witnesses. Plaintiffs counsel has concluded his opening argument and has not withdrawn any of those experts. So by sheer numbers alone, they exceed us. I think it's disingenuous to take the position that well, only two of those are retained experts. That is not part of their disclosure. Their disclosure says "standard of practice."

I also think it's disingenuous for them to say that they didn't go out and try to contact all the general surgeons in the community in order to somehow deter the Defendant from being able to utilize local experts. And they point to the fact that, well, we let you contact Dr. Thorne. Well, Dr. Thorne's not going to be too happy with the Plaintiff's counsel, because when we did talk to him, since we

listed him as someone who could talk about the local standard of practice, he said he was surprised to hear that the Plaintiff's counsel had listed him as an expert witness because he's never talked to the Plaintiff's counsel, knows nothing about the case and is furious that he would be listed by the Plaintiffs without ever being consulted. I think that goes to the evidence that we intend to show at trial that they are trying to make it more difficult for the Defense to be able to prove their case by contacting no one and listing all these people.

Another problem that I have with where this is going is we complied. We put all the materials down in good faith and on time. On our disclosure deadline of the 23rd of February, we put all the information possible down. If you compare that with the Plaintiff's disclosure, we got another disclosure from the Plaintiffs yesterday regarding their experts listing new opinions that have never been heretofore laid out. So I find it very surprising that the Plaintiffs can take the position that we should be limited when we have complied with the rules. They have not.

Now, with respect to the numbers. The fact that we have listed these four expert witnesses, I want to talk about them briefly for a moment because this issue of limiting the defense is just outrageously important to us as the Court can understand. Dr. Murray was contacted by my client during

the treatment of this particular patient. His name appears in the medical records, it's our contention that Dr. Murray is the equivalent of a treating health care provider in this case. If the Plaintiffs are going to take the position that all these other doctors they listed are just treaters so they don't count, then neither should Dr. Murray regardless of the fact that he may offer standard of practice opinions, as will the standard of practice treaters they have listed. So he doesn't even count in this equation.

They have also listed a Dr. McBride and a Dr. Stolanoff which in their latest reply brief, they admit are not treaters. Regardless of whether or not they have retained them, they have listed them as experts who will testify in the standard of practice. They haven't withdrawn them. So add up the numbers, McBride, Stolanoff, Johansen. They have three. The Defense has Tullis, Olcott and Montalbano which is a different subspecialty. We have three. It doesn't matter how you add it up, there's either equality or the plaintiffs have an excessive number of standard of practice experts than the Defense.

Now, in my brief for the Court, I tried to outline in addition to the fact that Dr. Murray has his own area of specialty and unique testimony that he offers, he gets patients from this area. When there are trouble cases that leave the Lewiston Valley, they go up to Lewiston. That's one reason why

his testimony is so important.

With respect to Dr. Olcott, Plaintiff's counsel has listed this Dr. Johansen who is a big gun coming in from Seattle where he works at a teaching institution there. It's only fair that we should have an academic expert which is why we have listed Dr. Olcott. He's somebody that will come in and talk about the training aspects and how on an academic parity level our client did not make any mistakes in this case as Dr. Johansen and their academic expert is going to contend.

Those two experts come down to the weight of their CVs, which one of them's more impressive. If we are limited on not being able to call Olcott, all of a sudden we don't have an academic expert and in the eyes of the jury, they may view Plaintiff's expert as far superior. The fact that we have listed one, we should be allowed to call that person. He will offer his own testimony that will not be needlessly cumulative. That's two of the three.

With respect to Dr. Tullis, he's our only Idaho guy. The issue is was the local standard of practice violated. That's what 6-1012 says. That's why we have Dr. Tullis who -- although he's not from Lewiston, he is at least an Idaho vascular surgeon who will be able to offer testimony on how things are done in Idaho. And he has worked outside of the Boise area. That's why we have those three experts listed.

Now, the fourth, Paul Montalbano, since he is a

neurosurgeon, he's in a totally different subspecialty. His opinions are going to focus mainly on the issues associated with the blood supply to the spinal cord, the pre-operative imaging studies and whether or not there were any red flags in there that would have suggested that the excessive collateralization of the vasculature that this patient had would have suggested she was likely to suffer a spinal cord infarct during an aortal bi-femoral bypass procedure. That's one of the reasons why we seek to have this particular witness called. I can only presume the Plaintiff seek to have him excluded because they didn't chose to list a neurosurgeon. We did. They had the first shot at it. If they wanted a neurosurgeon, they could have listed one.

Now, with respect to the 403 analysis, it's the Defense contention that at this juncture it cannot be determined fairly as to whether or not the testimony from these witnesses will amount to a needlessly cumulative presentation of evidence. Until the witnesses testify, this Court is well suited at the time of trial to put the brakes on any testimony it deems to be needlessly cumulative. That determination cannot be made at this juncture. For those reasons, we feel that it's premature to be addressing the issue under 403. The Plaintiff's witnesses have not testified, the issues have not been laid out for the Defense to then address in its case in chief. Until that time has come to pass, it's unfair from the

Defense prospective for this issue to be brought to the surface.

Now, there is another issue that is not in my briefing that I think also bears fruit on this. The Defense is listed a number of expert witnesses. Let's say at the time of trial if the Defense is limited to one at this particular point in time, my expert fails to qualify, or my expert is severely impeached at trial such that his credibility is worthless. I have listed four, but if I'm limited now, my client's ability to mount a significant and adequate defense to these allegations is diminished and destroyed because prematurely in advance of trial, things may happen ultimately that I can't predict that may impair one of my witness' presentations at trial. For that reason alone, I should not be limited.

Also the fact that each one of these experts is testifying as to what the standard of practice is for different reasons, as the case authorities that I presented to the Court in my brief outline, it's good to have more than one. One gives weight and dimension to the testimony of the last one to the issues that are being presented. Now, there's a line there , we acknowledge and concede that fact, but that line is drawn at the time of trial. That line is not drawn now.

Nothing under Idaho Code 6-1012 limits the number of witnesses that the Defense can call, and there hasn't been any case authorities that have been presented by the Plaintiffs

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which say in a medical malpractice case after the close of discovery that the Defense should be limited based on what their expert witness disclosure says or based on the number of witnesses that they have.

We provided this Court with a detailed disclosure, Plaintiffs put it in the record, the Court has a copy of it, we think we have played by the rules, we think we have been fair, we think that this motion is unfair to the Defense for all the reasons we have stated and we ask that it would be denied. Thank you.

THE COURT: Thank you, Mr. Jones.

Mr. Kessinger, any rebuttal?

MR. KESSINGER: Thank you, your Honor. We have heard a lot of talk about equality and inequity and unfairness and I would invite Defense Counsel right now to stipulate to one expert on each issue on the record if that's what he's looking for, that kind of fairness, that kind equality. Counsel, any interest?

MR. JONES: Finish your argument, Counsel.

MR. KESSINGER: Defense Counsel has indicated that Plaintiffs have been engaging in game playing, hiding the ball, that hasn't happened, your Honor. As you know, these cases are complex and there's a lot going on at the same time. Plaintiff feels that the disclosure rules were met with his disclosures, adequate explanation has been given for the number of witnesses

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who were disclosed as experts, and that is that they were treating people -- treating doctors, they have expert opinions, they are fact witnesses with expert opinions.

Defense has just spent a lot of time explaining how each of these medical experts have different expertise and how their opinions are going to be different. Defense spent approximately 18 pages per expert explaining their opinions. And in those 18 pages, there's no differences except for education and their experience at different facilities. I don't think that's the kind of differences that make their testimony noncumulative. And I don't think the jury -- I don't think it's going to be helpful for the jury to know that one was -- one was educated in Kentucky and the other was educated in Indiana. I don't think that makes any difference in the case. And those -- those, as it turns out, are the only differences that Defense can point out in the first three witnesses, that being -- that being Tullis, Murray, Olcott. And then Montalbano, we conceded he does have one page of unique information out of the 11-page opinion disclosure. So he does -- he does perhaps have some unique information.

And, again, we are not requesting that these people not be allowed to testify, what we are requesting is that they can't come in here and testify about the same thing over and over again, and that's what the disclosure tells us they are going to do. And Defense would like to work around

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that now and say, well, they are not going to say the same thing, that's quite convenient to come in here today and say they are not going to say the same thing, but the disclosure's here, it's in the record.

I hope he's right about it being a fascinating trial, the jury would probably like that.

I would disagree with Counsel's assessment of the rules as far as discovery being closed, these don't apply any more. Even if that were the case, this hearing, we attempted to have it earlier, it didn't work out. The Court clearly has a discretion to limit the number of witnesses in this case and Plaintiff believes that's appropriate.

The new disclosure, in fact we did supplement disclosure precisely because of Defendant's complaint listed in his brief. We did supplement our disclosure of Kaj Johansen, and that was in an effort to be fair to Defense. He had made some complaints in his brief, so we gave him all the information we had about that opinion in an effort to appease him.

Counsel's talked about Dr. Murray being the equivalent of a treater. We don't have any objection to Dr. Murray coming in and testifying this is what happened, this is what we talked about. But rendering -- rendering opinions on the ultimate issue would be -- would be outside the realm of what we would expect from him if he's just coming in and

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testifying as someone who maybe perhaps participated in that treatment. If he wants to come in and say, yeah, the doctor contacted me and we discussed XY and Z, we wouldn't be opposed to that. But coming in and rendering on opinion on the ultimate issue of whether the standard of care was violated, we would have a problem with that.

They are welcomed to call Dr. Olcott, they can call whichever expert they want, it's the repetition that is clearly outlined in this disclosure over and over and over again. Counsel has mentioned that Tullis is the only Idaho guy. Olcott can familiarize himself with the standard of care through Tullis if needs be.

He talked about the concern that maybe his experts will fail to qualify, maybe their credibility will be compromised, those are risks we all run with all our experts. That's the way that this process works is that experts are going to be exposed to some cross examination and sometimes that hurts the witness' opinion.

At the very least, at the very least we would ask that the Court limit Defendant's experts similar to what we see in the Federal Rules, and that being two experts on a single issue. They have already got the treater who is going to testify regarding these issues. He is an expert. He's going to carry a lot of weight with the jury in and of himself. At most we would ask that the Court allow them two witnesses for

each issue which is in line with other jurisdictions, is in no way contrary to the case law that Defendants side of -- Defendants case law stands for the proposition that the court can limit witnesses at its discretion so long as the court goes through the correct process and follows the rule. A number of those -- at least two of those cases were remanded with the appellate court saying, yeah, you can limit the witness, just make sure you tell us why. And that's what we are asking that the Court does.

It's unfair to the Plaintiff, you know, there's been lot of talk of unfairness, it's unfair to the Plaintiff to march in four people in a row saying the exact same thing. And so we would renew our request that the Court limit the number of witnesses Defense can call.

THE COURT: Thank you, Mr. Kessinger.

Well, thank you both for your presentations and your written materials to the Court, I found both helpful.

This, of course, is governed in my analysis for purposes of this afternoon is following Idaho Rule of Evidence 403 where it talks about the Court can exclude relevant evidence for differing reasons. And clearly all the evidence that's been discussed through these witnesses would be relevant evidence to this case, I think that's clear.

I did have an opportunity obviously, and I would refer specifically to Defendant's memorandum on pages 21 and

22, where it's described what the four positions, backgrounds are and their areas of expertise and what they would expect their testimony to be, so they are all relative -- I'm sorry, relevant and there would certainly be probative value from those experts.

The rule goes on to give the Court discretion to exclude that evidence for various reasons. And one of those, and maybe the most important of which, is whether that evidence would be cumulative in this particular case. And first of all, I think the four expert witnesses that have been discussed from my review of the information relative to those witnesses, I can't conclude at this time that that would be a needless presentation of cumulative evidence.

Mr. Kessinger, I understand what you are saying relative to the information that's been disclosed to you, I guess I'm not so persuaded that the evidence is going to be so repetitious that in my discretion I would exclude it at this point in time. I think Mr. Jones is correct in that -- well, two things. At this point in time I'm not persuaded to grant the motion. I think Mr. Jones is correct in that it's somewhat premature at this point in time to limit the evidence under 403. As the trial progresses and if I think that expert testimony is cumulative, I can revisit that and that would apply to either side of this. So quite often in these cases I have to kind of take a wait and see approach and sometimes that

argument comes up during the trial and I start agreeing with that argument. But at this point in time, I'm having difficulty agreeing with it based on what's presented before me today.

So based on that, in my review of Idaho Rule of Evidence 403, in recognizing it's in my discretion, I find that the evidence is relevant and I don't find that it would be a waste of time or a needless presentation of cumulative evidence based on my review of the materials today.

So with that, did you have anything further, Mr. Kessinger?

MR. KESSINGER: No, your Honor.

THE COURT: Alright. Thank you. Mr. Jones?

MR. JONES: No, your Honor.

THE COURT: Alright. Thank you both.

(Thereupon, the hearing was concluded at 1:40 p.m.)

CERTIFICATE

I, Linda L. Carlton, C.S.R., certify that I transcribed into the foregoing record the excerpt proceedings in the above-entitled cause, and that the said transcript is a full, true and correct copy of the above-entitled cause to the best of my ability, held in Lewiston, Idaho, on June 8, 2007.

DATED this [illegible] July, 2007.

Linda L. Carlton
Certified Shorthand Reporter
Second Judicial District
of the State of Idaho

IDAHO C.S.R. NO. 336

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IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES

This Memorandum is submitted in opposition to the Plaintiff's Motion seeking to unfairly limit the number of defense experts to only one per subject matter despite the fact that Plaintiff has in excess of this number himself. This is a medical malpractice case involving the death of Krystal Ballard who passed away in July 2010.

Plaintiff claims that the patient died as a result of malpractice by the Defendants which resulted in the decedent becoming infected which ultimately resulted in her death.

Plaintiff contends his claims are supported by the opinions of a number of experts in various fields including plastic surgery, infectious disease and pathology. The Defense disputes Plaintiff's claims and has identified experts to rebut these allegations. Despite the different backgrounds and specialties of these physicians, Plaintiff's counsel claims that pursuant to a rule of evidence, Idaho Rule of Evidence 403, the court should enter an order in advance of the trial limiting the defense to not more than one expert witness, other than the defendant himself, to testify on any given subject. For the reasons set forth below, the Plaintiff's Motion should be denied.

I.

ARGUMENT

A. Plaintiff Has Failed To Establish That The Probative Value Of The Testimony To Be Provided By Defendants' Expert Witnesses Is Substantially Outweighed By The Danger Of Presenting Needlessly Cumulative Evidence as required under IRE 403

As an initial starting point, the defense raises the standing and/or propriety of the Plaintiff to even bring the pending motion at this juncture in the case which is based solely on a rule of evidence. Expert witness disclosures are not evidence, nor are they admissible as evidence, but rather they are a discovery tool utilized to prepare for trial. The defense contends that Rule 403 has no application whatsoever at this pretrial stage and that this rule of evidence does not provide the Plaintiff with a vehicle or mechanism by which the number of defense experts can be limited months in advance of a trial.

In terms of addressing the application of Rule 403 if we were in a trial

setting, additional background should be considered by the court. There are multiple Defendants in this case including Dr. Kerr and Silk Touch Laser and Med Spa. The complex medical issues in this case cover an unusually large number of areas including the performance of multiple cosmetic procedures and the equipment involved therein, the proper sterilization of surgical equipment and maintaining a proper sterile surgical field, the identification and treatment of a septic infectious process, the effectiveness of various antibiotics, the cause and effect of multi-system organ failure and theories as to the cause of death for this particular patient.

Due to the number of medical issues in this case, Plaintiff has listed the opinions of not less than three retained experts to address both standard of practice and causation issues including: Dean Sorensen, M.D., George Nichols, M.D. and Keith Armitage, M.D. These individuals are disclosed as experts in various areas of medicine including plastic surgery, anatomical, clinical and forensic pathology and infectious disease. ***See*** Plaintiff's First and Second Supplemental Responses to Defendants First Set of Interrogatories attached to the Affidavit of Counsel in Opposition as Exhibits A and B.

In order to oppose these experts, the defense disclosed six retained experts including: Gregory Laurence, M.D., a cosmetic surgeon with his background and training in family practice medicine in which he is boarded; Charles Garrison, M.D., forensic pathology; Thomas Coffman, M.D., infectious disease; John Lundeby, M.D., a cosmetic surgeon with his background and training in general surgery in which he is boarded; Geoffrey Stiller, M.D., who completed a fellowship in cosmetic surgery on top of his background in general surgery; and Angier Wills, M.D., a plastic surgeon. In response to

the Plaintiff's request that the defense voluntarily agree to reduce the number of its experts prior to conducting depositions, the Defense withdrew Dr. Wills thereby effectively reducing the number of retained defense experts on the issues of standard of practice and causation to five. ***See*** the professional credentials and curriculum vitae for each of these experts attached to the Affidavit of Counsel in Opposition as Exhibit C.

At issue is whether Rule 403 provides a basis upon which the court may limit the number of defense experts during discovery, as opposed to the number of experts that may ultimately testify at trial. Idaho Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In terms of interpreting and applying Rule 403, Idaho courts have consistently determined that "the language of I.R.E. 403 tilts in favor of admissibility." ***State v. McGuire***, 135 Idaho 535, 540 20 P.3d 719 (Ct. App. 2001). Only if the probative value of the testimony is "substantially outweighed by danger of needless presentation of cumulative evidence," may a trial court exclude relevant evidence. ***See State v. Knight***, 120 Idaho 862, 865, 920 P.2d 78 (Ct. App. 1996). In addition, "statements by witnesses which corroborate the facts, to which another has already testified, are not necessarily inadmissible because they are cumulative." ***State v. Blackstead***, 126 Idaho 14, 22, 878 P.2d 188 (Ct. App. 1994). Instead, "Rule of Evidence 403, prohibits the introduction of needlessly cumulative evidence." ***Id***.

Under the clear and unambiguous language of Rule 403, in order for the relevant testimony of any of the defense experts to be limited in any way, the Plaintiff must

show that the presentation of such testimony from the Defense experts would amount to the "needless presentation of cumulative evidence." The fact that evidence to be provided by an expert witness may be similar or even cumulative to that of another witness does not, standing alone, meet the threshold test for exclusion under the Rule upon which the Plaintiff's motion is solely based. Rather, the evidence must be "needlessly" cumulative before the Court can even consider whether to limit it. The defense contends that such a determination cannot be made months prior to trial before the Plaintiff has presented any evidence.

The Plaintiff's Motion fails to establish anything more than sheer speculation that based solely on the number of Defense experts that their respective testimony would even be cumulative as opposed to needlessly cumulative as specifically stated by Rule 403. What opinions, facts and foundation the defense experts may testify to at trial as broadly set forth in the Defendants' Expert Disclosure cannot be fairly relied upon during discovery as grounds to limit the number of experts at this point. Unique to the nature of this case and equally critical to the Court's resolution of this matter, is the fact the parties are required to prove their respective cases by way of expert testimony pursuant to Idaho Code §§ 6-1012 and 6-1013. Idaho Code § 6-1012 provides:

> Proof of community standard of health care practice in malpractice case
>
> In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, **such claimant or plaintiff**

> **must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community** in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any . . .. (Emphasis added).

In order for the jury to understand what will be complex medical matters, experts will be relied upon by both parties to explain, rebut and educate the jury. As part of this process, experts will discuss in detail the medical issues in question and offer their varying opinions on whether Dr. Kerr's care and treatment in question complied with the local standards and practices of health care within the community to which he is held as well as their varying opinions as to the cause of the patient's death. ***See*** Idaho Code § 6-1012.

Indeed, a review of the defense disclosure shows the Defendants fully complied with the rules governing expert witness discovery in this case. The Defendants provided Plaintiff with an extremely detailed and timely Expert Witness Disclosure setting forth the opinions and factual basis expected to be presented on a variety of topics. ***See*** Defense Disclosure attached to the Affidavit of Scott McKay as Exhibit A. The Defendants cannot be faulted for complying with Rule 26(b)(4) in disclosing their experts' opinions regarding the substance, foundation and subject matter of their opinions. The

Defendants have set forth the full scope of the potential of the experts' testimony, but this does not mean that the experts will ultimately testify as to each and every opinion and issue stated therein.

This is because the Plaintiff goes first, has the burden of proof and the defense must plan ahead and be prepared at trial to meet and oppose the evidence and adverse opinions offered. Plaintiff's complaint that he is somehow outnumbered is insufficient to limit the defense's ability to present key testimony on the main issues in this case. Plaintiff has not cited any legal authority to support his argument that based on numbers alone the defense should be limited. There are multiple reasons why the testimony of defense experts will not be needlessly cumulative.

First, each of the Defendants' standard of health care practice experts will offer unique and relevant testimony on various aspects of the standard of practice topic which will not be needlessly cumulative. The Defendants have disclosed three retained experts regarding the standard of health care practice. Of these experts, Gregory Laurence, M.D. is from Tennessee and has a background in family practice medicine a specialty which the Plaintiff does not have; John Lundeby, M.D., is from Spokane, Washington and was involved in providing cosmetic surgery training to the Defendant Dr. Kerr; and Geoffrey Stiller, M.D. from Moscow, Idaho, and has a background in general surgery, another specialty which the Plaintiff does not have. Each one of these experts approach this case from a different perspective and simply because their respective disclosure reflects that they will be prepared to address similar topics does not mean that the presentation of their testimony at trial will result in the presentation of needless cumulative evidence.

Moreover, simply because these experts reach the same or similar conclusions that Dr. Kerr did not violate the applicable standard of health care practice is not a basis to limit or preclude their testimony on the key issues in the case which is governed by the unique statutory scheme set forth under Idaho Code §6-1012. This is significantly different from a situation where a party seeks to call multiple witnesses to testify on the same fact, such as whether a traffic light was green or red immediately prior to an automobile accident. Under that scenario, the defense concedes there would be little value to calling five witnesses to all say what color the light was at the time of the accident.

In contrast, a review of the Defendants' Expert Disclosure regarding the standard of health care practice experts establishes that there are different reasons and different aspects to their respective testimony. Each of these experts provides a unique aspect to the case that the Defendants should be entitled to present. In order to give a complete disclosure, and in an effort to avoid the potential argument by the Plaintiff that certain opinions were not disclosed, there is naturally going to be some overlap to testimony and to the disclosure itself in order to ensure compliance with Rule 26(b)(4). Many district courts in Idaho take the strict position that if an opinion is not set forth in the expert disclosure, then it cannot be presented by the witness at trial. Mindful of this position, the defense takes great pains to ensure the expert disclosure is complete. As a result, there is no justifiable reason for the Court to conclude at this early discovery phase juncture, that the highly relevant testimony of these experts will be needlessly cumulative and therefore subject to exclusion and/or limitation.

Second, each of these three experts come from different practice

backgrounds and gained their knowledge of the applicable standard of practice in a variety of ways. For example, Dr. Laurence is from Tennessee and has a background in family practice medicine rather than general surgery or plastic surgery like the Plaintiff's expert, Dr. Sorensen. This is a critical difference since Dr. Kerr has an anesthesia background and has been criticized by Plaintiff's expert because he does not have a general or plastic surgery background. Similarly, although Dr. Lundeby has a general surgery background, he will explain to the jury that he is actively involved in providing training to physicians from other medical specialties like family practice, ob/gyn, dermatology and anesthesia to perform the very procedures at issue without need of any formal general or plastic surgery residency as has been advanced by Plaintiff in this case.

Finally, Dr. Stiller is the only Idaho physician. His testimony is unique from that perspective in addition to the fact that he has knowledge that many, if not most, of the physicians in Idaho who are performing the surgery at issue in this case are not plastic surgeons, but rather some other specialty like Dr. Kerr. Furthermore, since there are additional claims against not only Dr. Kerr, but also the Defendant spa facility regarding sterilization procedures and techniques, the Defense is entitled to call witnesses who may be capable of rendering opinions more for one defendant than another. The Defense cannot get the breadth of this testimony from one witness and the rules do not require or advocate for Dr. Kerr to be limited as Plaintiff contends.

Third, if the Defendants are limited to a certain number of experts prior to trial, this may result in unfairly prejudicing the defense. For example, if one of these three standard of practice witnesses should fail to qualify as an expert at trial for any reason, or should a defense expert be meaningfully impeached, then the Defendants

would need to rely upon a similar expert to establish certain issues. The fact that the defense has retained multiple experts should entitle them to be available at the trial if needed. In addition, the Plaintiff's experts may be permitted to testify on issues that requires a certain Defense expert to rebut which the Defense has taken the time and effort to properly identify and disclose in full compliance with the rules of discovery. Thus, the difficulty in even considering placing limits on the Defense experts at this stage is that it is impossible to predict what will happen at trial or how Plaintiff will present his case.

Plaintiff is seeking millions of dollars in damages from the defense in this case. In order to fairly defend against these claims the Defense took the time and made the investment into utilizing the right experts for this case. As a result, the defense should be entitled to present the testimony of its timely retained and properly disclosed standard of practice experts. It is premature to decide at this juncture where the parties are still engaged in discovery whether the testimony of these witnesses at trial will amount to the needless presentation of cumulative evidence. Rule 403 does not provide the Plaintiff with a mechanism by which the Defense can be limited during discovery. As a result, the Plaintiff's Motion should be denied.

B. The Plaintiff's Motion Should Be Denied Consistent With The Case Authorities From Numerous Jurisdictions Which Have Refused To Limit The Number Of Medical Experts In Similar Cases

While there is no Idaho authority specifically regarding I.R.E. 403 and its application to limit the number of expert witnesses in a medical malpractice action, there are a number of other jurisdictions with similar or identical Rules of Evidence which have

addressed this issue. For example in the very recent case of ***McLean v. Liberty Health System***, 62 A.3d 922 (N.J. 2013), the New Jersey Appellate Court held that the district court in a medical malpractice case had abused its discretion in only allowing the plaintiff to call one standard of care expert. ***McLean*** involved the death of a teenager whose family sued various health care providers claiming that they had failed to timely diagnose and treat him for an infection. ***Id.*** at 924. At trial, counsel for the plaintiff sought to produce the testimony of multiple standard of practice experts in the same field of emergency medicine, but the court refused to allow him to call more than one in response to the defense position that allowing more than one expert would be duplicative. ***Id.*** at 926.

Reversing the district court, the ***McLean*** court stated:

> **We now hold that the trial court erred in limiting expert witnesses to only one per side for each relevant field of medicine, in particular, on the crucial issue of deviation from accepted standards of medical care. . . Nothing in our rules of evidence, or other laws or rules, gives a trial court authority to balance the number of witnesses presented by each side at the trial. Nor is the trial court authorized by N.J.R.E. 403 or any other rule or law to bar crucial evidence merely on the ground that it duplicates another witness's testimony.** ***McLean***, 62 A.3d at 928. (Emphasis added). ***See McLean*** Decision attached to the Affidavit of Counsel in Opposition as Exhibit D.

The ***McLean*** court further observed:

> Here, the testimony that plaintiff wished to present went to the heart of her case: whether defendant deviated from accepted standards of care for an emergency room physician. Although a second expert would have taken more time at the trial, it might have been time well spent. **In the field of medicine, second opinions are often sought to test the accuracy of a diagnosis or the benefits and risks of proposed treatment. Surely it cannot be said that**

> **additional expert testimony in a case that involved complicated issues of emergency and diagnostic medicine had such low probative value as to be substantially outweighed by its partially repetitive nature**. . . We note that Rule 403 does not refer to "duplicative evidence" but to "needless . . . cumulative evidence that might cause undue delay in the trial and a waste of time. ***McLean***, 62 A.3d at 929. (Emphasis added).

Another example can be found in the case of ***B.C. Sims v. Brackett***, 885 S.W.2d 450 (Tex. Ct. App. 1994), the Court held that the exclusion of an expert medical witness's testimony as to the cause of the patient's post-surgery intestinal leak on the grounds that such testimony was cumulative was improper. The Texas court discussed the fact that in a medical malpractice trial expert testimony is a necessity and the matters at issue are addressed by opposing experts. ***Id.*** at 454. In order for the trial court to exclude testimony, it must not just be cumulative, but rather the probative value of the expert's testimony must be "substantially outweighed by . . . [the] needless presentation of cumulative evidence." ***Id.*** In applying the Texas nearly identical equivalent of Idaho's Rule 403, the Court stated:

> To exclude evidence under Rule 403, the trial court must conduct a balancing test and only when the balance weighs significantly on the side of judicial efficiency may relative evidence be excluded as cumulative. . .. **The test is not merely whether the evidence to be deduced from the two witnesses is similar, but also whether the excluded testimony would have added substantial weight to the offering party's case. If so, it is error to exclude it.** ***B.C. Sims***, 885 S.W. 2d at 454. (Emphasis added).

The Court concluded that the excluded witnesses credentials and specialty gave their testimony great probative value which was not purely cumulative. ***Id.*** Where a party is denied the right to make a fair presentation to the jury, the court has not acted reasonably

and has abused its discretion in excluding the testimony of a witness on a "hotly contested issue" in the case. ***Id. See B.C. Sims*** Decision attached to the Affidavit of Counsel in Opposition as Exhibit E.

The Supreme Court of Wyoming reached a similar result in ***Kobos v. Everts***, 768 P.2d 534, 546 (Wyo. 1989). There the Court stated:

> Not all evidence which is entirely duplicative is therefore cumulative and excludable. Evidence may vary in degree of persuasiveness, and when an item of proof which is offered on a point is very different in character or persuasive impact from an item of proof previously received, the former cannot be considered merely "cumulative" of the latter. **Moreover, at times it is entirely reasonable for a party to insist, "One witness is good, but two or three will make my case much stronger, even though all will testify in a similar vein." In short, the discretion of the trial judge to exclude cumulative evidence must be exercised in a discriminating fashion, and with wisdom, particularly where the evidence in question goes to issues of central importance in the case. *Kobos***, 768 P.2d at 546 (Emphasis added).

See Kobos Decision attached to the Affidavit of Counsel in Opposition as Exhibit F. ***See also 2 D. Lonisell and C Mueller***, Federal Evidence § 128 at 74-75 (1985); ***Hill v. Bache Halsey Stuart Shields, Inc.***, 790 F.2d 817 (10th Cir. 1986); ***Bower v. O'Hara***, 759 F.2d 1117 (3rd Cir. 1985); and ***United States v. Fessel***, 531 F.2d 1275 (5th Cir. 1976). ***See also*** the case of ***Johnson v. United States***, 780 F.2d 902 (11th Cir. 1986), where the Eleventh Circuit held that the District Court abused its discretion excluding a third medical expert witness when the witness had different credentials and would have offered slightly different evidence and analysis. ***See Johnson*** Decision attached to the Affidavit of Counsel in Opposition as Exhibit G.

Finally, in ***Frederick v. Woman's Hospital of Acadiana***, 626 So.2d 467

(La. Ct. App. 1993), the Louisiana Court held that cumulative expert testimony was properly admitted. In ***Frederick***, the defendants in a medical malpractice case offered the testimony of two pediatric neurologists. ***Id.*** at 472. The two physicians attended different medical schools; one was principally a hospital administrator, the other was a private practitioner. The court determined that the trial judge was correct in permitting each to testify, as each one's testimony added dimensional perspective to the testimony of the other. ***Id.*** at 472-73.

The ***Frederick*** court also held that the trial judge properly admitted the testimony of three obstetrical-gynecologists. ***Id.*** at 473. Each witness differed in background and sub-specialty. One graduated from L.S.U. Medical School, was chief of OB/GYN at a Dallas hospital and specialized in fetal-maternal medicine. Another attended the University of Tennessee Medical School, was board-certified in OB/GYN, surgery and perinatology, and was a professor at the University of Mississippi Medical Center. The third OB/GYN called by the defendants trained at the University of Oregon, chaired the Department of OB/GYN at Tulane Medical Center, co-authored several books and had performed years of antenatal diagnosis and treatment of birth defects. The court concluded that the probative value of the testimony from each of these three experts, although similar, was not substantially outweighed by any concerns articulated in Rule 403. ***Id.***; ***see also Hall v. Brookshire Bros.***, 831 So.2d 1010 (La. Ct. App. 2002). See ***Frederick*** Decision attached to the Affidavit of Counsel in Opposition as Exhibit H.

In further opposition to the Plaintiff's Motion, the Defendants submit the transcript from an oral ruling by the Honorable Joel D. Horton in the case of ***Yoonas v. Ediger***, Ada County Case No. CV PI 0000249D. The transcript, a copy of which is

attached to the Affidavit of Counsel in Opposition as Exhibit I, is an excerpt of the hearing before (now Supreme Court Justice) Judge Horton on a similar plaintiff's motion to limit defense experts in a medical malpractice case. The defense in that case sought to call four experts in addition to the defendant. The excerpt provided contains Judge Horton's oral ruling that the presentation of four defense experts would not be needlessly cumulative. Similarly, the Defendants submit the transcript from an oral ruling by the Honorable Carl B. Kerrick in the case of ***Strandbakke v. Moreno***, Nez Perce County, No. CV 05-0002547. The transcript, a copy of which is attached to the Affidavit of Counsel in Opposition as Exhibit J, reaches the same conclusion as the court in ***Yoonas***. The court in ***Strandbakke*** concluded that the expert testimony was relevant, would not be needlessly cumulative can could not be limited in advance of trial just as the Plaintiff has argued in the case at bar.

This is a complex medical malpractice case involving several different areas of medicine including: cosmetic surgery, general surgery, forensic pathology, bacteriology, infectious disease, toxicology, anesthesiology, emergency medicine, internal medicine and urology. The issues in this case involve not only the performance of cosmetic surgery in multiple areas of the body, but also the determination of the cause for the patient to become septic and the various bacterial issues which are involved. The patient in this case died of unusual circumstances and the autopsy records, tissue slides and blood samples in this case have been or will be reviewed and evaluated by multiple specialists in medicine. The Defendants are entitled to present this evidence to the jury and the opinions of the properly disclosed witnesses. Similar to the decisions reached by courts from other jurisdictions, as well as Idaho District Courts, the Defendants

respectfully request this Court rule that at this early juncture there is no evidence before the Court which would support the Plaintiff's proposal to limit the number of Defense experts from three to one and deny said Motion.

III.

CONCLUSION

Excluding and/or limiting several of the defense experts from being able to testify on the key standard of practice and causation issues in this case despite the fact they were timely and properly disclosed would unfairly prejudice and hamper the Defendants' ability to present an effective defense, especially in light of the complicated nature of the medicine in this case. The complex medical issues in this case require significant expert witness testimony, which the jury should be entitled to receive without the arbitrary limitations proposed by Plaintiff. Each of the Defendants' expert witnesses will provide a different dimensional perspective to the testimony of the other without needlessly re-plowing the same ground. Thus, the number of retained standard of practice expert witnesses disclosed by the Defendants (three) are not excessive, and should not provide a basis to limit the experts to be called by the Defendants at trial on the most critical issues in the case.

Any decisions regarding the cumulative nature of the testimony to be proffered by the Defendants' expert witnesses can be adequately controlled and monitored by the Court at trial. The Plaintiff has yet to put on their case-in-chief and none of the Defense experts have testified or even given deposition testimony. It will not be known until the time of trial what evidence the Defendants will need to present in their case-in-chief through various experts. For all of the reasons discussed herein, the

Defendants respectfully request that the Court deny Plaintiff's Motion to Exclude Cumulative Expert Witnesses.

DATED this 2nd day of July, 2013.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2013, I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES by delivering the same to each of the following, by the method indicated below, addressed as follows:

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE VIDEO DEPOSITION OF DR. GEOFFREY STILLER

ORIGINAL

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To: Dr. Geoffrey Stiller
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video deposition of Dr. Geoffrey Stiller on **Friday, July 19, 2013** at 9:00 a.m. PST, at the law offices of Tim Gresback, 210 East 7th Street, Moscow, Idaho 83843, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from defense counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 3rd day of July, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER, LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2013, I served a true and correct copy of the foregoing by delivering the same to the following via U.S. Mail, postage prepaid:

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for Scott McKay

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, ,

Defendants.

Case No. CV OC 1204792

REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESSES

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ORIGINAL

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, and files his Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion to Exclude Cumulative Expert Witnesses. By their memorandum in opposition, Defendants attempt to justify a parade of defense experts on standard of care by looking to persuasive authorities, and by emphasizing that "each one of [their] experts approach this case from a differing perspective . . . ." (Defs.' Memo in Opp. 7.) Defendants also attempt to convince the Court that there is no vested authority granting this Court the discretion to limit expert witnesses during discovery.

In fact, there is Idaho case law specifically recognizing this Court's discretion to limit the number of expert witnesses during discovery. Many of the persuasive authorities provided by Defendants actually comport with the limitation requested by Plaintiff. And because differing perspectives should not obscure the fact that only one standard of care applies in this case, the Court would be well within its discretion to limit Defendant in accordance with Plaintiff's Motion to Exclude Cumulative Expert Witnesses.

As an initial point, nowhere in Plaintiff's motion does he "[complain] that he is somehow outnumbered . . . ." (*Id.*) Defendants' statement to the contrary should be disregarded. So, too, should Defendants' related assertion that "Plaintiff's Motion fails to establish anything more than sheer speculation that based solely on the number of Defense experts that their respective testimony would be cumulative." (*Id.*) The reason for this is obvious: Plaintiff need not speculate as to the cumulative nature of defense experts' testimony because "Defendants provided Plaintiff with an extremely detailed . . . Expert Witness Disclosure . . . ." (*Id.* at 6.) The clearly repetitive expert opinions contained within that disclosure speak for themselves as to the cumulative nature of the anticipated testimony. And to the extent Defendants support their opposition by reference to

hearing transcripts (or excerpts thereof) without valid, corresponding court orders, those purported "authorities" should be ignored.

Defendants would have this Court believe that no precedential authority exists to support the Court's limitation of expert witnesses during discovery. This is simply incorrect. In *Edmunds v. Kraner*, the Idaho Supreme Court ruled as follows:

> **Our law and our rules of civil procedure both provide that courts have the authority to limit the number of expert witnesses prior to trial. We have long recognized that courts have broad, inherent powers to control discovery.** ***See Bailey v. Sanford,*** **139 Idaho 744, 749, 86 P.3d 458, 463 (2004). This includes the inherent authority to limit the number of expert witnesses during discovery.** *See Hansen,* 974 P.2d at 1161 (finding no abuse of discretion where district court disallowed three expert witnesses prior to trial when it did not preclude the party seeking to use the witness testimony from raising a relevant issue). We have also advised that "judges should not hesitate to exercise appropriate control over the discovery process." *Sierra Life Ins., Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 801, 623 P.2d 103, 109 (1980) (quoting *Herbert v. Lando,* 441 U.S. 153, 177, 99 S.Ct. 1635, 1649, 60 L.Ed.2d 115, 134 (1979)).
>
> Our rules of civil procedure and the express purposes behind our discovery rules likewise recognize the court's authority to limit the number of expert witnesses. Rule 16(d)(4) provides that a court may limit the number of expert witnesses prior to trial. Rule 1(a) requires that the rules of civil procedure "be liberally construed to secure the just, speedy, and inexpensive determination of every action and proceeding."

142 Idaho 867, 877-78, 136 P.3d 338, 348-49 (2006) (emphasis added). Therefore, it is not, as Defendants suggest, premature to grant the requested relief.

And with regard to the case law provided in support of Defendants' argument, it is prudent to note those cases are consistent with Plaintiff's proposed limitation. In *McLean v. Liberty Health System*, for instance, the Court ruled that "the trial court erred in prohibiting plaintiff from presenting testimony by a *second* malpractice liability expert . . . ." 430 N.J.Super 156, 162, 62 A.3d 922, 926 (2013) (emphasis added).

In *B.C. Sims v. Brackett*, a case involving claims against surgeons, an infectious disease specialist, a kidney specialist, nurses, pharmacists, as well as the hospital in which those medical professionals worked, the Texas Court of Appeals employed a Rule 403 analysis in determining "that the trial judge abused his discretion in excluding [a medical expert who the plaintiff intended to offer on the standard of care for recovery]." 885 S.W.2d 450, 451-454 (1994). The improperly excluded expert was board certified in internal medicine, and the lower court ruled that his testimony would be cumulative of a board certified general surgeon who had previously testified. *Id.* at 453.

In *Johnson v. U.S.*, a medical malpractice case under the Federal Tort Claims Act, the Eleventh Circuit Court of Appeals vacated the judgment and remanded for continuation of the bench trial below, in part, because the government should have been allowed to offer an expert witness in child behavior in addition to its two other experts. 780 F.2d 902, 904-906 (1986). And in *Kobos v. Everts*, the Supreme Court of Wyoming employed a Rule 403 analysis in ruling that a the trial court erroneously precluded the plaintiff from offering a pediatrician and a pathologist in a case involving defendant pediatricians, orthopedic surgeons, and radiologists. 768 P.2d 534, 536, 545 (1989).

Though Defendants cite these cases in support of their opposition, there are two reasons why those cases provide more support for Plaintiff's motion than for Defendants' opposition. First, in none of these cases are *five* experts being offered to shed light on any single issue. In this case, however, Defendants seek to tender five experts as to standard of care. Additionally, these cases involve multiple defendants of varying specialties. Accordingly, it would follow that, in cases where multiple standards of care would apply, greater numbers of standard of care experts would be appropriate to shed light as to the applicable duties involved.

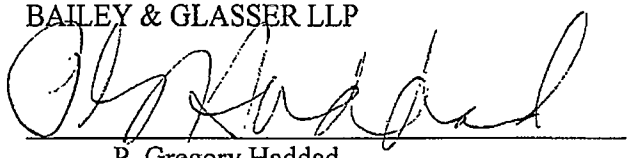
In this case, no such demand exists. Plaintiff, by his Complaint, invokes a *single* standard of care. Therefore, it is inevitable that Defendants' proposed standard of care experts -- all five of them -- would provide needlessly cumulative evidence on the *one* standard of care that applies in this case. Differing expert perspectives do nothing to mitigate this reality, and the Court would be well within its discretion to limit Defendants' experts in accordance therewith. This case is about one doctor's conduct, whether or not Defendants seek to emphasize the diverse perspectives of its proposed experts, which is a transparent attempt to justify inappropriately cumulative expert witnesses.

And while Defendants state that the limitation requested by Plaintiff "*may* result in unfairly prejudicing the defense[,]" practical consideration of this issue reveals that Plaintiff will be severely and unfairly prejudiced without such a limitation. (Defs.' Memo in Opp. at 9.) Not only will Plaintiff incur massive costs associated with expert discovery, most notably on expert depositions, but Defendants will directly benefit from these expenditures. Specifically, with a deposition transcript for each of their expert witnesses in hand, Defendants will be able to pick and choose which of the five standard of care experts they prefer to call at trial, excuse the remainder, and simultaneously reduce their trial expenses. Plaintiff's costs balloon while Defendants enjoy very apparent strategic and cost benefits.

Because this Court's authority to limit expert witnesses during discovery is explicitly recognized by the Idaho Supreme Court, because the authorities provided by Defendants fail to add merit to their argument, and because Plaintiff will suffer significant and unfair prejudice without the requested relief, Defendants should be limited to two expert witnesses, one of which would include Defendant, Dr. Kerr, on any single topic.

Dated this 8th day of July, 2013.

Respectfully submitted,
BAILEY & GLASSER LLP



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James B. Perrine

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David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, I served a true and correct copy of the foregoing by delivering the same facsimile and United States Mail, postage prepaid, to the following:

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Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO LIMIT DEFENSE EXPERTS

I.
INTRODUCTION

This Supplemental Memorandum is submitted in opposition to Plaintiff's

Reply Brief which raises an entirely new ground in support of his Motion which was not addressed in Plaintiff's initial Memo. Plaintiff's Motion and supporting documents were based solely on the application of Rule 403 to which the defense responded. Now, in his reply brief the Plaintiff cites for the first time to the Supreme Court case of ***Edmunds v. Kraner***, 142 Idaho 867, 136 P.3d 338 (2006). The portion of the case cited by the Plaintiff did not involve a Rule 403 analysis, but rather a totally separate basis involving the potential application of Rule 16(d) which involves pretrial conferences. In fairness, and in order to address this entirely new issue, the defense has submitted this supplemental memorandum in order to respond to this new issue.

II.
ARGUMENT

A. Idaho Law Does Not Require The Court To Limit The Defendants' Experts

The defense contends that the ***Edmunds*** decision does not apply in this case, nor does it set forth any requirement that the Court limit the number of defense expert witnesses in this case. ***Edmunds*** was a malpractice case involving an alleged overdose of the antibiotic Gentamicin causing one of the plaintiffs to suffer from neurotoxicity and ototoxicity. The defendant hospital, Saint Alphonsus Regional Medical Center (SARMC), moved for summary judgment as to all of the plaintiffs' claims. In opposition to this motion, the plaintiffs filed the second affidavit of their expert, Dr. Hollander as well as an affidavit of an additional expert Dr. Rotschafer. The district court struck these affidavits as being untimely and granted the hospital's motion. The plaintiff appealed the district court's grant of summary judgment.

On appeal, the issue was whether the district court abused its discretion by

excluding the testimony of Drs. Hollander and Rotschafer. The Court in ***Edmunds*** concluded that the affidavit of Dr. Rotschafer, who had never been disclosed, was untimely and properly excluded by the district court. ***Id.*** at 873, 136 P.3d at 344. However, as to the affidavit of Dr. Hollander, the Court found that Dr. Hollander had previously been disclosed by plaintiffs as an expert witness before the disclosure deadline had passed and that the opinions set forth in Dr. Hollander's second affidavit were timely offered in opposition to the issues raised by the hospital's motion for summary judgment. ***Id.*** at 344-46, 136 P.3d at 873-875.

Since the District Court's scheduling order did not require anything other than the names of the experts to be utilized, the Supreme Court in ***Edmunds*** held it was error for the trial court to conclude the supplemental affidavit of plaintiffs' expert, Dr. Hollander, was untimely. ***Id.*** at 346, 136 P.3d at 875. Since the Supreme Court in ***Edmunds*** concluded it was an abuse of discretion for the district court to have excluded the second affidavit of Dr. Hollander, the Court also concluded that the district court erred in granting the hospital's motion for summary judgment. ***Id.***

The Court's resolution of the summary judgment issues in ***Edmunds*** was dispositive of the entire appeal. Despite this fact, in dicta, the ***Edmunds*** court then went on to discuss whether the district court abused its discretion by failing to recognize that it had the inherent authority to limit the number of expert witnesses during pretrial discovery. In ***Edmunds***, the hospital identified 53 witnesses in its expert witness disclosure against the plaintiffs.

The plaintiffs in ***Edmunds*** argued that the number of experts disclosed by the hospital was excessive and unfairly prevented the plaintiffs from engaging in

meaningful discovery as to the opinions of the defense experts. ***Id.*** at 348, 136 P.3d at 877. The Court in ***Edmunds*** noted that the trial court had discretion regarding limitations on the number of experts utilized by a party and that the district court had erred by concluding that its power to limit experts was "simply an evidentiary issue for trial, not a discovery matter." ***Id.*** The Court stated, "[a]t the very least the trial court should have considered the Edmunds' request to limit the number of experts as a discovery issue and examined the purposes behind our discovery rules when ruling on the motion." ***Id.*** The Court in ***Edmunds*** reversed and remanded the trial court's decision, but also held open the possibility that the trial court could ultimately deny the plaintiffs' motion.

The decision in ***Edmunds*** remanding the issue of limiting experts arose out of the plaintiffs' argument that the disclosure of 53 experts was "an abusive tactic that prevented genuine discovery of expert opinions by deposition." ***Id.*** at 877, 136 P.3d at 348. The concern by the Court in ***Edmunds*** arose out of potential problems obtaining expert opinions as to 53 different experts in discovery. The decision did not address limiting experts at trial, which is the issue presented in the instant case. Since it was a discovery issue, the Court did not address I.R.E. 403 in its decision, and concluded that the trial court improperly focused on I.R.E. 403 and the evidentiary issues.

In this case, however, the issue before the Court is vastly different. Here, the issue relates to three standard of health care practice experts, plus Dr. Kerr. This is a far cry from the defendant disclosure in ***Edmunds*** of a whopping 53 experts with no opinions produced for any of them. In addition, Plaintiff's reference throughout his reply brief to the defense having five standard of practice experts is false and misleading. Further, unlike ***Edmunds***, the Defendants in this case disclosed over 100 pages of

detailed opinions of their experts, so there is no issue that the Plaintiffs do not know the substance of opinions of the experts involved. Indeed, given the scope of the disclosures produced, one questions why the Plaintiff is seeking to take the depositions of these witnesses at all and that in reality his motion is but a ruse to try and manufacture a claim of prejudice simply to try and even out for his client the number of experts set to testify at trial.

At a minimum, nothing in the ***Edmunds*** decision requires this Court to limit the Defense expert witnesses. Furthermore, it is of important note that the Supreme Court did not prohibit the trial court from refusing to limit the number of experts on remand, nor did the court set any magic number for experts on any one subject as the Plaintiff seeks to have done in this case. Rather, the Court in ***Edmunds*** directed the trial court that it was allowed to consider the motion to limit as a discovery motion and to not simply pass on it as an evidentiary issue. The Court did not, however, give specific guidance as to how the trial court could properly analyze the issue or how to analyze the number of experts that should be allowed to testify at trial. Plaintiff is seeking several million dollars from the Defendants who contend it would be an abuse of discretion to limit the defense to less than those experts currently listed to testify on the key issues in this case. There is no blanket rule set forth by ***Edmunds*** which says the defense can only call one expert on a topic as alleged by the Plaintiff.

Plaintiff argues that his trial costs will increase because of the cost of having to conduct the depositions of each of the defense experts. This is a perplexing statement. There is no requirement that Plaintiff's counsel take any expert depositions. In point of fact, counsel for the defense rarely takes the depositions of the Plaintiff's

experts. This is because the rules of discovery entitle a party to rely on the contents of the disclosure and interrogatory responses to Rule 26(b)(4) interrogatories. Thus, to the extent the Plaintiff wants to argue that his costs will increase if he has to take all of the defense expert depositions, this is a tactical decision on his counsel's part and not a requirement of discovery, nor should such an argument serve as a valid basis upon which to limit the minimal number of defense experts in this case. For these reason, the defense respectfully requests that Plaintiff's Motion to limit be denied.

DATED this 9th day of July, 2013.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2013, I served a true and correct copy of the foregoing SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO LIMIT DEFENSE EXPERTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

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James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657

Terrence S. Jones

Time	Speaker	Note
04:07:35 PM		CVOC12-4792 Ballard v Kerr Mo/Limit Expert Witnesses
04:07:46 PM	Judge	Calls case
04:07:52 PM	Scott McKay	on behalf of the Plaintiff
04:08:00 PM	Terry Jones	on behalf of the Defendant
04:10:21 PM	S. McKay	Argues Motion to Limit Expert Witnesses
04:14:24 PM	T. Jones	Argues in opposition of Motion to Limit Expert Witnesses
04:28:14 PM	S. McKay	Responds
04:34:09 PM	Judge	Will not limit Expert witnesses but gives additional time for Depositions. The Defense has to pay for half of the expense in regards to the Tennessee expert deposition.
04:42:11 PM	Judge	Mr. Jones will submit an appropriate order

CF7
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SW

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

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Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 22nd day of July, 2013, I served Defendants' Answers and Responses to Plaintiff's Third Set of Discovery Requests,

together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
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Attorneys for Defendants

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Defendants.

Case No. CV OC 1204792

ORDER DENYING PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESS

THIS MATTER having come before the Court on the 10 day of July, 2013 pursuant to Plaintiff's Motion to Exclude Cumulative Expert Witnesses, the parties having

appeared by and through their respective attorneys, the Court having considered the evidence and the arguments of counsel hereby orders as follows:

Plaintiff's Motion seeking to limit the number of defense witnesses is hereby DENIED. However, in order to allow for the depositions of the defense experts to occur, Plaintiff's counsel shall be provided additional time beyond the time set in the current scheduling order. In addition, the defense shall pay for one-half of the deposition fee charged by Dr. Gregory Lawrence.

Approved as to form:

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

Scott McKay, Of the Firm
Attorneys for Plaintiffs

DATED this 23rd day of July, 2013.

Honorable Deborah A. Bail

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2013, I served a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE EXPERT WITNESS by delivering the same to each of the following, by the method indicated below, addressed as follows:

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P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657
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Clerk of the Court

4TH JUDICIAL DISTRICT COURT OF THE STATE - OF - IDAHO IN AND FOR ADA COUNTY

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Attorneys for Defendants

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CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF INTENT TO SERVE SUBPOENA

Defendants Brian C. Kerr, M.D. and Silk Touch Laser, LLP hereby provide notice that they intend to serve the attached subpoena directed to the Idaho State Tax Commission, pursuant to Idaho Rule of Civil Procedure 45(b)(2).

ORIGINAL

DATED this 25th day of July, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2013, I served a true and correct copy of the foregoing NOTICE OF INTENT TO SERVE SUBPOENA by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657

Jeremiah A. Quane

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 SUBPOENA (RECORDS)

THE STATE OF IDAHO SENDS GREETINGS TO:

IDAHO STATE TAX COMMISSION
PO BOX 36
BOISE, ID 83722-0410

ORIGINAL

YOU ARE HEREBY COMMANDED to produce the following documents, records or objects, including electronically stored information:

1. Any and all tax and income records, including any and all related or supporting documents, for Krystal M. Ballard [redacted] deceased, for the years 2007 through 2010.

2. Any and all tax and income records, including any and all related or supporting documents, for Charles K. Ballard [redacted] for the years 2007 through 2013.

You are commanded to produce the requested documents on or before August 26, 2013 to Quane Jones McColl, PLLC, P.O. Box 1576, Boise, Idaho 83701. Defendants Brian C. Kerr, M.D. and Silk Touch Laser, LLP shall reimburse you for any reasonable copying charges.

You are further notified that if you fail to produce or permit copying or inspection of the documents requested above at or before August 26, 2013, you may be held in contempt of court and the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this Subpoena.

By order of the Court.

DATED this 25th day of July, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AMENDED NOTICE TO TAKE VIDEO DEPOSITION OF DR. JOHN P. LUNDEBY, M D

To: Dr. John P. Lundeby, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video deposition of Dr. John P. Lundeby, M.D., on **Friday, July 26, 2013** at 8:30 a.m. at law offices of Ramsden and Lyons, LLP, 700 Northwest Blvd. Coeur d'Alene, ID 83814, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 24th day of July, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2013, I served a true and correct copy of the foregoing **AMENDED NOTICE TO TAKE VIDEO DEPOSITION OF DR. JOHN P. LUNDEBY, M.D.,** by delivering the same to the following via FACSIMILE,

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF TAKING DEPOSITION DUCES TECUM OF DR. DEAN SORENSEN

TO: THE ABOVE-ENTITLED PLAINTIFF and his counsel of record:

YOU WILL PLEASE TAKE NOTICE that Defendants, will take testimony on oral examination of Dr. Dean Sorensen before a court reporter and notary public with the firm of M&M Court Reporting Service, Inc., commencing on Wednesday, the 21st day of August, 2013, at 11:00 a.m., and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at the law offices of Nevin, Benjamin, McKay & Bartlett LLP, Boise, Idaho 83702, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

The Deponent is instructed to bring all of the following:

1. An updated copy of your Curriculum Vitae;

2. A list of all publications authored by you, in whole or in part;

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case;

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case;

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need

only be identified and not produced);

6. Any exhibits which you plan to use at trial;

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions;

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions;

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony;

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case.

15. All correspondence, including attachments, to and from defense counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies,

procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

DATED this 31st day of July, 2013.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 2013, I served a true and correct copy of the foregoing NOTICE OF TAKING DEPOSITION DUCES TECUM OF DR. DEAN SORENSEN by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (334) 262-0657

Jeremiah A. Quane

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
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Morgantown, WV 26508
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James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AMENDED NOTICE TO TAKE VIDEO DEPOSITION OF DR. THOMAS COFFMAN, M.D.

To: Dr.Thomas Coffman, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video deposition of Dr. Thomas Coffman, M.D., on **Tuesday, August 20, 2013** at 11:00 a.m. mountain time at law offices of Quane Jones McColl, PLLC, US Bank Plaza, 101 S. Capitol Boulevard, Suite 1601, Boise, ID 83701, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 9th day of August, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP
By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2013, I served a true and correct copy of the foregoing **AMENDED NOTICE TO TAKE VIDEO DEPOSITION OF DR.THOMAS COFFMAN, M.D.,** by delivery of email to the below:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
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James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE VIDEO DEPOSITION OF DR. THOMAS COFFMAN, M.D.

To: Dr.Thomas Coffman, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video deposition of Dr. Thomas Coffman, M.D., on **Monday, August 19, 2013** at 11:00 a.m. mountain time at law offices of Quane Jones McColl, PLLC, US Bank Plaza, 101 S. Capitol Boulevard, Suite 1601, Boise, ID 83701, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 10 day of August, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP
By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 07 day of August, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO DEPOSITION OF DR.THOMAS COFFMAN, M.D.,** by delivery of email to the below:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE OF SERVICE OF DISCOVERY**

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of Plaintiff's Second Supplemental Response to Defendants' Notice Duces Tecum of Taking the Video Deposition of Charles Ballard, together with a copy of this Notice of Service of Discovery, has been served upon counsel indicated on the certificate of service below.

DATED this 6th day of August, 2013.

Respectfully Submitted,

BAILEY & GLASSER LLP

By _____

P. Gregory Haddad
James B. Perrine

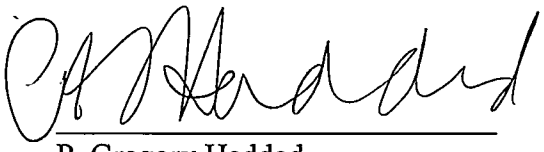
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2013, I served a true and correct copy of the foregoing ***Notice of Service of Discovery*** by delivering the same to the following via email and U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Facsimile: 208-780-3930



P. Gregory Haddad

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

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BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

ORIGINAL

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of Plaintiff's Third Supplemental Response to Defendants' First Set of Interrogatories, together with a copy of this Notice of Service of Discovery, has been served upon counsel indicated on the certificate of service below.

DATED this 14th day of August, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2013, I served a true and correct copy of the foregoing ***Notice of Service of Discovery*** by delivering the same to the following via facsimile:

Jeremiah A. Quane
Terrence Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Facsimile: 208-780-3930

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF CHANGE OF ADDRESS

TO: THE CLERK OF THE ABOVE-ENTITLED COURT and THE ABOVE ENTITLED PARTIES, and their attorneys of record:

PLEASE TAKE NOTICE that Bailey & Glasser, LLP's Montgomery, Alabama office has moved, and its new address is:

J.B. Perrine, Esq.
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
Telephone: (205) 988-9253
Fax: (205) 733-4896

Please amend your certificate of service and pleadings accordingly.

DATED this 22nd day of August, 2013.

Respectfully Submitted,

BAILEY & GLASSER LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

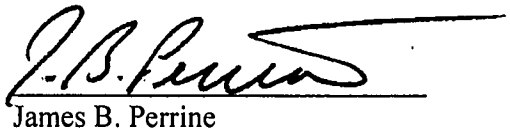
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2013, I served a true and correct copy of the foregoing ***Notice of Change of Address*** by U.S. Mail, postage prepaid, on the following:

Jeremiah A. Quane
Terrence Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Facsimile: 208-780-3930



James B. Perrine

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

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BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S NOTICE OF INTENT TO OFFER TESTIMONY OF MEDICAL EXPERT BY VIDEO TELECONFERENCE AND REQUEST FOR LEAVE TO PERMIT SAME

ORIGINAL

Plaintiff Charles Ballard, through his attorneys, hereby gives notice of his intent to offer the testimony of plaintiff's medical expert, Keith Armitage, M.D. during trial through video teleconference via simultaneous electronic transmission. Plaintiff will take responsibility for coordinating and establishing this video feed into the courtroom. Through this video feed, Dr. Armitage will be visible and able to communicate with the Court, counsel and jury during his testimony.

Good cause exits for permitting Dr. Armitage to appear and testify in this manner. Plaintiff's counsel has just learned that Dr. Armitage has conflicting travel including a scheduled trip to Qatar during the time that Plaintiff will present Plaintiff's case in chief. As a result, Dr. Armitage is unable to travel to Boise and present testimony at the time Plaintiff requires him to do so. Dr. Armitage is a necessary and important witness to the presentation of Plaintiff's case. He is an infectious disease specialist who will testify to the cause of Krystal Ballard's death - an issue that is disputed by the parties. Plaintiff will be significantly prejudiced unless he is able to present the testimony of this medical expert.

Accordingly, Plaintiff seeks leave of court to present the testimony of Dr. Armitage during trial as described above.

Dated this 30th day of August, 2013.

Respectfully submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I served a true and correct copy of the foregoing by faxing the same to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519
Facsimile – 208-780-3930

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
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BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF TELPEHONIC STATUS CONFERENCE

625782

Plaintiff gives notice that a telephonic status conference will be held on Wednesday, September 4, 2013, at 3:00 p.m. MDT, in the above case. Plaintiff will initiate the call and have all parties on the line before calling the court at 208-287-7561.

Dated this 30th day of August, 2013.

Respectfully submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I served a true and correct copy of the foregoing by faxing the same to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519
Facsimile – 208-780-3930

Scott McKay

Bail
Tara
9/4/13
SK

A.M. 1123 FILED P.M.

SEP 0 3 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION OF DR. GREGORY LAURENCE

withdraw

To: Dr. Gregory Laurence
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video conference deposition of Dr. Gregory Laurence, on **Friday, September 6, 2013, at 3:00 p.m.,** central time, at Interactive Solutions, 3860 Forest Hill Irene Road, Suite 10, Memphis, TN 38125, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 21 day of August, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of August, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION OF DR. GREGORY LAURENCE** by U.S. Mail, postage pre-paid, upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

Time	Speaker	Note
3:01:04 PM		CVOC12-4792 Ballard v Kerr Telephonic Status Conf.
3:01:04 PM	Judge	Calls case
3:03:30 PM	Greg Haddad	on behalf of the Plaintiff
3:03:30 PM	Jeremiah Quane	on behalf of the Defendant
3:05:14 PM	G. Haddad	Requests a continuance of the Jury Trial
3:08:56 PM	Judge	comments
3:13:47 PM	Judge	Vacates the Jury Trial. Re-sets Jury Trial (10 days) - November 5 @ 9:30 am.

JT— 9/24/13

Bail
Tara
9-10-13
DJ

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

GD

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of **Plaintiff's Fourth Supplemental Answers to Defendants' First Set of Interrogatories**, together with a copy of this Notice of Service of Discovery, has been served upon counsel indicated on the certificate of service below.

DATED this 5th day of September, 2013.

Respectfully Submitted,

BAILEY & GLASSER LLP

By _____

P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2013, I served a true and correct copy of the foregoing **Notice of Service of Discovery** by delivering the same to each of the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Facsimile: 208-780-3930

P. Gregory Haddad

FILED
Monday, September 9, 2013 at 11:18 AM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: Linda Sims-Douglas, Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV-OC-2012-04792

AMENDED
NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS

This case is set for Jury Trial to commence on the **Tuesday, November 5, 2013 at 09:30 AM** and continue for ten (10) days. ***No trial proceedings will be held on Mondays, because it is the Court's criminal calendar day.***

IT IS HEREBY FURTHER ORDERED:

1. All pretrial motions, with the exception of Motions in Limine, shall be heard and completed at least twenty-eight (28) days before the trial date. ***A Judge's copy of all motions and memoranda in support thereof should be filed directly with chambers. *Motions in Limine must be filed not later than two (2) weeks prior to trial. No Motions filed after that time will be considered. Motions in Limine shall be heard on the morning of trial, unless otherwise scheduled by the Court.***

a. The last day to file written discovery (Interrogatories and request for production of documents) shall be no later than ninety (90) days prior to trial.

b. The plaintiff shall disclose all expert witnesses to be used at trial by no later than one hundred eighty (180) days prior to trial.

c. The defendants shall disclose all expert witnesses to be used at trial by no later than one hundred twenty (120) days prior to trial.

d. The last day for the taking of any discovery depositions shall be no later than sixty (60) days prior to trial.

e. The last day to file amendments to join any additional parties shall be no later than one hundred eighty (180) days prior to trial.

f. **MOTIONS FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINETY (90) DAYS PRIOR TO TRIAL.

**NO HEARING ON ANY SUMMARY JUDGMENT WILL BE PERMITTED IN THE SEVENTY-FIVE (75) DAY PERIOD PRIOR TO TRIAL, REGARDLESS OF WHEN THE MOTION IS FILED.

**IT IS ADVISABLE TO SCHEDULE YOUR MOTION FOR HEARING AS SOON AS FEASIBLE.

**ALL WITNESSES ARE TO BE IDENTIFIED BY NAME AND ADDRESS.

2. Not later than fourteen (14) days before the trial date, counsel for all parties to the action shall hold a conference for exchange of information and discussion of matters specified by I.R.C.P. 16(a) and 16(b).

3. Not later than seven (7) days before trial: (a) each attorney shall certify to the Court in writing that such Exchange of Information Conference has taken place and furnish with such certification a list of the names of persons disclosed as possible witnesses pursuant to Rule 16(a)(4), and a descriptive list of all exhibits proposed to be offered in evidence, reciting which exhibits counsel have agreed may be received in evidence without objection and those to which no objection will be made on grounds other than irrelevancy or immateriality; or (b) in lieu thereof, all counsel may join in submitting a written stipulation in conformance with Rule 16(b).

4. Any objection to the date of this trial must be made by any party within fifteen (15) days from the date of this notice.

5. All exhibit lists must be submitted to the Court five (5) days prior to trial.

6. All requested jury instructions must be submitted to the Court, *both hard copy and e-mailed to* lsimsdouglas@adaweb.net fourteen (14) days prior to trial.

7. This Order shall control the subsequent course of the action unless modified for good cause shown to prevent manifest injustice.

8. The Court may impose appropriate sanctions for violation of this order, which may include assignment of the trial date to another case.

9. Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case if the assigned judge is unavailable. The following is a list of potential alternate judges:

Hon. G. D. Carey	Hon. James C. Morfitt
Hon. Gregory M. Culet	Justice Gerald Schroeder
Hon. Dennis Goff	Hon. Kathryn A. Sticklen
Hon. Renae Hoff	Justice Linda Copple Trout
Hon. Daniel C. Hurlbutt, Jr.	Hon. Darla Williamson
Hon. James Judd	Hon. W. H. Woodland
Hon. Duff McKee	**All Sitting Fourth District Judges**

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this notice.

DATED Monday, September 9, 2013.

Deborah A. Bail

DEBORAH A. BAIL
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 10th day of September, 2013, I mailed (served) a true and correct copy of the within instrument to:

DAVID Z. NEVIN
SCOTT S. MCKAY
ATTORNEYS AT LAW
POST OFFICE BOX 2772
BOISE ID 83701-2772

JEREMIAH A. QUANE
ATTORNEY AT LAW
POST OFFICE BOX 519
BOISE ID 83701-0519

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

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BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AMENDED NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION OF DR. GREGORY LAURENCE

To: Dr. Gregory Laurence
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video conference deposition of Dr. Gregory Laurence, on **Wednesday, October 2, 2013, at 11:00 a.m.,** central time, at Interactive Solutions, 3860 Forest Hill Irene Road, Suite 10, Memphis, TN 38125, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 11th day of September, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2013, I served a true and correct copy of the foregoing **AMENDED NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION OF DR. GREGORY LAURENCE** by U.S. Mail, postage pre-paid, upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF TAKING DEPOSITION DUCES TECUM OF RECORD CUSTODIAN FROM SAINT ALPHONSUS DEPARTMENT OF MEDICAL IMAGING

TO: THE ABOVE-ENTITLED PLAINTIFF and his counsel of record:

YOU WILL PLEASE TAKE NOTICE that Defendants, will take testimony on oral examination of a record and imaging study custodian of the Saint Alphonsus

Department of Medical Imaging before a court reporter and notary public with the firm of M&M Court Reporting Service, Inc., commencing on Wednesday, the 23rd day of October, 2013, at 11:00 a.m., and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at the law offices of Quane Jones McColl, PLLC, 101 S. Capitol Boulevard, Ste. 1601, Boise, Idaho 83702, at which time and place are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

The Deponent is instructed to bring the following:

1. The CT study performed at 10:09 on July 25, 2010 on Krystal Ballard (4/19/1983) and interpreted by Dr. Howard Schaff that represents the CT study.

DATED this 16th day of September, 2013.

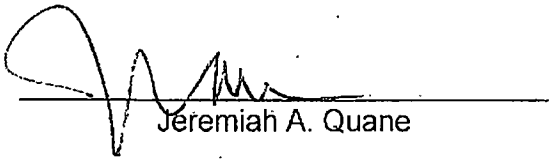
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2013, I served a true and correct copy of the foregoing NOTICE OF TAKING DEPOSITION DUCES TECUM OF RECORD CUSTODIAN FROM SAINT ALPHONSUS DEPARTMENT OF MEDICAL IMAGING by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

Saint Alphonsus
Department of Medical Imaging

Gem State Radiology

Patient: BALLARD, KRYSTAL
DOB: 4/19/1983 EMPI: 04828667 Visit/Acct: 1020600274/1020600274
Site: SARMC PT/MOD: ER/CT MRN: 000807064
Ref. Prov: MATTHEW B. CAMPBELL MD Exam: 43952414 Room/Bed: / ER
Add. Providers: EMERGENCY ZZPHYSICIAN

EXAM DATE: 7/25/2010 10:09 Contrast:

PROCEDURE: CT OF THE CHEST, ABDOMEN, AND PELVIS WITHOUT CONTRAST

COMPARISON: None.

INDICATIONS: Recent liposuction with severe respiratory distress and hypotension. Patient has been resuscitated with 6 L of fluid. Acute renal failure.

TECHNIQUE: CT scan of the chest, abdomen, and pelvis was performed without the administration of intravenous contrast.

FINDINGS: Assessment of bowel and solid parenchymal organs is limited without IV contrast.

NECK BASE:	Normal.
LUNGS:	Bilateral diffuse airspace disease, nonspecific but most likely represents ARDS.
MEDIASTINUM:	Endotracheal tube terminates above the level of the carina in satisfactory position.
CARDIAC:	Normal.
PLEURA/CHEST WALL:	Normal.
LIVER:	Periportal edema likely due to resuscitation.
BILIARY:	Normal.
PANCREAS:	Normal.
SPLEEN:	Normal.
KIDNEYS:	Several bilateral punctate intrarenal calculi. No hydronephrosis.
ADRENALS:	Normal.
AORTA/VASCULAR:	Normal.
RETROPERITONEUM:	Normal.
BOWEL/MESENTERY:	Normal. Nasogastric tube terminates in the stomach.
ABDOMINAL WALL:	Extensive stranding of the subcutaneous fat involving the abdominal wall and gluteal regions bilaterally. There is gas identified within the upper anterior abdominal wall and upper left gluteal region. This could be related to recent liposuction. Secondary infection cannot be excluded. No focal fluid collection is evident.
PELVIC ORGANS:	Foley catheter identified in a nondistended urinary bladder.
BONES:	Small amount of free intraperitoneal fluid likely related to resuscitation.

CONCLUSION:

Extensive stranding of the subcutaneous fat involving the abdominal wall and gluteal regions consistent with the clinical history of recent liposuction. There is soft tissue gas identified within the upper abdominal wall and left gluteal region. This could be related to recent liposuction. Secondary infection is not excluded. No focal fluid collection is evident.

Extensive bilateral pulmonary air space disease most likely represents ARDS. Bilateral small pleural effusions are evident.

Periportal edema and small volume ascites likely due to volume resuscitation.

Patient: BALLARD, KRYSTAL
DOB: [redacted]
Site: SARMC
Ref. Prov: MATTHEW B. CAMPBELL MD
Add. Providers: EMERGENCY ZZPHYSICIAN

EMPI: 04828667
PT/MOD: ER/CT
Exam: 43952414

Visit/Acct: 1020800274/1020600274
MRN: 000807064
Room/Bed: / ER

EXAM DATE: 7/25/2010 10:09

Contrast:

Bilateral nephrolithiasis.

Dictated by: Howard Schaff, M.D. on 7/25/2010 at 10:43
Approved by: Howard Schaff, M.D. on 7/25/2010 at 10:43

ORIGINAL

NO. _____
A.M. _____ FILED P.M. 422

SEP 1 6 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF INTENT TO SERVE SUBPOENA DUCES TECUM

Defendants Brian C. Kerr, M.D. and Silk Touch Laser, LLP hereby provide notice that they intend to serve the attached subpoena duces tecum directed to the Saint Alphonsus Department of Medical Imaging, pursuant to Idaho Rule of Civil Procedure

45(b)(2).

DATED this 16th day of September, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2013, I served a true and correct copy of the foregoing NOTICE OF INTENT TO SERVE SUBPOENA DUCES TECUM by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896

_____
Jeremiah A. Quane

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 SUBPOENA DUCES TECUM

THE STATE OF IDAHO SENDS GREETINGS TO:

SAINT ALPHONSUS DEPARTMENT OF MEDICAL IMAGING
1055 N. Curtis Road
Boise, Idaho 83706

YOU ARE HEREBY COMMANDED that, all and singular business and excuses being laid aside, a record and imaging study custodian of the Saint Alphonsus Department of Medical Imaging is to appear before a court reporter and notary public with the firm of M&M Court Reporting Service, Inc., commencing on Wednesday, the 23rd day of October, 2013, at 11:00 a.m., at the law offices of Quane Jones McColl, PLLC, 101 S. Capitol Boulevard, Ste. 1601, Boise, Idaho 83702, to testify as a witness at the taking of a deposition in the above-entitled action.

You are further commanded to bring with you, and produce at the time and place, the following imaging study:

1. The CT study performed at 10:09 on July 25, 2010 on Krystal Ballard (4/19/1983) and interpreted by Dr. Howard Schaff that represents the CT study.

You are further notified that if you fail to appear at the place and time specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to attend as a witness.

DATED this 16th day of September, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2013, I served a true and correct copy of the foregoing SUBPOENA DUCES TECUM by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (304) 594-9709

James B. Perrine
BAILEY & GLASSER LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
Telephone (205) 988-9253
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (205) 733-4896

_____
Jeremiah A. Quane

Saint Alphonsus
Department of Medical Imaging
[redacted]

Gem State Radiology

Patient: BALLARD, KRYSTAL
DOB: [redacted]
Site: SARMC
Ref. Prov: MATTHEW B. CAMPBELL MD
Add. Providers: EMERGENCY ZZPHYSICIAN

EMPI: 04828667
PT/MOD: ER/CT
Exam: 43952414

Visit/Acct: 1020600274/1020600274
MRN: 000807064
Room/Bed: / ER

EXAM DATE: 7/25/2010 10:09

Contrast:

PROCEDURE: **CT OF THE CHEST, ABDOMEN, AND PELVIS WITHOUT CONTRAST**

COMPARISON: None.

INDICATIONS: Recent liposuction with severe respiratory distress and hypotension. Patient has been resuscitated with 6 L of fluid. Acute renal failure.

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CONCLUSION:

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Periportal edema and small volume ascites likely due to volume resuscitation.

Patient: BALLARD, KRYSTAL
DOB: 4/19/1983 **EMPI:** 04828667 **Visit/Acct:** 1020600274/1020600274
Site: SARMC **PT/MOD:** ER/CT **MRN:** 000807064
Ref. Prov: MATTHEW B. CAMPBELL MD **Exam:** 43952414 **Room/Bed:** / ER
Add. Providers: EMERGENCY ZZPHYSICIAN

EXAM DATE: 7/25/2010 10:09 **Contrast:**

Bilateral nephrolithiasis.

Dictated by: Howard Schaff, M.D. on 7/25/2010 at 10:43
Approved by: Howard Schaff, M.D. on 7/25/2010 at 10:43

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
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P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MOTION FOR (AUTOMATIC) DISQUALIFICATION OF ALTERNATIVE JUDGE, PER THE COURT ORDER OF SEPTEMBER 9, 2013

COMES NOW, Defendants, by and through their counsel of record, Quane Jones McColl, PLLC, and pursuant to Rule of Civil Procedure 40(d)(1), respectfully moves this Court to grant an automatic disqualification of The Honorable Darla

Williamson from presiding over the above-entitled matter as an alternative judge.

DATED this 17 day of September, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2013, I served a true and correct copy of the foregoing MOTION FOR (AUTOMATIC) DISQUALIFICATION OF ALTERNATIVE JUDGE, PER THE COURT ORDER OF SEPTEMBER 9, 2013 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

Jeremiah A. Quane

see Bail / Tardy 9-19-13 JH

NO. _____ FILED
A.M. 9:47 P.M. _____

SEP 18 2013

CHRISTOPHER D. RICH, Clerk
By DAYSHA OSBORN
DEPUTY

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 16th day of September, 2013, I served DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NO.

10

20, together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

Jeremiah A. Quane

ORIGINAL

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE TO TAKE VIDEOTAPED AND VIDEO CONFERENCE DEPOSITION OF CHARLES GARRISON, M.D.**

To: Charles Garrison, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the videotaped and video conference deposition of Charles Garrison, M.D., on **Monday, September 23, 2013, at 4:00 p.m., MDT**, at Kumm & Reichert, 1305 East Center Street, Pocatello, Idaho 83201, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of all depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 20th day of September, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

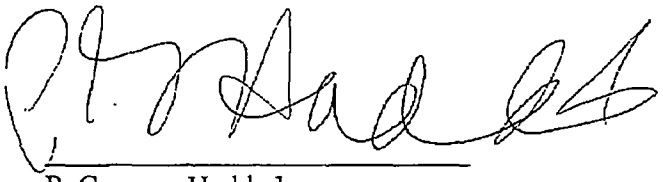
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEOTAPED AND VIDEO CONFERENCE DEPOSITION OF CHARLES GARRISON, M.D.,** by Facsimile, upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701



P. Gregory Haddad

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Charles Ballard

Plaintiff(s):

vs.

Brian Calder Kerr, M.D. et al.

Defendant(s):

AFFIDAVIT OF SERVICE

Case Number: CV OC 1204792

For:
Quane Jones McColl, PLLC
101 S. Capitol Blvd., Ste. 1601
Boise, ID 83702

STATE OF IDAHO)
:ss
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on September 23, 2013 to be served on **SAINT ALPHONSUS DEPARTMENT OF MEDICAL IMAGING**.

I, Spencer K. Kent, who being duly sworn, depose and say that on Monday, September 23, 2013, at 2:32 PM, I:

SERVED the within named **Saint Alphonsus Department of Medical Imaging** by delivering a true copy of the **Subpoena Duces Tecum, Notice of Taking Deposition Duces Tecum** to Theresa Jones, Risk Management Specialist, a person authorized to accept service on behalf of Saint Alphonsus Department of Medical Imaging. Said service was effected at **999 N. Curtis Rd., Ste. 302, Boise, ID 83706**.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Our Reference Number: 131782
Client Reference: Jeremiah A. Quane

Subscribed and sworn before me today
Monday, September 23, 2013

SHANNON ROESBERY NOTARY PUBLIC STATE OF IDAHO

Shannon Roesbery
Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on November 20, 2018

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 SUBPOENA DUCES TECUM

THE STATE OF IDAHO SENDS GREETINGS TO:

SAINT ALPHONSUS DEPARTMENT OF MEDICAL IMAGING
1055 N. Curtis Road
Boise, Idaho 83706

YOU ARE HEREBY COMMANDED that, all and singular business and excuses being laid aside, a record and imaging study custodian of the Saint Alphonsus Department of Medical Imaging is to appear before a court reporter and notary public with the firm of M&M Court Reporting Service, Inc., commencing on Wednesday, the 23rd day of October, 2013, at 11:00 a.m., at the law offices of Quane Jones McColl, PLLC, 101 S. Capitol Boulevard, Ste. 1601, Boise, Idaho 83702, to testify as a witness at the taking of a deposition in the above-entitled action.

You are further commanded to bring with you, and produce at the time and place, the following imaging study:

1. The CT study performed at 10:09 on July 25, 2010 on Krystal Ballard (4/19/1983) and interpreted by Dr. Howard Schaff that represents the CT study.

You are further notified that if you fail to appear at the place and time specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to attend as a witness.

DATED this 16th day of September, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2013, I served a true and correct copy of the foregoing SUBPOENA DUCES TECUM by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (304) 594-9709

James B. Perrine
BAILEY & GLASSER LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
Telephone (205) 988-9253
Attorneys for Plaintiff

[ ] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (205) 733-4896

_____
Jeremiah A. Quane

Saint Alphonsus
Department of Medical Imaging
1055 N. Curtis Road | Boise, ID 83706 | (208) 367-2121

Gem State Radiology

Patient: BALLARD, KRYSTAL
DOB: [redacted] EMPI: 04828667 Visit/Acct: 1020600274/1020600274
Site: SARMC PT/MOD: ER/CT MRN: 000807064
Ref. Prov: MATTHEW B. CAMPBELL MD Exam: 43952414 Room/Bed: / ER
Add. Providers: EMERGENCY ZZPHYSICIAN

EXAM DATE: 7/25/2010 10:09 Contrast:

PROCEDURE: CT OF THE CHEST, ABDOMEN, AND PELVIS WITHOUT CONTRAST

COMPARISON: None.

INDICATIONS: Recent liposuction with severe respiratory distress and hypotension. Patient has been resuscitated with 6 L of fluid. Acute renal failure.

TECHNIQUE: CT scan of the chest, abdomen, and pelvis was performed without the administration of intravenous contrast.

FINDINGS: Assessment of bowel and solid parenchymal organs is limited without IV contrast.

NECK BASE:	Normal.
LUNGS:	Bilateral diffuse airspace disease, nonspecific but most likely represents ARDS.
MEDIASTINUM:	Endotracheal tube terminates above the level of the carina in satisfactory position.
CARDIAC:	Normal.
PLEURA/CHEST WALL:	Normal.
LIVER:	Periportal edema likely due to resuscitation.
BILIARY:	Normal.
PANCREAS:	Normal.
SPLEEN:	Normal.
KIDNEYS:	Several bilateral punctate intrarenal calculi. No hydronephrosis.
ADRENALS:	Normal.
AORTA/VASCULAR:	Normal.
RETROPERITONEUM:	Normal.
BOWEL/MESENTERY:	Normal. Nasogastric tube terminates in the stomach.
ABDOMINAL WALL:	Extensive stranding of the subcutaneous fat involving the abdominal wall and gluteal regions bilaterally. There is gas identified within the upper anterior abdominal wall and upper left gluteal region. This could be related to recent liposuction. Secondary infection cannot be excluded. No focal fluid collection is evident.
PELVIC ORGANS:	Foley catheter identified in a nondistended urinary bladder.
BONES:	Small amount of free intraperitoneal fluid likely related to resuscitation.

CONCLUSION:

Extensive stranding of the subcutaneous fat involving the abdominal wall and gluteal regions consistent with the clinical history of recent liposuction. There is soft tissue gas identified within the upper abdominal wall and left gluteal region. This could be related to recent liposuction. Secondary infection is not excluded. No focal fluid collection is evident.

Extensive bilateral pulmonary air space disease most likely represents ARDS. Bilateral small pleural effusions are evident.

Periportal edema and small volume ascites likely due to volume resuscitation.

Patient: [redacted] KRYSTAL
DOB: [redacted]
Site: SARMC
Ref. Prov: MATTHEW B. CAMPBELL MD
Add. Providers: EMERGENCY ZZPHYSICIAN

EMPI: 04828667
PT/MOD: ER/CT
Exam: 43952414

Visit/Acct: 1020600274/1020600274
MRN: 000807064
Room/Bed: / ER

EXAM DATE: 7/25/2010 10:09

Contrast:

Bilateral nephrolithiasis.

Dictated by: Howard Schaff, M.D. on 7/25/2010 at 10:43
Approved by: Howard Schaff, M.D. on 7/25/2010 at 10:43

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
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P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **SECOND AMENDED NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION OF DR. GREGORY LAURENCE**

To: Dr. Gregory Laurence
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video conference deposition of Dr. Gregory Laurence, on **Wednesday, October 2, 2013, at 9:00 a.m.,** mountain time, at Regus, 950 West Bannock Street, #1100, Boise, Idaho 83702, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. An updated copy of your Curriculum Vitae.

2. A list of all publications authored by you, in whole or in part.

3. A list of all cases in which you have given testimony by way of interrogatories, deposition, sworn statement or trial, including style of case, civil action number, jurisdiction, counsel of record, and outcome of case.

4. A copy of all notes, memoranda, e-mail, faxes, computer notes and correspondence prepared by you or on your behalf in connection with your involvement in this case, including your investigation and preparation of any opinions you have pertaining to this case.

5. A copy of all notes, memoranda, e-mail, faxes, correspondence and computer documents received by you to assist you in connection with your investigation of this case and the formulation of your opinions (deposition transcripts and exhibits need only be identified and not produced).

6. Any exhibits which you plan to use at trial.

7. Any documents or publication referred to or relied upon by you in preparation of your testimony and/or opinions.

8. All calculations, documents, work papers, drawings, maps, sketches and diagrams prepared by you, on your behalf, or which you plan to utilize in connection with your investigation, testimony and/or opinions.

9. A list of all authorities and publications upon which you rely, in whole or in part, in formulating your opinion or testimony.

10. All file(s) and all documents you have kept, maintained, reviewed or referred to in arriving at your opinions (if you have discarded any materials whatsoever, you are required to bring a list of such items);

11. A list of all depositions you have read and/or reviewed which were taken in the instant case, along with the deposition transcripts themselves;

12. Transcripts of alI depositions and other materials you have reviewed which were not taken or included in the instant action;

13. Copies of all medical records and other medical information (x-rays, slides, etc.) you have reviewed for your testimony in this case;

14. Copies of your billing statement for time spent working on this case;

15. All correspondence, including attachments, to and from the Plaintiff's counsel in this case; and

16. Copies of any and all criteria, standards, guidelines, policies, procedures, rules, regulations, medical literature and/or articles you intend to rely upon or to which you will refer to support your opinions in this case.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 27th day of September, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2013, I served a true and correct copy of the foregoing **SECOND AMENDED NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION OF DR. GREGORY LAURENCE** by Facsimile and U.S. Mail, postage pre-paid, upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR**

To: Susan Kerr
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video conference deposition duces tecum of Susan Kerr, on **Wednesday, October 2, 2013, at 12:00 p.m.,** mountain time, at Regus, 950 West Bannock Street, #1100, Boise, Idaho 83702, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. A copy of all documents and data that comprise or relate to the "records of Silk touch, records and data she compiled of Silk Touch for infections, patients, drawings of Krystal Ballard, photos of Krystal Ballard and experience in training and cosmetic procedures" as referenced in Defendants' Supplemental Answer to Plaintiff's Interrogatory No. 20 dated September 16, 2013 concerning Susie Kerr.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 27th day of September, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR** by Facsimile upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

civil section court?
Bail
Tara
10/7/13
SW

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 3rd day of October, 2013, I served DEFENDANTS' SECOND SUPPLEMENTAL ANSWER TO PLAINTIFF'S FIRST SET OF

INTERROGATORIES, together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, Idaho 83701
Telephone (208) 343-1000
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile (208) 345-8274

P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508
Telephone (304) 594-0087
Attorneys for Plaintiff

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[ ] Facsimile (304) 594-9709

James B. Perrine
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104
Telephone (334) 262-6485
Attorneys for Plaintiff

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[ ] Facsimile (334) 262-0657

Terrence S. Jones

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 8th day of October, 2013, I served SUPPLEMENTAL RESPONSE TO PLAINTIFF'S REQUEST FOR PRODUCTION NO. 1,

together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

Jeremiah A. Quane

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, ,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MOTON FOR ENTRY OF PROTECTIVE ORDER

ORIGINAL

NOW COMES Plaintiff, Charles Ballard, by counsel, and moves the Court for entry of a protective order. The protective order at issue should be entered because Plaintiff and Defendants previously agreed to the language contained therein.

On July 31, 2013, Plaintiff's counsel presented Defendants' counsel with a draft stipulated protective order for review. (**Exhibit A**, Email from B. McAllister to J. Quane and T. Jones.) On August 1, 2013, defense counsel approved the language of the proposed stipulated protective order. (**Exhibit B**, Email from T. Jones to B. McAllister.) The next day, defense counsel signed the agreement and returned the signed stipulation electronically. (**Exhibit C**, Email from T. Jones to B. McAllister, Aug. 2, 2013.) Plaintiff's counsel signed the stipulated protective order on August 6, 2013, and mailed it to the Clerk for filing the same day. (**Exhibit D**, Correspondence from P. Gregory Haddad to Clerk enclosing stipulated protective order (unrelated enclosure omitted).)

On or around August 13, 2013, a member of the Clerk's office contacted Plaintiff's local counsel to explain that the parties' stipulation could not be filed without a proposed protective order to be entered by the Court. On September 4, 2013, Plaintiff's counsel provided defense counsel with a proposed protective order for review and approval; there is no substantive difference in content between the original stipulation and the proposed order. (**Exhibit E**, Email from B. McAllister to J. Quane and T. Jones with attachments.)

Having received no response from defense counsel, Plaintiff's counsel followed-up with defense counsel on September 11, 2013. (**Exhibit F**, Email from B. McAllister to J. Quane and T. Jones.) On September 23, 2013, having still received no response, a paralegal for Plaintiff's counsel contacted defense counsel to seek defense counsel's approval of the proposed protective order. (**Exhibit G**, Email from F. Caruthers to J. Quane and T. Jones.) Defense counsel elected

to ignore Plaintiff's counsel's communications once again.

Plaintiff now seeks entry of the proposed protective order, attached hereto at **Exhibit H**. Plaintiff made every effort to obtain Defendants' approval of the proposed protective order. And because there is no substantive difference between the content of the original stipulation, which all parties endorsed, and the order currently being submitted for entry, Plaintiff's counsel respectfully requests that the proposed Protective Order attached hereto at Exhibit H be entered.

Dated this 11th day of October, 2013.

Respectfully Submitted,
BAILEY & GLASSER LLP

By _____

P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of October, 2013, I served a true and correct copy of the foregoing ***Plaintiff's Motion for Entry of Protective Order*** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519

~~P. Gregory Haddad~~
Scott McKay

EXHIBIT A

Brian J. McAllister

From:	Brian J. McAllister
Sent:	Wednesday, July 31, 2013 9:04 AM
To:	'jaq@quanelaw.com'; 'tsj@quanelaw.com'
Cc:	Philip G. Haddad; 'smckay@nbmlaw.com'; Farrah Caruthers
Subject:	Ballard v. Kerr, et al. - Draft Stipulated Protective Order
Attachments:	634879.pdf
PM Message ID:	365602

Gentlemen:

Attached please find a draft stipulated protective order. Please let us know whether the language contained therein is acceptable.

Thank you.

EXHIBIT B

Brian J. McAllister

From: Terry Jones <tsj@quanelaw.com>
Sent: Thursday, August 01, 2013 3:33 PM
To: Brian J. McAllister; Jeremiah A. Quane
Cc: Philip G. Haddad; smckay@nbmlaw.com; Farrah Caruthers
Subject: RE: Ballard v. Kerr, et al. - Draft Stipulated Protective Order

Brian and Greg:

We have reviewed the proposed document and find it acceptable. Please put date lines on the signature lines and we will sign it and return it to you. Please provide us with your proposed order you intend to submit along with the stipulation so we may approve it.

Terry.

From: Brian J. McAllister [mailto:bmcallister@baileyglasser.com]
Sent: Wednesday, July 31, 2013 7:04 AM
To: Jeremiah A. Quane; Terry Jones
Cc: Philip G. Haddad; 'smckay@nbmlaw.com'; Farrah Caruthers
Subject: Ballard v. Kerr, et al. - Draft Stipulated Protective Order

Gentlemen:

Attached please find a draft stipulated protective order. Please let us know whether the language contained therein is acceptable.

Thank you.

Brian J. McAllister :: Lawyer
2855 Cranberry Square :: Morgantown WV 26508
Office 304.594.0087 :: Fax 304.594.9709

BAILEY&GLASSER LLP

EXHIBIT C

Brian J. McAllister

From: Terry Jones <tsj@quanelaw.com>
Sent: Friday, August 02, 2013 1:21 PM
To: Brian J. McAllister; Jeremiah A. Quane
Cc: smckay@nbmlaw.com; Philip G. Haddad; Farrah Caruthers
Subject: RE: Balard v. Kerr - Stipulated Protective Order
Attachments: 20130802110637.pdf

Brian:

Assuming the document you sent me is the same as the prior version aside from the date lines, here is a signed copy. The confusion regarding the order is simply that we usually see a proposed order for the court to sign regarding the stipulation of the parties. If you are satisfied without a separate order then please sign and submit the document and then we are ready to receive the tax records.

Terry.

From: Brian J. McAllister [mailto:bmcallister@baileyglasser.com]
Sent: Friday, August 02, 2013 10:52 AM
To: Terry Jones; Jeremiah A. Quane
Cc: 'smckay@nbmlaw.com'; Philip G. Haddad; Farrah Caruthers
Subject: Balard v. Kerr - Stipulated Protective Order

Terry –

Per your request, attached please find the stipulated protective order with date lines included, which can be returned to us once you've had a chance to sign.

With reference to your request for a draft proposed order, perhaps there is some confusion. It was our intention to avoid the need for an entered order by simply filing the attached stipulation.

Please advise.

Thanks.

Brian

Brian J. McAllister :: Lawyer
2855 Cranberry Square :: Morgantown WV 26508
Office 304.594.0087 :: **Fax** 304.594.9709

BAILEY&GLASSER LLP

EXHIBIT D

BAILEY&GLASSER LLP

Lawyers
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2855 Cranberry Square
Morgantown, WV 26508

August 6, 2013

Clerk of the District Court
c/o Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

RE: Ballard v. Kerr, et al.
Case No. CV OC 1204792

Dear Clerk:

Enclosed for filing in the above referenced matter, enclosed please find the following:

1. Stipulated Protective Order; and
2. Notice of Service of Discovery.

Copies have been emailed to counsel of record. Thank you for your assistance in this matter.

Sincerely,

/s/ P. Gregory Haddad

P. Gregory Haddad, Esq.

PGH/das
Enclosures (as stated)

cc: Jeremiah A. Quane, Esq. (via U.S. Mail and email)
Terrence Jones, Esq. (via U.S. Mail and email)
Scott McKay, Esq. (via email)
J. B. Perrine, Esq. (via email)

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **STIPULATED PROTECTIVE ORDER**

The parties to this action have determined that certain information to be filed with the Court or produced during discovery by the parties to this action is Confidential (as defined below), the unauthorized disclosure of which would be detrimental to the legitimate commercial or privacy interests of the parties. Accordingly, based upon the stipulation of the parties, upon consideration of the record, and pursuant to the provisions of Rule 26(c) of the Idaho Rule of Civil Procedure, the parties, by their respective counsel, hereby agree as follows:

1. When used in this Order, the word "document" includes, but is not limited to documents produced by any party or nonparty in this action whether pursuant to the Idaho Rules of Civil Procedure, subpoena, or by agreement; responses to requests for admissions, requests for

production, and/or interrogatories; deposition transcripts and exhibits; and any portions of any court papers which quote from or summarize any of the foregoing.

2. All documents or testimony designated as confidential in accordance with this order shall be used solely for the prosecution and/or defense of this action and for no other purpose.

3. Any party or nonparty producing documents which contain or disclose commercially sensitive information, proprietary information, financial information, or personal health information may designate such documents as confidential. The party or nonparty producing agreed-upon "CONFIDENTIAL" documents shall stamp such documents with the notice "CONFIDENTIAL."

4. Any party or nonparty giving testimony in this action may designate as "CONFIDENTIAL" that portion of the testimony containing or disclosing commercially sensitive information, proprietary information, financial information, or personal health information by advising the reporter of such confidentiality. The reporter shall separately transcribe those portions of the testimony so designated and shall mark the face of the transcript as "CONFIDENTIAL" as the designating person may direct. Each party or nonparty shall have twenty (20) days after receipt of the transcript of any deposition (as certified by the Court Reporter) within which to notify the other party in writing of the portions of the transcript that it wishes to designate as Confidential Information. Prior to the expiration of such twenty (20) day period, all information disclosed during a deposition shall be treated as though designated confidential, unless otherwise agreed by the parties and the witness, or ordered by the Court.

5. Confidential documents or testimony may be referred to in pleadings, motions and briefs, and may be used in depositions and marked as deposition exhibits in this action. However,

no such document or testimony shall be used for any of these purposes unless it, and that portion of the court paper in which the confidential information is revealed, is appropriately marked confidential and filed under seal with the Clerk of the Court. If a court pleading refers to a Confidential document but does not reveal the content of the Confidential document the pleading need not be filed under seal (although the Confidential document, if attached, shall be file under seal).

6. Except as set forth above, or with the prior written consent of the party or nonparty asserting confidential treatment, no document or testimony designated as "CONFIDENTIAL" and no information contained in it or obtained from it may be disclosed to any person other than:

a. The Court, its staff, and court reporters;

b. Counsel for the parties in this action and their staff;

c. Independent experts retained by counsel for the parties to assist them in litigation;

d. Potential witnesses; and

e. The parties in this action.

7. Any independent expert or potential witness to whom any document or testimony designated as confidential is disclosed must agree to be bound by the terms of this Protective Order and to be subject to the jurisdiction of this Court for contempt and any other appropriate proceedings in the event of an alleged or actual violation of this Order. Each such person to whom confidential testimony or documents is disclosed must sign a document stating that he or she has read this Order and agrees to comply with its terms and to be subject to the jurisdiction of this Court for any proceedings involving alleged improper use or disclosure of the confidential

information.

8. This Order shall not prevent the disclosure of documents to the persons who were the authors or addressees of the documents or are shown as having received copies of them.

9. Documents produced by parties or nonparties (*i.e.*, materials produced from personal or business files, not deposition transcripts, court papers and so on) which are designated confidential and all copies of them (other than exhibits of record) shall be destroyed or returned to the party producing such documents when the action is concluded.

10. The restrictions and obligations relating to documents or testimony designated as confidential in accordance with this Stipulated Protective Order shall not apply to any document or information: 1) which all parties agree in writing were publicly known at the time it was produced; 2) which this Court rules was publicly known at the time it was produced to the receiving party; or 3) which this Court rules has since become publicly known through no fault of the receiving party.

11. If a party or nonparty, through inadvertence, produces any confidential document without labeling or marking or otherwise designating it as such in accordance with the provisions of this Stipulated Protective Order, the designating party may give written notice within 30 days of discovery to the receiving party that the document is deemed confidential and should be treated as such in accordance with the provisions of this Stipulated Protective Order. The receiving party must treat such document as confidential from the date such notice is received. Disclosure, prior to the receipt of such notice, of a confidential document to persons not authorized to receive it shall not be deemed a violation of this Stipulated Protective Order; provided, however, that the party making such disclosure shall notify the designating party in writing of all such unauthorized persons to whom such disclosure was made and shall use best

efforts to secure the return of all such confidential documents. The inadvertent disclosure of a confidential document by a producing party without designation at the time of disclosure shall not be treated as a waiver of the confidentiality of the subject matter.

12. Nothing contained in this Stipulated Protective Order shall be construed to require production of a confidential document or testimony that is privileged or otherwise protected from discovery. If a party, through inadvertence, produces a document that it believes is immune from discovery pursuant to the attorney-client privilege and/or the work product privilege, such production shall not be deemed a waiver of any privilege, and the producing party may give written notice to the receiving party that the document or information produced is deemed privileged and that return of the document or information is requested. Upon receipt of such written notice, the receiving party shall immediately gather the original and all copies of the document or information of which the receiving party is aware and shall immediately return the original and all such copies to the producing party. The return of the document(s) and/or information to the producing party shall not preclude the receiving party from later moving the Court to compel production of the returned documents and/or information.

13. Nothing in this Stipulated Protective Order shall prevent any party or nonparty to this action from seeking modification of this Order or from objecting that a document or testimony has been inappropriately classified as confidential. In addition, nothing in this Order shall prevent a party from objecting to discovery which it believes to be otherwise improper. All parties and nonparties shall endeavor in good faith to resolve any dispute over the designation of documents as confidential on an informal basis before presenting the matter to the Court for resolution. In any motion brought to challenge or sustain a designation as confidential, the burden of establishing confidentiality shall be on the designating party

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____

Scott McKay
David Z. Nevin

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

Date: 8/6/13

QUANE JONES McCOLL, PLLC

By: _____

Jeremiah A. Quane
Terrence Jones

Attorneys for Defendants

Date: 8/2/13

EXHIBIT E

Brian J. McAllister

From: Brian J. McAllister
Sent: Wednesday, September 04, 2013 1:57 PM
To: 'jaq@quanelaw.com'; 'tsj@quanelaw.com'
Cc: Philip G. Haddad; J.B. Perrine; 'smckay@nbmlaw.com'; Farrah Caruthers; Brian J. McAllister
Subject: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order
Attachments: Stipulation for Protective Order.pdf; Proposed Protective Order.pdf

Gentlemen –

The Clerk's office requested that we present the Stipulation for Protective Order with a changed title and a proposed Protective Order. I believe the Clerk and the Court will be satisfied with the attached.

As you will see, there is no substantive difference between the stipulated protective order we previously presented to the Clerk and the attached documents. Please review when you have a moment, and please sign both documents if they are acceptable. We will file shortly thereafter.

Thank you.

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **STIPULATION FOR PROTECTIVE ORDER**

The parties to this action have determined that certain information to be filed with the Court or produced during discovery by the parties to this action is confidential (as defined below), the unauthorized disclosure of which would be detrimental to the legitimate commercial or privacy interests of the parties. Accordingly, based upon the stipulation of the parties, upon consideration of the record, and pursuant to the provisions of Rule 26(c) of the Idaho Rule of Civil Procedure, the parties, by their respective counsel, hereby agree as follows:

1. When used in this Order, the word "document" includes, but is not limited to documents produced by any party or nonparty in this action whether pursuant to the Idaho Rules of Civil Procedure, subpoena, or by agreement; responses to requests for admissions, requests for production, and/or interrogatories; deposition transcripts and exhibits; and any portions of any court papers which quote from or summarize any of the foregoing.

2. All documents or testimony designated as confidential in accordance with this order shall be used solely for the prosecution and/or defense of this action and for no other purpose.

3. Any party or nonparty producing documents which contain or disclose commercially sensitive information, proprietary information, financial information, or personal health information may designate such documents as confidential. The party or nonparty producing agreed-upon "CONFIDENTIAL" documents shall stamp such documents with the notice "CONFIDENTIAL."

4. Any party or nonparty giving testimony in this action may designate as "CONFIDENTIAL" that portion of the testimony containing or disclosing commercially sensitive information, proprietary information, financial information, or personal health information by advising the reporter of such confidentiality. The reporter shall separately transcribe those portions of the testimony so designated and shall mark the face of the transcript as "CONFIDENTIAL" as the designating person may direct. Each party or nonparty shall have twenty (20) days after receipt of the transcript of any deposition (as certified by the Court Reporter) within which to notify the other party in writing of the portions of the transcript that it wishes to designate as Confidential Information. Prior to the expiration of such twenty (20) day period, all information disclosed during a deposition shall be treated as though designated confidential, unless otherwise agreed by the parties and the witness, or ordered by the Court.

5. Confidential documents or testimony may be referred to in pleadings, motions and briefs, and may be used in depositions and marked as deposition exhibits in this action. However, no such document or testimony shall be used for any of these purposes unless it, and that portion of the court paper in which the confidential information is revealed, is appropriately marked

confidential and filed under seal with the Clerk of the Court. If a court pleading refers to a Confidential document but does not reveal the content of the Confidential document the pleading need not be filed under seal (although the Confidential document, if attached, shall be file under seal).

6. Except as set forth above, or with the prior written consent of the party or nonparty asserting confidential treatment, no document or testimony designated as "CONFIDENTIAL" and no information contained in it or obtained from it may be disclosed to any person other than:

a. The Court, its staff, and court reporters;

b. Counsel for the parties in this action and their staff;

c. Independent experts retained by counsel for the parties to assist them in litigation;

d. Potential witnesses; and

e. The parties in this action.

7. Any independent expert or potential witness to whom any document or testimony designated as confidential is disclosed must agree to be bound by the terms of this Protective Order and to be subject to the jurisdiction of this Court for contempt and any other appropriate proceedings in the event of an alleged or actual violation of this Order. Each such person to whom confidential testimony or documents is disclosed must sign a document stating that he or she has read this Order and agrees to comply with its terms and to be subject to the jurisdiction of this Court for any proceedings involving alleged improper use or disclosure of the confidential information.

8. This Order shall not prevent the disclosure of documents to the persons who were the authors or addressees of the documents or are shown as having received copies of them.

9. Documents produced by parties or nonparties (*i.e.*, materials produced from personal or business files, not deposition transcripts, court papers and so on) which are designated confidential and all copies of them (other than exhibits of record) shall be destroyed or returned to the party producing such documents when the action is concluded.

10. The restrictions and obligations relating to documents or testimony designated as confidential in accordance with this Stipulated Protective Order shall not apply to any document or information: 1) which all parties agree in writing were publicly known at the time it was produced; 2) which this Court rules was publicly known at the time it was produced to the receiving party; or 3) which this Court rules has since become publicly known through no fault of the receiving party.

11. If a party or nonparty, through inadvertence, produces any confidential document without labeling or marking or otherwise designating it as such in accordance with the provisions of this Stipulated Protective Order, the designating party may give written notice within 30 days of discovery to the receiving party that the document is deemed confidential and should be treated as such in accordance with the provisions of this Stipulated Protective Order. The receiving party must treat such document as confidential from the date such notice is received. Disclosure, prior to the receipt of such notice, of a confidential document to persons not authorized to receive it shall not be deemed a violation of this Stipulated Protective Order; provided, however, that the party making such disclosure shall notify the designating party in writing of all such unauthorized persons to whom such disclosure was made and shall use best efforts to secure the return of all such confidential documents. The inadvertent disclosure of a

confidential document by a producing party without designation at the time of disclosure shall not be treated as a waiver of the confidentiality of the subject matter.

12. Nothing contained in this Stipulated Protective Order shall be construed to require production of a confidential document or testimony that is privileged or otherwise protected from discovery. If a party, through inadvertence, produces a document that it believes is immune from discovery pursuant to the attorney-client privilege and/or the work product privilege, such production shall not be deemed a waiver of any privilege, and the producing party may give written notice to the receiving party that the document or information produced is deemed privileged and that return of the document or information is requested. Upon receipt of such written notice, the receiving party shall immediately gather the original and all copies of the document or information of which the receiving party is aware and shall immediately return the original and all such copies to the producing party. The return of the document(s) and/or information to the producing party shall not preclude the receiving party from later moving the Court to compel production of the returned documents and/or information.

13. Nothing in this Stipulated Protective Order shall prevent any party or nonparty to this action from seeking modification of this Order or from objecting that a document or testimony has been inappropriately classified as confidential. In addition, nothing in this Order shall prevent a party from objecting to discovery which it believes to be otherwise improper. All parties and nonparties shall endeavor in good faith to resolve any dispute over the designation of documents as confidential on an informal basis before presenting the matter to the Court for resolution. In any motion brought to challenge or sustain a designation as confidential, the burden of establishing confidentiality shall be on the designating party.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
Scott McKay
David Z. Nevin

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

QUANE JONES McCOLL, PLLC

By: _____
Jeremiah A. Quane
Terrence Jones

Attorneys for Defendants

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PROTECTIVE ORDER**

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1. When used in this Order, the word "document" includes, but is not limited to documents produced by any party or nonparty in this action whether pursuant to the Idaho Rules of Civil Procedure, subpoena, or by agreement; responses to requests for admissions, requests for

production, and/or interrogatories; deposition transcripts and exhibits; and any portions of any court papers which quote from or summarize any of the foregoing.

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b. Counsel for the parties in this action and their staff;

c. Independent experts retained by counsel for the parties to assist them in litigation;

d. Potential witnesses; and

e. The parties in this action.

7. Any independent expert or potential witness to whom any document or testimony designated as confidential is disclosed must agree to be bound by the terms of this Protective Order and to be subject to the jurisdiction of this Court for contempt and any other appropriate proceedings in the event of an alleged or actual violation of this Order. Each such person to whom confidential testimony or documents is disclosed must sign a document stating that he or she has read this Order and agrees to comply with its terms and to be subject to the jurisdiction of this Court for any proceedings involving alleged improper use or disclosure of the confidential

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13. Nothing in this Stipulated Protective Order shall prevent any party or nonparty to this action from seeking modification of this Order or from objecting that a document or testimony has been inappropriately classified as confidential. In addition, nothing in this Order shall prevent a party from objecting to discovery which it believes to be otherwise improper. All parties and nonparties shall endeavor in good faith to resolve any dispute over the designation of documents as confidential on an informal basis before presenting the matter to the Court for resolution. In any motion brought to challenge or sustain a designation as confidential, the burden of establishing confidentiality shall be on the designating party.

SO ORDERED this _____ day of September, 2013.

Deborah A. Bail, Judge

Approved By:

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
Scott McKay
David Z. Nevin

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

QUANE JONES McCOLL, PLLC

By: _____
Jeremiah A. Quane
Terrence Jones

Attorneys for Defendants

EXHIBIT F

Brian J. McAllister

From: Brian J. McAllister
Sent: Wednesday, September 11, 2013 4:31 PM
To: 'jaq@quanelaw.com'; 'tsj@quanelaw.com'
Cc: Philip G. Haddad; 'smckay@nbmlaw.com'; 'Debi Presher (dpresher@nbmlaw.com)'; Farrah Caruthers; Brian J. McAllister
Subject: FW: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order
Attachments: Stipulation for Protective Order.pdf; Proposed Protective Order.pdf

Gentlemen –

When you have a moment, would you please review the attached documents, sign them, and return them to me for filing, or alternatively, let me know what revisions you feel are required?

Many thanks.

Brian

From: Brian J. McAllister
Sent: Wednesday, September 04, 2013 1:57 PM
To: 'jaq@quanelaw.com'; 'tsj@quanelaw.com'
Cc: Philip G. Haddad; J.B. Perrine; 'smckay@nbmlaw.com'; Farrah Caruthers; Brian J. McAllister
Subject: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order

Gentlemen –

The Clerk's office requested that we present the Stipulation for Protective Order with a changed title and a proposed Protective Order. I believe the Clerk and the Court will be satisfied with the attached.

As you will see, there is no substantive difference between the stipulated protective order we previously presented to the Clerk and the attached documents. Please review when you have a moment, and please sign both documents if they are acceptable. We will file shortly thereafter.

Thank you.

Brian J. McAllister :: Lawyer
2855 Cranberry Square :: Morgantown WV 26508
Office 304.594.0087 :: **Fax** 304.594.9709

BAILEY&GLASSER LLP

EXHIBIT G

Brian J. McAllister

From: Farrah Caruthers
Sent: Monday, October 07, 2013 10:41 PM
To: Brian J. McAllister
Subject: FW: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order
Attachments: Stipulation for Protective Order.pdf; Proposed Protective Order.pdf

Importance: High

Farrah Caruthers :: Paralegal :: Bailey & Glasser LLP :: 304.345.6555

From: Farrah Caruthers
Sent: Monday, September 23, 2013 11:42 AM
To: jaq@quanelaw.com; 'Terry Jones' (tsj@quanelaw.com)
Cc: Philip G. Haddad; Scott McKay (smckay@nbmlaw.com) (smckay@nbmlaw.com); Brian J. McAllister; dpresher@nbmlaw.com; Farrah Caruthers
Subject: FW: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order
Importance: High

Mr. Quane and Mr. Jones:

Have you had a chance to review the attached documents? Please advise.

Thank you for your prompt attention to this matter.

Farrah Caruthers

Farrah Caruthers :: Paralegal :: Bailey & Glasser LLP :: 304.345.6555

From: Brian J. McAllister
Sent: Wednesday, September 11, 2013 4:31 PM
To: 'jaq@quanelaw.com'; 'tsj@quanelaw.com'
Cc: Philip G. Haddad; 'smckay@nbmlaw.com'; 'Debi Presher (dpresher@nbmlaw.com)'; Farrah Caruthers; Brian J.

McAllister
Subject: FW: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order

Gentlemen –

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Many thanks.

Brian

Brian J. McAllister :: Lawyer :: Bailey & Glasser LLP :: 304.594.0087

From: Brian J. McAllister
Sent: Wednesday, September 04, 2013 1:57 PM
To: 'jaq@quanelaw.com'; 'tsj@quanelaw.com'
Cc: Philip G. Haddad; J.B. Perrine; 'smckay@nbmlaw.com'; Farrah Caruthers; Brian J. McAllister
Subject: Ballard v. Kerr - Revised Stipulation and Proposed Protective Order

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Thank you.

Brian J. McAllister :: Lawyer
2855 Cranberry Square :: Morgantown WV 26508
Office 304.594.0087 :: **Fax** 304.594.9709

BAILEY&GLASSER LLP

EXHIBIT H

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PROTECTIVE ORDER**

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production, and/or interrogatories; deposition transcripts and exhibits; and any portions of any court papers which quote from or summarize any of the foregoing.

2. All documents or testimony designated as confidential in accordance with this order shall be used solely for the prosecution and/or defense of this action and for no other purpose.

3. Any party or nonparty producing documents which contain or disclose commercially sensitive information, proprietary information, financial information, or personal health information may designate such documents as confidential. The party or nonparty producing agreed-upon "CONFIDENTIAL" documents shall stamp such documents with the notice "CONFIDENTIAL."

4. Any party or nonparty giving testimony in this action may designate as "CONFIDENTIAL" that portion of the testimony containing or disclosing commercially sensitive information, proprietary information, financial information, or personal health information by advising the reporter of such confidentiality. The reporter shall separately transcribe those portions of the testimony so designated and shall mark the face of the transcript as "CONFIDENTIAL" as the designating person may direct. Each party or nonparty shall have twenty (20) days after receipt of the transcript of any deposition (as certified by the Court Reporter) within which to notify the other party in writing of the portions of the transcript that it wishes to designate as Confidential Information. Prior to the expiration of such twenty (20) day period, all information disclosed during a deposition shall be treated as though designated confidential, unless otherwise agreed by the parties and the witness, or ordered by the Court.

5. Confidential documents or testimony may be referred to in pleadings, motions and briefs, and may be used in depositions and marked as deposition exhibits in this action. However,

no such document or testimony shall be used for any of these purposes unless it, and that portion of the court paper in which the confidential information is revealed, is appropriately marked confidential and filed under seal with the Clerk of the Court. If a court pleading refers to a Confidential document but does not reveal the content of the Confidential document the pleading need not be filed under seal (although the Confidential document, if attached, shall be file under seal).

6. Except as set forth above, or with the prior written consent of the party or nonparty asserting confidential treatment, no document or testimony designated as "CONFIDENTIAL" and no information contained in it or obtained from it may be disclosed to any person other than:

a. The Court, its staff, and court reporters;

b. Counsel for the parties in this action and their staff;

c. Independent experts retained by counsel for the parties to assist them in litigation;

d. Potential witnesses; and

e. The parties in this action.

7. Any independent expert or potential witness to whom any document or testimony designated as confidential is disclosed must agree to be bound by the terms of this Protective Order and to be subject to the jurisdiction of this Court for contempt and any other appropriate proceedings in the event of an alleged or actual violation of this Order. Each such person to whom confidential testimony or documents is disclosed must sign a document stating that he or she has read this Order and agrees to comply with its terms and to be subject to the jurisdiction of this Court for any proceedings involving alleged improper use or disclosure of the confidential

information.

8. This Order shall not prevent the disclosure of documents to the persons who were the authors or addressees of the documents or are shown as having received copies of them.

9. Documents produced by parties or nonparties (*i.e.*, materials produced from personal or business files, not deposition transcripts, court papers and so on) which are designated confidential and all copies of them (other than exhibits of record) shall be destroyed or returned to the party producing such documents when the action is concluded.

10. The restrictions and obligations relating to documents or testimony designated as confidential in accordance with this Stipulated Protective Order shall not apply to any document or information: 1) which all parties agree in writing were publicly known at the time it was produced; 2) which this Court rules was publicly known at the time it was produced to the receiving party; or 3) which this Court rules has since become publicly known through no fault of the receiving party.

11. If a party or nonparty, through inadvertence, produces any confidential document without labeling or marking or otherwise designating it as such in accordance with the provisions of this Stipulated Protective Order, the designating party may give written notice within 30 days of discovery to the receiving party that the document is deemed confidential and should be treated as such in accordance with the provisions of this Stipulated Protective Order. The receiving party must treat such document as confidential from the date such notice is received. Disclosure, prior to the receipt of such notice, of a confidential document to persons not authorized to receive it shall not be deemed a violation of this Stipulated Protective Order; provided, however, that the party making such disclosure shall notify the designating party in writing of all such unauthorized persons to whom such disclosure was made and shall use best

efforts to secure the return of all such confidential documents. The inadvertent disclosure of a confidential document by a producing party without designation at the time of disclosure shall not be treated as a waiver of the confidentiality of the subject matter.

12. Nothing contained in this Stipulated Protective Order shall be construed to require production of a confidential document or testimony that is privileged or otherwise protected from discovery. If a party, through inadvertence, produces a document that it believes is immune from discovery pursuant to the attorney-client privilege and/or the work product privilege, such production shall not be deemed a waiver of any privilege, and the producing party may give written notice to the receiving party that the document or information produced is deemed privileged and that return of the document or information is requested. Upon receipt of such written notice, the receiving party shall immediately gather the original and all copies of the document or information of which the receiving party is aware and shall immediately return the original and all such copies to the producing party. The return of the document(s) and/or information to the producing party shall not preclude the receiving party from later moving the Court to compel production of the returned documents and/or information.

13. Nothing in this Stipulated Protective Order shall prevent any party or nonparty to this action from seeking modification of this Order or from objecting that a document or testimony has been inappropriately classified as confidential. In addition, nothing in this Order shall prevent a party from objecting to discovery which it believes to be otherwise improper. All parties and nonparties shall endeavor in good faith to resolve any dispute over the designation of documents as confidential on an informal basis before presenting the matter to the Court for resolution. In any motion brought to challenge or sustain a designation as confidential, the burden of establishing confidentiality shall be on the designating party.

SO ORDERED this _____ day of _____, 2013.

_____
Deborah A. Bail, Judge

Prepared By:

NEVIN, BENJAMIN, MCKAY &
BARTLETT LLP.

By: _____
Scott McKay
David Z. Nevin

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

David Nevin (ISB #2280) dnevin@nbmlaw.com
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T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE OF RECONVENED VIDEOTAPED AND VIDEO CONFERENCE DEPOSITION OF CHARLES GARRISON, M.D.**

To: Charles Garrison, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, reconvene the videotaped and video conference deposition of Charles Garrison, M.D., on **Tuesday, October 15, 2013, at 3:00 p.m., MST**, at Kumm & Reichert, 1305 East Center Street, Pocatello, Idaho 83201, at which place and time you are invited to appear and take part in such deposition as you deem proper.

Plaintiff does not waive any objections to the untimely disclosed opinions of Dr. Garrison, which were first brought to Plaintiff's attention at the original deposition of Dr. Garrison. Plaintiff reserves the right to move to exclude opinions of Dr. Garrison, which Defendants failed to timely supplement.

The Deponent is requested to bring all of the following:

1. Any and all documents, articles, publications, slides, and/or photos of slides reviewed, referred to, or relied upon by you in forming your opinion related to fat embolism, or which support your opinion related to fat embolism.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 9th day of October, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2013, I served a true and correct copy of the foregoing **NOTICE OF RECONVENED VIDEOTAPED AND VIDEO CONFERENCE DEPOSITION OF CHARLES GARRISON, M.D.,** by Facsimile, upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

civil section cont?
Bail
Take
10/16/13
SA

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
303 W. Bannock
Boise, Idaho 83702
T: (208) 343-1000; F: (208) 345-8274

P. Gregory Haddad ghaddad@baileyglasser.com
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, Alabama 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **AMENDED NOTICE OF RECONVENED VIDEOTAPED AND VIDEO CONFERENCE DEPOSITION OF CHARLES GARRISON, M.D.**

To: Charles Garrison, M.D.
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, reconvene the videotaped and video conference deposition of Charles Garrison, M.D., on **Wednesday, October 16, 2013, at 5:00 p.m., MST**, at Kumm & Reichert, 1305 East Center Street, Pocatello, Idaho 83201, at which place and time you are invited to appear and take part in such deposition as you deem proper.

Plaintiff does not waive any objections to the untimely disclosed opinions of Dr. Garrison, which were first brought to Plaintiff's attention at the original deposition of Dr. Garrison. Plaintiff reserves the right to move to exclude opinions of Dr. Garrison, which Defendants failed to timely supplement.

The Deponent is requested to bring all of the following:

1. Any and all documents, articles, publications, slides, and/or photos of slides reviewed, referred to, or relied upon by you in forming your opinion related to fat embolism, or which support your opinion related to fat embolism.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 11th day of October, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

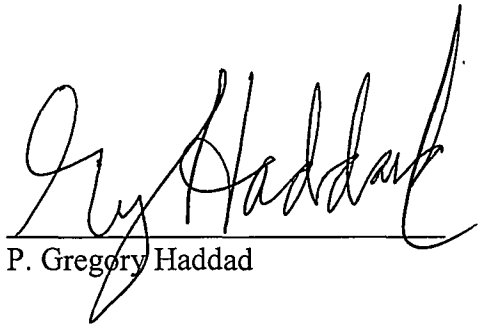
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2013, I served a true and correct copy of the foregoing **AMENDED NOTICE OF RECONVENED VIDEOTAPED AND VIDEO CONFERENCE DEPOSITION OF CHARLES GARRISON, M.D.,** by Facsimile, upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701



P. Gregory Haddad

civil Section Court?
Bail
Tara
10/8/13
SA

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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303 W. Bannock
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BAILEY & GLASSER, LLP
201 Monroe Street, Suite 2170
Montgomery, AL 36104
T: (334) 262-6485; F: (334) 262-0657

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE OF HEARING**

Plaintiff gives notice that his Motion for Protective Order will be heard at 9:30 a.m. on Tuesday, November 5, 2013.

Dated this 17th day of October, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2013, I served a true and correct copy of the foregoing by faxing the same to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519
Facsimile – 208-780-3930

Scott McKay

Bail
Tara
10-21-13
DS

David Z. Nevin (ISB#2280), dnevin@nbmlaw.com
Scott McKay (ISB#4309), smckay@nbmlaw.com
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BAILEY & GLASSER LLP
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Birmingham, Alabama 35244
T: (208) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

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Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of *Plaintiff's Fifth Supplemental Answers to Defendants' First Set of Interrogatories*, together with a copy of this *Notice of Service of Discovery*, has been served upon counsel indicated on the certificate of service below.

DATED this 18th day of October, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2013, a true and correct copy of the foregoing ***Notice of Service of Discovery*** was served upon the following via facsimile:

Jeremiah A. Quane
QUANE JONES McCOLL PLLC
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 1576
Boise, Idaho 83701-1576
Facsimile: 208-780-3930

Scott McKay

NO. _____
A.M. _____ FILED P.M. 4:39

OCT 21 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
DEPUTY

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
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P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' MOTIONS IN LIMINE

COMES NOW, Defendants, by and through their counsel of record, Quane Jones McColl, PLLC, and move this Court, pursuant to Rules 103, 104, 401, 402, 403, 701 and 803 of the Idaho Rules of Evidence and Rules 16 and 47(i) of the Idaho Rules of Civil Procedure for Orders in Limine as to the following issues:

1) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, that Defendant Dr. Kerr or any of the defense witnesses, including Dr. Kelly O'Neil, have ever had any complaints filed against them or proceedings or orders of any kind before any state licensing entity in any jurisdiction that they have ever been licensed in.

2) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the fact that Dr. Kerr or any of the defense witnesses, including Kelly O'Neil have ever been previously sued for malpractice or settled a malpractice claim in any jurisdiction.

3) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, that Dr. Laurence has been the subject of any criminal indictments or grand jury proceedings in any jurisdiction.

4) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the fact that any of the Defendants have liability insurance, the availability of insurance or the issue of insurance

in any way at all.

5) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the fact that any of the Defendants or any of the defense witnesses have ever been previously represented by Jeremiah Quane or any of the attorneys with the firm Quane Jones McColl, PLLC.

6) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the effect of this or any medical malpractice case on the cost of health care or the implementation of the affordable care act also known as "Obamacare."

This Motion in Limine is based upon the Memorandum in Support of Defendants' Motions in Limine filed contemporaneously herewith, in addition to the court record, files, and pleadings otherwise on file in this action.

DATED this 21st day of October, 2013.

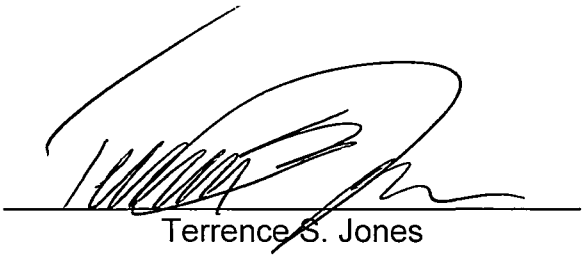
QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2013, I served a true and correct copy of the foregoing DEFENDANTS' MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Terrence S. Jones

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTIONS IN LIMINE

STATE OF IDAHO)
: ss.
County of Ada)

Terrence S. Jones, having been first duly sworn upon oath, deposes and

says:

1. I am a member of the law firm Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statement are made of my own personal knowledge and are true and correct.

2. Attached hereto as **Exhibit A** is a true and correct copy of ***Hathcock v. Wood***, 815 So. 2d 502 (Ala. 2001), which is offered in support of Defendants' Motions in Limine.

3. Attached hereto as **Exhibit B** is a true and correct copy of ***Heshelman v. Lombardi***, 183 Mich.App. 72, 454 N.W.2d 603 (1990), which is offered in support of Defendants' Motions in Limine.

4. Attached hereto as **Exhibit C** is a true and correct copy of ***King v. Byrd***, 716 So. 2d 831 (Fla. Dist. Ct. App. 1998), which is offered in support of Defendants' Motions in Limine.

5. Attached hereto as **Exhibit D** is a true and correct copy of ***Manhardt v. Tamton***, 832 So. 2d 129 (Fla. Dist. Ct. App. 2002), which is offered in support of Defendants' Motions in Limine.

6. Attached hereto as **Exhibit E** is a true and correct copy of ***Morrow v. Stivers***, 836 S.W.2d 424 (Ky. Ct. App. 1992), which is offered in support of Defendants' Motions in Limine.

7. Attached hereto as **Exhibit F** is a true and correct copy of ***Noble v. Lansche***, 735 S.W.2d 63 (Mo. Ct. App. 1987), which is offered in support of Defendants' Motions in Limine.

8. Attached hereto as **Exhibit G** is a true and correct copy of ***Stickney v. Wesley Med. Ctr.***, 244 Kan. 147, 768 P.2d 253 (1989), which is offered in support of

Defendants' Motions in Limine.

FURTHER your Affiant saith not.

Terrence S. Jones

SUBSCRIBED AND SWORN to before me this 21st day of October, 2013.

(SEAL)

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2013, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896

Jeremiah A. Quane

EXHIBIT A

Westlaw.

815 So.2d 502
(Cite as: 815 So.2d 502)

Supreme Court of Alabama.
Ben Cleburn HATHCOCK
v.
Marshall WOOD and Reba Wood.

1982225.
March 16, 2001.

Motorist and passenger in lead vehicle brought personal injury action against driver of following vehicle arising out of rear-end accident. The Circuit Court, Etowah County, No. CV-96-330,William H. Rhea III, J., entered jury verdict awarding $200,000 to the motorist and $600,000 to passenger-husband. Defendant driver appealed. The Supreme Court, Brown, J., held that: (1) whether driver breached duty of care by not anticipating that vehicles he was following might stop was issue for jury; (2) evidence concerning probationary status of plaintiffs' medical expert's professional license improperly related to specific evidence bearing on witness's reputation for veracity; (3) motorist's comment that she and her husband had been unable to afford consistent medical care and that they had been forced to sell their home to pay for husband's treatment properly provided jury with a concise explanation to implication raised by defense counsel that they were exaggerating extent of husband's original injuries or that his current physical condition could not be found to have been proximately caused by the automobile accident, given the 10-month lapse in treatment; (4) motorist was entitled to general damages of $200,000, largely to compensate her for loss of husband's consortium; and (5) passenger was entitled to general damages of $600,000, largely on basis of claim to compensate for mental anguish.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k207 k. Arguments and Conduct of Counsel. Most Cited Cases
Defendant driver's counsel failed to object to accident victims' counsel's comment requesting jury to compensate victims for their injuries so that they could regain their home, and, thus, the alleged error was not preserved for review.

[2] Automobiles 48A ⚿245(15)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(2) Care Required and Negligence
48Ak245(15) k. Vehicles Following, Overtaking, or Passing. Most Cited Cases
Whether driver breached duty of care by not anticipating that the vehicles he was following might stop was issue for jury in personal injury action against driver arising out of rear-end motor vehicle accident.

[3] Appeal and Error 30 ⚿866(3)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict
30k866(3) k. Appeal from Ruling on Motion to Direct Verdict. Most Cited Cases
Standard by which Supreme Court will review

an appeal from a ruling on a motion for a judgment as a matter of law (JML) is materially indistinguishable from the standard by which it will review a summary judgment, that is, whether the nonmoving party has presented substantial evidence in support of his position.

[4] Evidence 157 ⚿597

157 Evidence
157XIV Weight and Sufficiency
157k597 k. Sufficiency to Support Verdict or Finding. Most Cited Cases
Evidence is "substantial" only if it is of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.

[5] Judgment 228 ⚿199(3.10)

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(3.10) k. Where There Is No Evidence to Sustain Verdict. Most Cited Cases

Judgment 228 ⚿199(3.11)

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(3.11) k. Where Undisputed Facts Entitle Movant to Judgment as Matter of Law. Most Cited Cases
Judgment as a matter of law (JML) should be entered only when there is a complete absence of proof on a material issue or where there are no disputed questions of fact for the jury to determine.

[6] Appeal and Error 30 ⚿927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of Evidence and Inferences Therefrom on Direction of Verdict. Most Cited Cases
In determining whether material questions of fact exist on motion for judgment as a matter of law (JML), the appellate court must view the evidence presented at trial in a light most favorable to the nonmoving party.

[7] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases
Evidence concerning probationary status of medical expert's professional license improperly related to specific evidence bearing on witness's reputation for veracity in personal injury action arising from motor vehicle accident. Rules of Evid., Rule 608(b).

[8] Appeal and Error 30 ⚿232(.5)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k232 Scope and Effect of Objection
30k232(.5) k. In General. Most Cited Cases
Supreme Court's consideration of alleged error is limited to the grounds raised before the trial court.

[9] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeach-

ment. Most Cited Cases
Only kind of evidence that may be presented as to an expert's character for truthfulness is evidence regarding the expert's general reputation in the community for untruthfulness, or opinion testimony from another competent witness. Rules of Evid., Rule 608.

[10] Trial 388 ⚿130

388 Trial
388V Arguments and Conduct of Counsel
388k130 k. Evidence to Rebut Statements. Most Cited Cases
Motorist's comment that she and her husband had been unable to afford consistent medical care and that they had been forced to sell their home to pay for husband's treatment properly provided jury with a concise explanation for implication raised by defense counsel that they were exaggerating extent of husband's original injuries or that his current physical condition could not be found to have been proximately caused by the automobile accident, given husband's 10-month lapse in treatment.

[11] Evidence 157 ⚿107

157 Evidence
157IV Admissibility in General
157IV(A) Facts in Issue and Relevant to Issues
157k107 k. Pecuniary Condition. Most Cited Cases

Trial 388 ⚿125(4)

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k125 Appeals to Sympathy or Prejudice
388k125(4) k. Reference to Wealth or Poverty of Parties. Most Cited Cases
It is highly prejudicial to a defendant for the jury to be improperly informed as to the poverty of the plaintiff, and, consequently, evidence of such character is generally inadmissible.

[12] Evidence 157 ⚿107

157 Evidence
157IV Admissibility in General
157IV(A) Facts in Issue and Relevant to Issues
157k107 k. Pecuniary Condition. Most Cited Cases
Evidence of plaintiff's financial condition may be relevant and admissible when it goes to a material issue in the case.

[13] Evidence 157 ⚿155(1)

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k155 Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party
157k155(1) k. In General. Most Cited Cases

Trial 388 ⚿130

388 Trial
388V Arguments and Conduct of Counsel
388k130 k. Evidence to Rebut Statements. Most Cited Cases
Evidence regarding a party's financial condition may be admissible when the party's opponent has opened the door by commenting upon or asking questions concerning the party's financial standing.

[14] Trial 388 ⚿62(1)

388 Trial
388IV Reception of Evidence
388IV(B) Order of Proof, Rebuttal, and Reopening Case
388k62 Evidence in Rebuttal
388k62(1) k. In General; Grounds for Admission. Most Cited Cases
Rebuttal evidence must not be substantially unconnected with previously admitted illegal evid-

ence.

[15] Damages 115 ⚿127.11

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.11 k. Internal Injuries in General. Most Cited Cases
(Formerly 115k133)

Damages 115 ⚿127.74

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.72 Loss of Consortium, Services, or Earnings Arising Out of Injury to Another
115k127.74 k. Husband and Wife. Most Cited Cases
(Formerly 115k133)

Evidence 157 ⚿571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) k. Damages. Most Cited Cases

Injured motorist was entitled to general damages of $200,000 for accident in which her vehicle was struck from behind, though her medical expenses for rib and chest pain was $1,068.50, given that bulk of claim was intended largely to compensate her for loss of husband's consortium; husband's medical expert testified that head injury husband had suffered in accident had altered his personality and had caused him to become emotionally fragile, and evidence suggested that husband's condition left him permanently unable to support, comfort, and care for wife.

[16] Damages 115 ⚿127.15

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.12 Head and Neck Injuries in General; Mental Impairment
115k127.15 k. Brain Injuries in General; Mental Impairment. Most Cited Cases
(Formerly 115k130.1)

Damages 115 ⚿140.7

115 Damages
115VII Amount Awarded
115VII(E) Mental Suffering and Emotional Distress
115k140.7 k. Particular Cases. Most Cited Cases
(Formerly 115k140.5)

Award to injured passenger of general damages of $600,000 for accident in which vehicle in which he was a passenger was struck from behind was not excessive, given that bulk of his claim was intended largely to compensate for mental anguish from accident; evidence suggested that passenger frequently experienced intense emotional outbursts and generally suffered from depression because of his chronic pain and his inability to work, that his suicide attempt was another acute indicator of his mental condition, and medical expert suggested that passenger's head injury had caused a permanent change in his cognitive ability, memory, and emotional capacity to handle elements of daily life.

[17] Appeal and Error 30 ⚿1004(8)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(6) Particular Cases and Items
30k1004(8) k. Personal Injuries. Most Cited Cases

On review of a jury verdict on the ground of excessiveness of damages award, Supreme Court

focuses on the plaintiff, and must ask what the evidence supports in terms of the loss or harm suffered by the plaintiff.

|18| Appeal and Error 30 ⇐1004(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(1) k. In General. Most Cited Cases

In the absence of a flawed verdict, Supreme Court may not invade the jury's province to award compensatory damages.

***505** Barbara F. Olschner and J. Mark Hart of Olschner & Hart, P.C., Birmingham, for appellant.

Gregory S. Cusimano, Michael L. Roberts, and David A. Kimberley of Cusimano, Keener, Roberts & Kimberley, P.C., Gadsden, for appellees.

BROWN, Justice.

This negligence case arises out of an automobile accident that occurred on March 19, 1994. The defendant Ben Cleburn Hathcock appeals from a judgment entered upon a jury verdict awarding $600,000 to the plaintiff Marshall Wood and $200,000 to the plaintiff Reba Wood. We affirm.

I. Facts and Procedural History

On the morning of March 19, 1994, Ben Hathcock was traveling west, behind three automobiles, on Highway 278, which connects Piedmont and Gadsden. Dorothy Law was driving the first vehicle, the one the farthest ahead of Hathcock; Reba Wood, with her husband Marshall Wood as her passenger, was driving the second vehicle; an unknown person was driving the third vehicle, the vehicle immediately ahead of Hathcock. According to the evidence presented at trial, Law, driving the lead automobile, activated her left turn signal as she reached the crest of a hill, to indicate her intent to turn into the driveway of a private residence. As Law stopped on the highway to allow an oncoming car to pass, Mrs. Wood prepared to stop behind her. The third vehicle, however, swerved to the right and headed toward the shoulder of the road past the Woods' vehicle. Hathcock, who testified that he did not see Law's turn signal or brake lights, quickly applied his brakes and turned to the right also; his vehicle hit the rear of the Woods' vehicle, at an angle, shoving it into Law's vehicle.

Mr. and Mrs. Wood were injured in the accident. Soon after the accident, they sought medical treatment for their injuries at a hospital emergency room. Mrs. Wood complained of rib and chest pain; she was treated and released that same day. Her medical expenses totalled $1,068.50. Mr. Wood was treated for a neck strain and was given a cervical collar, and he, too, was released that same day. This visit to the hospital provided Mrs. Wood's only treatment, but the record suggests that it merely marked the beginning of Mr. Wood's treatment.

Over the next two years, Mr. Wood sought treatment from several doctors. On April 7, 1994, almost three weeks after the accident, Mr. Wood sought treatment for his neck. He was diagnosed with a neck strain; he did not return for treatment until February 2, 1995. At that time, he was continuing to complain about pain in his neck. On March 22, 1995, Mr. Wood sought treatment from a chiropractor; the chiropractor treated him 34 times, until August 1995. After Mr. Wood had concluded the chiropractic treatments, he sought medical attention, in December 1996, from a new physician. The record suggests that, after that time, Mr. Wood sought regular treatment from several physicians, including a neurosurgeon, for pain in his neck, shoulders, and back, as well as for what he alleges was a deteriorating mental condition.

***506** [1] The Woods sued Hathcock on March 18, 1996, alleging that Hathcock had negligently or wantonly caused the 1994 automobile accident. As the trial began, defense counsel suggested in her

opening argument that the evidence would show that Mr. Wood's alleged injuries were exaggerated, or, alternatively, were not related to the 1994 accident. She specifically stated that the evidence would show significant gaps of time between treatments, especially during the year following the accident. At the conclusion of the opening statements, the Woods' counsel called Mrs. Wood as his first witness. During her testimony, Mrs. Wood on several occasions referred the Woods' financial condition, indicating that it was poor, and at times suggesting that it caused them to delay Mr. Wood's medical visits. Mrs. Wood also said that as a result of the accident she and her husband had been poor and that their poverty had caused them to lose their house and their upholstery business. Defense counsel, who had previously made a motion in limine to exclude all testimony as to the Woods' poverty, properly objected to Mrs. Wood's statement. [FN1]

> FN1. Defense counsel, however, did not object to statements made by plaintiffs' counsel during his closing argument, in which he asked the jury to compensate the Woods for their injuries so that they could regain their home. Therefore, any error in regard to those statements in the closing argument of the plaintiffs' counsel has not been preserved for review.

The trial court entered a judgment as a matter of law ("JML") in favor of Hathcock on the wantonness claim, but submitted the negligence claim to the jury. The jury returned a verdict in favor of the Woods, awarding them $600,000 for Mr. Wood's physical injuries, mental anguish, and lost earnings and $200,000 for Mrs. Wood's physical injuries and the loss of consortium of her husband. Hathcock moved for a remittitur or, alternatively, for a new trial. The court conducted a hearing on the motion and then denied it. The court entered a judgment on the verdict. This appeal followed.

II. Analysis

[2] Hathcock first argues that the trial court erred in not entering a JML for him on the Woods' negligence claim because, he says, he did not breach a duty of care. He contends that he was driving at a safe speed and was following the vehicle in front of him at a lawful distance, but that he was nevertheless unable to see that the Woods' vehicle was stopping, because his view of its brake lights was obstructed by the vehicle between the Woods and Hathcock.

[3][4][5][6] The standard by which we review an appeal from a ruling on a motion for a JML is materially indistinguishable from the standard by which we review a summary judgment. Simply, this standard is " 'whether the nonmoving party has presented substantial evidence in support of his position.' " *Norfolk So. Ry. v. Bradley,* 772 So.2d 1147, 1150 (Ala.2000) (quoting *K.S. v. Carr,* 618 So.2d 707, 713 (Ala.1993)). Evidence is "substantial" only if it is "of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Fla.,* 547 So.2d 870, 871 (Ala.1989). A JML should be entered only when "there is a complete absence of proof on a material issue or where there are no disputed questions of fact for the jury to determine." *Norfolk So.,* supra, 772 So.2d at 1150 (quoting *K.S. v. Carr,* 618 So.2d at 713). In determining whether material ***507** questions of fact exist, the court must view the evidence presented at trial in a light most favorable to the nonmoving party. Given that principle, we must resolve all factual disputes in favor of the Woods.

Hathcock relies, in part, on *Tinsley v. Henderson,* 613 So.2d 1268 (Ala.1993). In that case, Henderson was driving down a two-lane road, at a speed below the legal limit, when his truck struck and killed Timothy Tinsley, as Timothy was riding his bicycle. Timothy's parents sued Henderson, claiming that he had negligently or wantonly caused the accident. This Court affirmed a summary judgment in Henderson's favor, holding that the Tinsleys had failed to present substantial evid-

ence indicating that Henderson's actions were not reasonably prudent. *Tinsley,* 613 So.2d at 1271.

This present case is distinguishable from *Tinsley,* because Hathcock could reasonably have expected that the vehicles traveling in front of him could suddenly slow down or stop at any time; indeed, slowing down or stopping is part of the nature of traffic on a two-lane road. Thus, while Hathcock claims he was confronted with "a sudden emergency not of his making," he was not presented with an unexpected emergency as Henderson was in *Tinsley.* The jury could reasonably infer from the evidence that Hathcock breached a duty of care by not anticipating that the vehicles he was following might stop. *See Martin v. Arnold,* 643 So.2d 564, 567 (Ala.1994) ("a motorist is negligent if he fails to discover a vehicle that he reasonably could have discovered in time to avoid injury").

[7] Hathcock also argues that the trial court erred by not allowing defense counsel to cross-examine Dr. Thomas Conboy, one of the Woods' expert witnesses, as to the probationary status of his professional license. The trial court refused to admit this evidence, concluding that its prejudice outweighed its relevance. In *Ayres v. Lakeshore Community Hospital,* 689 So.2d 39 (Ala.1997), this Court stated the following general rule regarding the cross-examination of an expert witness:

> "[T]he trial judge has substantial discretion as to the questions a party is allowed to ask of an expert witness. The scope and extent of cross-examination [are] vested in the trial court's sound discretion, and this court will not reverse on the basis of the trial court's rulings regarding cross-examination unless an abuse of discretion has occurred."

689 So.2d at 41. Thus, we must determine whether the trial court abused its discretion by curtailing defense counsel's cross-examination as to matters involving Dr. Conboy's probation imposed by his governing professional association.

[8] Hathcock argues in his brief that the evidence of Dr. Conboy's probation was relevant to show bias on the part of Dr. Conboy. The record, however, reveals that during a hearing on pretrial motions defense counsel repeatedly urged the trial court to allow this evidence on the basis that it was germane to the question of Dr. Conboy's veracity. [FN2] The record also shows ***508** during the trial defense counsel made a similar argument during her offer of proof: "This is a serious case, and the defendant ought to be able, in fairness, to qualify [Dr. Conboy's] truthfulness...." This Court's consideration of this issue is limited to the grounds raised before the trial court. *See Lance, Inc. v. Ramanauskas,* 731 So.2d 1204, 1220 (Ala.1999) (stating that "specific objections waive all other objections").

> FN2. On one occasion, defense counsel stated during her offer of proof:
>
> > "[DEFENSE COUNSEL]: I think this [evidence] is huge, when as an expert-I'm not talking about some little article he wrote somewhere out in the universe. I'm talking engaged as an expert witness, testified falsely, and has admitted to testifying falsely. And I can't, according to the plaintiffs, cross-examine this expert in front of the jury about his giving false testimony in regard to his qualifications. The most basic thing that an expert does is to tell you what he can and can't do."
>
> We believe that this colloquy, which occurred at the end of the hearing, accurately summarized defense counsel's arguments before the trial court.

[9] The Alabama Rules of Evidence clearly allow cross-examination as to "matters affecting the credibility of the witness." Rule 611(b), Ala R.Evid . Rule 608, however, requires the trial judge to keep a watchful eye on evidence concerning the character or conduct of a witness. Rule 608(b), which governs evidence of specific conduct by a witness,

states:

> "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may be not be inquired into on cross-examination of the witness nor proved by extrinsic evidence."

The only kind of evidence that may be presented as to an expert's "character for truthfulness" is evidence regarding the expert's "general reputation in the community for untruthfulness," or opinion testimony from another competent witness. Charles W. Gamble, *McElroy's Alabama Evidence* § 142.01(3) (5th ed.1996). The excluded evidence in this case, however, is rather specific in that it pertains to certain events that led to Dr. Conboy's being placed on probation by his licensing board. Because specific evidence bearing on a witness's reputation for veracity is forbidden by Rule 608(b), Ala.R.Evid, we conclude that the trial court did not abuse its discretion by preventing defense counsel from exploring these matters. We further conclude that the trial court did not abuse its discretion in excluding evidence of Dr. Conboy's probation, which is inextricably intertwined with these previous acts.

[10] Next, Hathcock argues that the trial court erred by allowing Mrs. Wood to comment on the Woods' poor financial condition. He contends that her comments were unfairly prejudicial and requires a reversal of the judgment. We disagree.

[11][12] "It is well settled that it 'is highly prejudicial to a defendant for the jury to be improperly informed as to the ... poverty of the plaintiff.' " *Bennett v. Brewer,* 682 So.2d 448, 449 (Ala.1996) (quoting *Liberty Nat'l Life Ins. Co. v. Kendrick,* 282 Ala. 227, 230, 210 So.2d 701, 703 (1968)). Consequently, evidence of this character is generally inadmissible, *see Miller v. Dacovich,* 355 So.2d 1109, 1110 (Ala.1978); *Johnson v. Harrison,* 404 So.2d 337, 339-40 (Ala.1981); *Mutual Sav. Life Ins. Co. v. Smith,* 765 So.2d 652, 654 (Ala.Civ.App.1998); and *McElroy's Alabama Evidence,* supra, § 189.05(1). Nevertheless, we have recognized that evidence of this character "may be relevant and admissible when it goes to a material issue in the case." *Johnson v. Harrison,* 404 So.2d 337, 339 (Ala.1981).

Mrs. Wood's testimony as to the loss of the family business was admissible for purposes of proving the damages claimed, because it supported an inference that the Woods lost the business because injuries he sustained in the March 19, 1994, accident caused Mr. Wood to be unable to work. Therefore, Mrs. Wood's comments concerning the Woods' poverty tended directly to prove Mr. Wood's diminished earning capacity; thus, they were relevant to a material issue in the case. *See generally Carnival Cruise Lines, Inc. v. Snoddy,* 457 So.2d 379, 381 (Ala.1984) ("In a ***509** personal injury action, a plaintiff is entitled to recover both the value of the work time lost prior to trial ('lost earnings') and the value of the reduction in his ability to earn a living ('impairment of earning capacity').").

[13][14] Evidence regarding a party's financial condition may also be admissible when the party's opponent has "opened the door by commenting upon or asking questions concerning [the] party's financial standing." *McElroy's Alabama Evidence,* supra, § 189.05(2)(c). Rebuttal evidence, however, must not be "substantially unconnected with the [previously admitted] illegal evidence." *Cook v. Latimer,* 274 Ala. 283, 288, 147 So.2d 831, 835 (1962).

Counsel for Hathcock suggested in her opening statement that the temporal gaps in Mr. Wood's medical treatment called into question his claim that his injuries were caused by the automobile accident or called into question whether his injuries were as severe as he maintained they were. In *Alabama Power Co. v. Bruce,* 209 Ala. 423, 96 So. 346 (1923), this Court addressed similar facts with respect to a plaintiff who underwent a surgical procedure that he alleged had been made necessary by an accident he alleged had been caused by the de-

fendant 10 months earlier. In that case, defense counsel commented during closing arguments that the plaintiff's delay in seeking treatment suggested that his injuries either were not caused by the accident or were not as serious as he had claimed. Plaintiff's counsel responded in his closing argument by stating that the plaintiff had not sought medical treatment because of the poverty of the plaintiff's family. The defendant argued on appeal that the statements of the plaintiff's counsel were improper and warranted an order granting a new trial. This Court disagreed, holding that the poverty argument by the plaintiff's counsel was not improper, given the prior suggestion by defense counsel regarding the plaintiff's failure to obtain immediate medical treatment. *Alabama Power,* 209 Ala. at 427, 96 So. at 349. In that case, defense counsel's remarks made the plaintiff's poverty evidence relevant for an admissible purpose.

We conclude that the principle applied in *Alabama Power Co. v. Bruce* also applies in the present case. Defense counsel's opening statements suggested to the jury that the evidence would show that Mr. Wood did not see a physician concerning his injuries for almost 10 months after visiting the doctor on April 7, 1994. The thrust of this statement was to suggest either that Mr. Wood was exaggerating the extent of his original injuries or that, given the nearly 10-month lapse in treatment, his current physical condition could not be found to have been proximately caused by the automobile accident. In response to these remarks and in anticipation of defense counsel's theory of the case, Mrs. Wood testified that she and her husband had been unable to afford consistent medical care and that they had been forced to sell their home to pay for his treatment once they could no longer ignore the necessity for it. Mrs. Wood's testimony as to the Woods' inability to afford medical care, therefore, provided the jury with a concise explanation for why her husband let almost 10 months pass without seeking treatment for his maladies. Further, her testimony regarding the sale of the family home explained why they could later afford adequate treatment. Consequently, given the facts of this case, we conclude that the trial court did not err by allowing this evidence.

[15][16] Finally, Hathcock argues that the $800,000 award of compensatory damages was excessive. Specifically, he contends that the evidence did not support the individual awards to Mr. and Mrs. Wood ***510** totalling $600,000 and $200,000 respectively.

[17][18] We have consistently held that jury verdicts carry a presumption of correctness and that that presumption is strengthened when the trial court denies a motion for a new trial. *Northeast Alabama Reg'l Med. Ctr. v. Owens,* 584 So.2d 1360, 1366 (Ala.1991). The appellate courts of this state do not favor setting aside a jury verdict if doing so can be avoided. *Id.* When we review a jury verdict on the ground of excessiveness, our review focuses on the plaintiff, and we must ask what the evidence supports in terms of the loss or harm suffered by the plaintiff. *Daniels v. East Alabama Paving, Inc.,* 740 So.2d 1033, 1044 (Ala.1999). In the absence of a flawed verdict, no statute allows us to invade the jury's province to award compensatory damages. *Id.*

The evidence suggests that Mrs. Wood incurred medical expenses totalling $1,068.50. The evidence as to the total medical expenses incurred by Mr. Wood is unclear. Although evidence indicated that Mr. Wood had incurred medical expenses totalling $4,358.25, that amount was payable only to a single physician. The record indicates that Mr. Wood saw numerous other medical and psychological professionals, but we are unable to determine the cost of those services from the record before us. Whatever the value or the cost of those services may have been, it is apparent that the bulk of Mr. Wood's award, like the bulk of Mrs. Wood's award, was intended to compensate for more than medical costs. While Mrs. Wood's damages award was apparently intended largely to compensate her for the loss of her husband's consortium, Mr. Wood's award entailed elements of lost earnings (based on his testi-

mony that he had projected the year 2013 as his year of retirement) and, importantly, mental anguish.

Regarding the award to Mrs. Wood, we note that the jury heard a substantial amount of evidence regarding Mr. Wood's mental condition after the accident. Dr. Conboy, testifying for the Woods, concluded that the head injury Mr. Wood had suffered in the accident had altered his personality and had caused him to become emotionally fragile. The evidence suggests that Mr. Wood's condition left him permanently unable to support, comfort, and care for Mrs. Wood. Consequently, we are reluctant to disturb the jury's award to her.

MuchofMr.Wood's$600,000compensatory-damages award was apparently attributable to his claim for damages for mental anguish. With respect to awards to compensate for mental anguish, we have stated:

> "A physical injury or physical symptom is not a prerequisite for a finding of mental anguish. *Kmart Corp. v. Kyles,* 723 So.2d 572, 578 (Ala.1998). A plaintiff is required only to present some evidence of mental anguish, and once the plaintiff has done so the question whether the plaintiff has suffered mental anguish and, if so, the question of how much compensation the plaintiff is entitled to for the mental anguish are questions for the jury, *Kyles,* 723 So.2d at 578."

Wal-Mart Stores, Inc. v. Goodman, 789 So.2d 166, 178 (Ala.2000).

The record contains ample evidence regarding Mr. Wood's mental condition following the accident. The evidence suggests that he frequently experienced intense emotional outbursts and generally suffered from depression because of his chronic pain and his inability to work. Mr. Wood's expert testimony suggested that his head injury had caused a change in his cognitive ability, ***511** his memory, and his emotional capacity to handle elements of daily life. The evidence also suggests that Mr. Woods attempted suicide in 1998; a suicide attempt is another acute indicator of his mental condition. Considering the totality of this evidence, we are reluctant to disturb a judgment based on the jury's verdict.

III. Conclusion

We conclude that the trial court properly denied the defendant's motion for a remittitur or a new trial. The judgment is affirmed.

AFFIRMED.

HOUSTON, SEE, HARWOOD, and STUART, JJ., concur.

Ala.,2001.
Hathcock v. Wood
815 So.2d 502

END OF DOCUMENT

EXHIBIT B

Westlaw.

454 N.W.2d 603
183 Mich.App. 72, 454 N.W.2d 603
(Cite as: 183 Mich.App. 72, 454 N.W.2d 603)

Court of Appeals of Michigan.
Eva HESHELMAN, Plaintiff-Appellant,
v.
Kenneth LOMBARDI, M.D., and Battle Creek Medical Associates, P.C., Defendants-Appellees.

Docket No. 111627.
Submitted Dec. 20, 1989.
Decided April 2, 1990.
Released for Publication May 9, 1990.

Patient brought action against physician for alleged medical malpractice arising from physician's failure to diagnose and treat her heart attack. The Circuit Court, Calhoun County, James C. Kingsley, J., entered judgment in favor of physician, and patient appealed. The Court of Appeals, Michael J. Kelly, P.J., held that: (1) evidence supported finding that physician was not negligent, and (2) error arising when expert witness was cross-examined by evidence that prior medical malpractice action had been brought against him was harmless.

Affirmed.

Allen, J., filed concurring opinion.

West Headnotes

[1] New Trial 275 ⚿6

275 New Trial
275I Nature and Scope of Remedy
275k6 k. Discretion of Court. Most Cited Cases
Whether to grant motion for new trial is within trial court's discretion.

[2] Appeal and Error 30 ⚿873(3)

30 Appeal and Error
30XVI Review
30XVI(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions
30k869 On Appeal from Final Judgment
30k873 Subsequent Orders and Proceedings
30k873(3) k. Order on Motion for New Trial Made After Judgment. Most Cited Cases
Standard of review of denial of new trial is whether verdict was against overwhelming weight of the evidence.

[3] Appeal and Error 30 ⚿873(3)

30 Appeal and Error
30XVI Review
30XVI(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions
30k869 On Appeal from Final Judgment
30k873 Subsequent Orders and Proceedings
30k873(3) k. Order on Motion for New Trial Made After Judgment. Most Cited Cases
In determining whether evidence was overwhelming, in reviewing denial of motion for new trial, Court of Appeals should give deference to trial court's unique ability to judge weight and credibility of testimony and should not substitute its judgment for that of jury unless record reveals miscarriage of justice.

[4] Evidence 157 ⚿571(3)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(3) k. Due Care and Proper Conduct. Most Cited Cases
Evidence was insufficient to establish that physician was negligent in failing to diagnose and treat patient's heart attack; physician testified that patient complained of only mild tightness in her chest and exhibited no symptoms of heart problems after complete examination, although expert testi-

fied that physician had not obtained adequate history from patient and that electrocardiogram would have revealed patient's condition.

[5] Trial 388 ⚷235(7)

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k231 Sufficiency as to Subject-Matter
388k235 Weight and Effect of Evidence
388k235(7) k. Testimony of Experts and Other Opinion Evidence. Most Cited Cases

Jury instruction regarding evaluation of testimony of expert witnesses was not disfavored instruction on weighing of expert testimony; thus, court was not required to state reasons on the record for instruction. MCR 2.516(D)(3).

[6] Appeal and Error 30 ⚷1064.1(8)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(2) Particular Cases
30k1064.1(8) k. Negligence and Torts in General. Most Cited Cases
(Formerly 299k18.130 Physicians and Surgeons)

Improperly instructing jury on inherent risks in medical treatment in medical malpractice action in which plaintiff did not claim that fact of her injuries was proof of malpractice did not have sufficient effect on verdict to require reversal.

[7] Evidence 157 ⚷77(6)

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k77 Failure to Call Witness
157k77(6) k. Attorneys or Physicians as Witnesses. Most Cited Cases

Physician's failure to present expert's testimony regarding malpractice after expert reviewed patient's medical records did not entitle patient to inference that expert's testimony would have been favorable to her, where patient had opportunity to question expert regarding his opinion as to breaches of standard of care, but chose not to do so.

[8] Appeal and Error 30 ⚷302(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k302 Sufficiency and Scope of Statement of Grounds
30k302(1) k. In General. Most Cited Cases
(Formerly 299k18.130 Physicians and Surgeons)

Issue of whether physician's attorney concealed expert opinion concerning whether malpractice had occurred was not preserved for appeal in medical malpractice action, where patient did not object to alleged concealment at trial and did not claim concealment of evidence in motion for new trial. MCR 2.611(A)(1)(f).

[9] Appeal and Error 30 ⚷281(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k281 Necessity in General
30k281(1) k. In General. Most Cited Cases

Certain motions, such as challenges to verdicts on ground that they are against great weight of evidence, must be raised in motion for new trial in order to preserve them for appeal.

[10] Appeal and Error 30 ⚷204(1)

30 Appeal and Error
30V Presentation and Reservation in Lower

Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k202 Evidence and Witnesses
30k204 Admission of Evidence
30k204(1) k. In General. Most Cited Cases

Issues regarding admission or exclusion of evidence are properly preserved by timely objection on the record.

[11] Appeal and Error 30 ⚿289

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k287 Review of Proceedings at Trial
30k289 k. Rulings as to Evidence. Most Cited Cases

Timely objection on the record, with response by opposing counsel and ruling by trial judge, should create adequate record from which to review admission or exclusion of evidence; there is no additional requirement that party restate his or her evidentiary objections anew in motion for new trial.

[12] Appeal and Error 30 ⚿971(3)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k971 Examination of Witnesses
30k971(3) k. Cross-Examination. Most Cited Cases

Witnesses 410 ⚿267

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k267 k. Control and Discretion of Court. Most Cited Cases

Scope of cross-examination, like admission of evidence, is matter within trial court's discretion, and court's determination should not be reversed absent abuse of that discretion.

[13] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases

Evidence that expert witness had been named as defendant in prior medical malpractice action was not admissible for impeachment purposes. MRE 404(b), 608(b).

[14] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases

Mere fact that someone has been named as defendant in malpractice lawsuit may not be used to impeach his or her credibility as expert witness.

[15] Appeal and Error 30 ⚿1026

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In General. Most Cited Cases

To determine whether error is harmless, two inquiries must be made: whether error is so offensive to maintenance of sound judicial process that it can never be regarded as harmless; and whether Court of Appeals can declare belief that error was harmless beyond reasonable doubt.

[16] Appeal and Error 30 ⚿1048(6)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error

30XVI(J)9 Witnesses
30k1048 Rulings on Questions to Witnesses
30k1048(6) k. Cross-Examination and Re-Examination. Most Cited Cases

Error arising when expert witness was cross-examined regarding prior medical malpractice action that had been brought against him was harmless in medical malpractice action.

****604 *73** Field & Field, P.C. by Samuel T. Field, Kalamazoo, for plaintiff-appellant.

Bremer, Wade, Nelson, Mabbitt & Lohr by ***74** Phillip J. Nelson and Michael D. Wade, Grand Rapids, for defendants-appellees.

Before MICHAEL J. KELLY, P.J., and SULLIVAN and ALLEN,[FN*] JJ.

FN* Glenn S. Allen, former Court of Appeals judge, sitting on the Court of Appeals by assignment.

MICHAEL J. KELLY, Presiding Judge.

Plaintiff Eva Heshelman appeals from a jury verdict of no cause of action in favor of defendants Kenneth Lombardi, M.D., and Battle Creek Medical Associates, P.C. Plaintiff sued defendants for alleged medical malpractice arising from Dr. Lombardi's failure to diagnose and treat her heart attack. Following a four-day trial, the jury found that Dr. Lombardi had not been negligent in his diagnosis or treatment of plaintiff and rendered a verdict for defendants.

Plaintiff testified that on February 26, 1985, at around 11:00 a.m. she felt sudden chest pains and pain in her left arm. Plaintiff was fifty-nine years old and had a prior history of atherosclerotic artery disease. Plaintiff had undergone an operation in 1982 to remove atherosclerotic obstructions. Plaintiff's family had a history of heart disease. Plaintiff also smoked and had been smoking for the past thirty-five years.

After feeling chest pains, plaintiff went to see Dr. Lombardi. She testified that when she arrived at Lombardi's office she was perspiring and had almost fainted. When Lombardi examined her, she told him that she was suffering pain in her chest and in her left arm. According to plaintiff, Lombardi did not question her in detail about her symptoms. Plaintiff testified that Lombardi told her that the causes of her complaints were that she was working too hard, was overweight, and was smoking too much. Dr. Lombardi did not give plaintiff an electrocardiogram.

75** When plaintiff returned home, her pain did not subside. At around 7:00 p.m. that evening, plaintiff went to a hospital emergency*605** room, where she was diagnosed as suffering from a myocardial infarction. Plaintiff's heart was damaged as a result of this infarction. A cardiac catheterization indicated that her right coronary artery was totally occluded. An angiogram performed in April of 1987 indicated that the artery was still occluded but that her other blood vessels were normal and her overall heart function was good.

At trial, plaintiff's expert, Dr. Crane, testified that a physician confronted with a patient complaining of chest pains should first check the patient's medical history. Crane faulted Dr. Lombardi's failure to obtain adequate information on plaintiff's history. Crane testified that Lombardi's failure to adequately check plaintiff's history led to inadequate treatment and diagnosis. In Dr. Crane's opinion, an electrocardiogram performed at the time of Lombardi's examination would have demonstrated a cardiac abnormality.

Dr. Lombardi testified that when he examined plaintiff she complained only of mild tightness in her chest and did not mention pain in her arms. Lombardi testified that he had taken a proper history from plaintiff and that his method of charting was common practice. Lombardi said he examined plaintiff and listened to her heart and that she was

not sweating or exhibiting other symptoms of a heart attack. Lombardi diagnosed plaintiff as having a respiratory infection. Lombardi testified that he was familiar with the standard of care applicable to specialists in internal medicine and that he had not violated that standard of care.

Defendants also presented an expert witness, Dr. Dykman, who testified regarding plaintiff's damages. Dr. Dykman specifically stated that he was *76 not testifying regarding the standard of care or any breach thereof.

Following the jury verdict in favor of defendants, plaintiff moved for a new trial based upon alleged instructional error and the verdict being against the great weight of the evidence. The court denied plaintiff a new trial. Plaintiff appeals as of right, raising four issues.

I

The first issue we address is whether the jury's verdict was against the great weight of the evidence. Plaintiff claims that the trial court erred in not granting her a new trial on this basis. We find no error.

[1][2][3] Whether to grant a motion for a new trial is within the trial court's discretion. *Termaat v. Bohn Aluminum & Brass Co.,* 362 Mich. 598, 602, 107 N.W.2d 783 (1961). The standard of review is whether the verdict was against the overwhelming weight of the evidence. *Troyanowski v. Village of Kent City,* 175 Mich.App. 217, 223, 437 N.W.2d 266 (1988). In determining whether the evidence was overwhelming, this Court should give deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Id.*

[4] Review of the record does not indicate that the verdict was contrary to the overwhelming evidence. The trial presented a credibility contest between plaintiff Eva Heshelman and defendant Dr. Lombardi. Plaintiff testified as to one set of facts, which indicated that she suffered from severe symptoms and that Lombardi gave her only a cursory examination. Lombardi testified that plaintiff complained only of mild tightness in her *77 chest and, after a complete examination, she exhibited no symptoms of heart problems. Plaintiff's expert testified that, based upon plaintiff's testimony, Dr. Lombardi violated the necessary standard of care by not obtaining an adequate history from plaintiff and that an electrocardiogram would have revealed plaintiff's condition. Lombardi testified that he did not violate the standard of care and that his examination of plaintiff did not indicate that an electrocardiogram was necessary. The jury evidently found Dr. Lombardi's testimony more credible and found that he had not been negligent in his treatment of plaintiff. We are bound by the assessment of the witnesses' credibility made by the jury and the trial court.

**606 II

Plaintiff argues that the trial court erred in instructing the jury, claiming several instructional errors. We find no error requiring reversal.

[5] The court gave the following instruction regarding the testimony of expert witnesses.

> In this case, a number of doctors have given their opinions as experts in the field of internal medicine. Experts are permitted to give their opinions as to matters on which they are experts. You should consider each expert opinion received in evidence, but you are not bound to follow the opinion of an expert. You may give each opinion whatever weight you believe it deserves.
>
> In determining whether or not to believe the opinion of an expert or which opinion to believe, you should consider the reasons and facts upon which the expert bases his or her opinion and whether those facts are true. You should also consider the qualifications and believability of the expert in light of all the evidence in the case.

*78 This instruction is essentially the same as

CJI 5:2:12, now CJI2d 5.10.

Plaintiff argues that this instruction was erroneous under MCR 2.516(D)(3), which provides:

> (3) Whenever the SJI committee recommends that no instruction be given on a particular matter, the court shall not give an instruction on the matter unless it specifically finds for reasons stated on the record that
>
> (a) the instruction is necessary to state the applicable law accurately, and
>
> (b) the matter is not adequately covered by other pertinent standard jury instructions.

Plaintiff points out that the comments to SJI2d 4.10 recommend that no instruction on "weighing expert testimony" be given. Plaintiff reasons that the court erred by giving this instruction regarding expert testimony without stating reasons on the record for this particular instruction.

We note that CJI 5:2:12, upon which the complained-of instruction was patterned, is followed by commentary also recommending that no instruction be given regarding "weighing expert testimony." From this, it is evident that the committee did not consider CJI 5:2:12 to be such a "weighing" instruction and one not to be recommended. Thus, the instruction given by the trial judge, which tracked CJI 5:2:12, was not a disfavored weighing instruction, and the court did not need to comply with MCR 2.516(D)(3) in order to read it to the jury.

[6] Plaintiff claims that the court erred in giving SJI2d 30.04, which provides:

> There are risks inherent in medical treatment that are not within a doctor's control. A doctor is not liable merely because of an adverse result. *79 However, a doctor is liable if the doctor is negligent and that negligence is a proximate cause of an adverse result.

Plaintiff argues that this instruction was inappropriate because plaintiff never argued that the mere fact of her injuries was proof of malpractice. In *Jones v. Porretta,* 428 Mich. 132, 146, 405 N.W.2d 863 (1987), our Supreme Court noted that where a plaintiff makes such an argument a similar instruction could be given.

> Where proofs put the significance of an adverse result in issue, it may be more appropriate to explain the physician's duty of care by advising the jury that there are inherent risks in medical treatment which are beyond the physician's control.

Despite the fact that this instruction may not have been entirely appropriate for this fact situation, we find that any error which resulted was minimal and had no effect on the verdict. At worst, this instruction was "nothing more than an innocuous recitation of what a reasonable juror already understands." *Jones, supra,* at p. 144, 405 N.W.2d 863. This instruction did not have any significant effect on the verdict.

[7] Plaintiff also argues that the trial court improperly refused to give SJI2d **607 6.01, regarding failure to produce evidence or a witness. SJI2d 6.01a provides:

> The [plaintiff/defendant] in this case has not offered [the testimony of _____/_____]. As this evidence was under the control of the [plaintiff/defendant] and could have been produced by [him/her], and no reasonable excuse for the [plaintiff's/defendant's] failure to produce the evidence was given, you may infer *80 that the evidence would have been adverse to the [plaintiff/defendant].

Plaintiff argues that, because defendants had their expert witness, Dr. Dykman, review plaintiff's medical records to form an opinion regarding whether Dr. Lombardi breached the standard of care and then did not present Dykman's testimony regarding malpractice, plaintiff was entitled to the inference that his testimony would have been damaging to defendants.

Review of the record reveals that the parties deposed Dr. Dykman in March of 1988 and that at that time he had not formed an opinion as to whether malpractice had occurred. Due to this lack of information regarding Dykman's opinion, plaintiff's counsel asserted that he would object to the admission of testimony by Dykman regarding the breach of the standard of care unless he was given this information prior to trial. The day before trial, Dykman testified by way of a video deposition regarding Dr. Lombardi's treatment of plaintiff and whether it breached the standard of care. Because plaintiff's counsel did not have adequate time to conduct further discovery regarding Dykman's opinion as to malpractice, defense counsel offered Dykman's testimony only with regard to plaintiff's damages, and not in regard to the standard of care or its breach. In his cross-examination of Dykman, plaintiff's counsel emphasized that his testimony did not go to the standard of care or its breach, and did not question Dykman as to whether any malpractice occurred.

There is no indication that defendants concealed the evidence of Dykman's opinion from plaintiff because it was damaging to defendants. This case is not analogous to the situation where a witness is unavailable due to the actions of a party. Plaintiff***81** had the opportunity to question Dr. Dykman regarding his opinion as to breaches of the standard of care, but chose not to do so. Plaintiff was not entitled to the inference that Dykman's testimony regarding whether malpractice occurred would have favored plaintiff. The trial court properly refused to give SJI2d 6.01a.

III

[8] Plaintiff argues that this case must be remanded for an evidentiary hearing because of newly discovered evidence which had been concealed by the misconduct of defense counsel. Plaintiff argues that this evidence is favorable and that its absence entitles her to a new trial. The newly discovered evidence in question is the previously mentioned opinion of Dr. Dykman regarding malpractice. Plaintiff argues that Dykman had concluded that malpractice occurred; defendants claim that Dykman had concluded that no malpractice occurred. The available record does not reveal the nature of Dykman's opinion in this matter.

Plaintiff did not object to this alleged concealment at trial, despite the fact that plaintiff's counsel was evidently aware of any concealment. Nor did plaintiff object to this claimed concealment of evidence in his motion for a new trial. Since plaintiff made no objection below, the issue was not addressed by the trial court and there is no record from which to review the issue. Thus, plaintiff has not properly preserved this issue for appeal. *Janda v. Detroit,* 175 Mich.App. 120, 129, 437 N.W.2d 326 (1989).

Additionally, we note that MCR 2.611(A)(1)(f) provides:

> A new trial may be granted to all or some of the ***82** parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> * * * * * *
>
> (f) Material evidence, *newly discovered, which could not with reasonable* ****608** *diligence have been discovered and produced at trial.*

The evidence in question was not newly discovered. As previously noted, plaintiff could have questioned Dr. Dykman regarding this matter, but chose not to. With any degree of reasonable diligence, plaintiff could have discovered this evidence and produced it or obtained a ruling at trial.

IV

Plaintiff argues that reversal is required because the trial court permitted defense counsel to cross-examine plaintiff's expert, Dr. Crane, regarding an unrelated malpractice suit brought against Crane. We agree that this was erroneous, but find that reversal is not required.

We first address defendants' contention that, by failing to raise the issue in her motion for a new trial, plaintiff did not properly preserve it for review. We disagree. Defendants rely on *Palmiter v. Monroe Co. Bd. of Road Comm'rs,* 149 Mich.App. 678, 692, n. 2, 387 N.W.2d 388 (1986), and *Krzysiak v. Hinton,* 104 Mich.App. 134, 139, 304 N.W.2d 823 (1981), for the proposition that an issue is waived unless raised in a motion for a new trial.

In *Krzysiak, supra,* at p. 139, 304 N.W.2d 823, the Court stated that, where the plaintiffs challenged, for the first time on appeal, the trial court's refusal to give certain voir dire questions, the plaintiffs were obligated to raise this issue in their motion for a new trial in order to preserve it for appeal.

> ***83** Plaintiffs were obligated to raise this issue in their motion for new trial and failure to do so constitutes waiver of the question on appeal. Failure to raise the issue in the motion for new trial deprives us on appeal of the benefit of the trial court's view regarding its reason for denial.

Our interpretation of the *Krzysiak* Court's language indicates that the panel did not find the issue unpreserved solely due to the failure to raise it in the new trial motion, but because the challenging party did nothing below to create a record regarding the issue raised on appeal, either by objection or motion on the record.

[9][10] Certain motions, such as challenges to verdicts on the ground that they are against the great weight of the evidence, must be raised in a motion for a new trial in order to preserve them for appeal. *People v. Cage,* 83 Mich.App. 534, 538, 269 N.W.2d 213 (1978); *People v. Mattison,* 26 Mich.App. 453, 459, 182 N.W.2d 604 (1970). The purpose behind this rule is clear: if these issues were not previously raised in this manner, there would be no record regarding them to review on appeal. However, issues regarding the admission or exclusion of evidence are properly preserved by a timely objection on the record. MRE 103 provides in relevant part:

> (a) *Effect of Erroneous Ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence ***84** was made known to the court by offer or was apparent from the context within which questions were asked.
>
> (b) *Record of Offer and Ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

[11] A timely objection on the record, with a response by opposing counsel and a ruling by the trial judge, should create an adequate record from which to review the admission or exclusion of evidence. There is no additional requirement that a party restate his evidentiary objections anew in his motion for a new trial. We reject the contrary assertions from *Palmiter* and *Krzysiak.*

****609** [12] The scope of cross-examination, like the admission of evidence, is a matter within the trial court's discretion, and the court's determination should not be reversed absent an abuse of that discretion. *Wilson v. Stilwill,* 411 Mich. 587, 599, 309 N.W.2d 898 (1981). During his cross-examination of Dr. Crane, defense counsel questioned him regarding a medical malpractice case in which he had been sued. The trial court permitted this line of questioning over plaintiff's objection, ruling that it was admissible as it went to the weight

and credibility of Dr. Crane's testimony.

[13][14] We find that the trial judge abused his discretion by permitting this line of questioning. Evidence of prior malfeasance by a witness is admissible only under very specific circumstances and for very specific reasons. MRE 608(b); MRE 404(b). Under MRE 608(b), specific instances of a witness' conduct may be inquired into on cross-examination only where they are probative of truthfulness or ***85** untruthfulness, and only to inquire into that witness' or another witness' truthful character. The fact that Dr. Crane was named a defendant in a malpractice suit is in no way probative of his truthfulness. Nor was this fact probative of Dr. Crane's competency or knowledge. Highly competent and knowledgeable physicians have been sued for malpractice. Mere unproven accusations of malpractice stated in a complaint cannot be used as a basis for attacking a physician's knowledge and credibility. Such allegations of malpractice are analogous to unproven charges of criminal activity. Arrests and charges not resulting in conviction may not be used for impeachment. *People v. Falkner,* 389 Mich. 682, 695, 209 N.W.2d 193 (1973). Similarly, the mere fact that someone has been named as a defendant in a malpractice lawsuit may not be used to impeach his credibility as an expert witness. See *Ecco, Ltd. v. Balimoy Mfg. Co., Inc.,* 179 Mich.App. 748, 752, 446 N.W.2d 546 (1989).

[15][16] Despite this error, we find that reversal is not required. To determine whether an error is harmless, two inquiries must be made: (1) whether the error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless; and (2) whether this Court can declare a belief that the error was harmless beyond a reasonable doubt. *People v. Robinson,* 386 Mich. 551, 563, 194 N.W.2d 709 (1972). The admission of this improper impeachment question and Dr. Crane's answers was not so offensive to the maintenance of a sound judicial process that we could never regard it as harmless. See *People v. Allen,* 429 Mich. 558, 612, 420 N.W.2d 499 (1988). We also conclude that, in light of the testimony presented at trial, the suppression of this question and Dr. Crane's answer would have had no effect on the jury's verdict. Any error did not prejudice plaintiff's case ***86** and, therefore, was harmless beyond a reasonable doubt.

Affirmed.

SULLIVAN, J., concurred.

GLENN S. ALLEN, Judge (concurring).

While I concur with the majority's opinion, I write separately to express my disagreement with defendants' interpretation of *Krzysiak v. Hinton,* 104 Mich.App. 134, 304 N.W.2d 823 (1981), and *Palmiter v. Monroe Co. Bd. of Road Comm'rs,* 149 Mich.App. 678, 692, n. 2, 387 N.W.2d 388 (1986). I do not construe *Krzysiak* or *Palmiter, supra,* as authority for the proposition that the failure to raise in a motion for a new trial the propriety of a trial court's ruling on requested jury instructions or the admissibility of evidence *in itself* renders the question unpreserved for appellate review. In *Krzysiak,* counsel did not object on the record when the trial court declined to ask certain voir dire jury questions. Thus, in the absence of something in the record by way of an objection, a motion, *or* a subsequent motion for a new trial, the issue of the propriety of the court's ruling is unpreserved.

The *Palmiter* panel's reliance on *Krzysiak* was made only by way of a footnote. Because the reference was fleeting and thereafter the Court discussed the issue on ****610** its merits, I consider *Palmiter* enfeebled authority for the rule stated.

Mich.App.,1990.
Heshelman v. Lombardi
183 Mich.App. 72, 454 N.W.2d 603

END OF DOCUMENT

EXHIBIT C

716 So.2d 831, 23 Fla. L. Weekly D1980
(Cite as: 716 So.2d 831)

District Court of Appeal of Florida,
Fourth District.
William Bryan KING, M.D., Appellant,
v.
Priscilla BYRD, individually and as Guardian, Friend and Natural Parent of Kenan A. Byrd, a minor, Appellee.

No. 97-1384.
Aug. 26, 1998.
Clarification, Certification and Stay of Mandate Denied Sept. 11, 1998.

Mother whose son was brain damaged during birth brought medical malpractice action against doctor. The Circuit Court, St. Lucie County, Rupert Jasen Smith, Senior Judge, entered judgment on jury verdict for mother. Doctor appealed. The District Court of Appeal, Warner, J., held that: (1) record supported trial court's finding that reason for seeking to exercise peremptory challenge against black veniremember was pretextual, and (2) defense counsel opened door to attacks on his ethics by seeking to impeach experts with details regarding cases in which he had represented them.

Affirmed.

West Headnotes

[1] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases

Record supported trial court's finding that doctor's reason was pretextual for seeking to exercise peremptory challenge against black veniremember in medical malpractice action brought by mother whose son was brain damaged during birth, where reason was that veniremember was single mother of two young children; counsel began explanation by stating that he could strike someone if he didn't like their haircut, which may have evinced to court a lack of credibility, and veniremember responded during questioning that she could put aside sympathy.

[2] Evidence 157 ⚿155(5)

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k155 Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party
157k155(5) k. Admission of Similar Evidence When First Evidence Was Inadmissible. Most Cited Cases

Defense counsel opened door to attacks on his ethics by expert witness in medical malpractice action when defense counsel sought to impeach plaintiff's experts with details regarding cases in which he had represented them, including grievance filed against one expert alleging that he had committed act constituting sexual battery on a patient.

[3] Evidence 157 ⚿558(4)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k558 Cross-Examination
157k558(4) k. Irrelevant, Collateral, or Immaterial Matters. Most Cited Cases

Defense counsel's cross-examination of plaintiff's expert in medical malpractice case, about matters in which counsel had represented expert in unrelated procedure, was irrelevant and should not have been allowed, as it was not a proper attack on expert's credibility. West's F.S.A. §§ 90.608-90.610 .

[4] Appeal and Error 30 ⚿207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k207 k. Arguments and Conduct of Counsel. Most Cited Cases

Trial 388 ⚿121(4)

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k121 Comments on Evidence or Witnesses
388k121(4) k. Remarks Reflecting on Credibility of Witnesses. Most Cited Cases

Plaintiff's counsel's use of the term "hired gun" to refer to defense expert during closing argument was improper but did not rise to level of fundamental error.

***832** Mark Hicks and David J. Maher of Hicks & Anderson, P.A., Miami and David Spicer of Bobo Spicer Ciotoli Fulford, West Palm Beach, for appellant.

Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach and Willie E. Gary and Paul Mark Lucas of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, Ft. Pierce, for appellee.

ON MOTION FOR REHEARING

WARNER, Judge.

We deny the appellant's motion for rehearing, grant appellee's motion, grant the motion for clarification and withdraw our previously issued opinion and substitute the following in its place.

After a heated trial in this medical malpractice case, the jury awarded appellee/Priscilla Byrd $7,633,000 as compensation for brain damage to her son which occurred during his birth. Appellant, Dr. William King, contends that the trial was flawed because the trial court: (1) refused to permit the exercise of a peremptory challenge as to one juror, (2) permitted counsel to attack defense counsel's ethics during the examination of two witnesses, (3) permitted improper closing argument, and (4) erred in the application of its ruling on the statute of limitations. We affirm on all issues.

[1] In voir dire, the defense sought to exercise a peremptory challenge on the first juror, Tisha Williams. Upon initial questioning, Ms. Byrd's attorney asked for Ms. Williams's background, and she revealed that she worked for the sheriff's department, had twin five-year-old girls, and was single. Defense counsel's voir dire was very short. In fact, he individually questioned only Ms. Williams and one other juror. He prefaced ***833** his questioning with a statement to the jury regarding the case and specifically questioned whether the jurors could lay aside sympathy for Ms. Byrd's six-year-old brain damaged son. As to Ms. Williams, he asked her whether, after having seen Ms. Byrd's little son, she could determine that Ms. Byrd was not entitled to any money if the evidence showed that the doctor didn't do anything wrong. Ms. Williams responded that she could do that. He asked her how she generally felt about medical malpractice, to which she replied that she had never dealt with anything like it. Finally, he asked her whether she could listen to complicated medical testimony in a week and one-half long case and render a verdict. Ms. Williams stated that she could.

During the jury selection process, defense counsel exercised a peremptory challenge as to Ms. Williams. Plaintiff's counsel objected, stating that Ms. Williams was a black woman who had said she could be fair. In response, defense counsel stated that:

> I'm entitled to strike anybody, if I don't like the way they cut their hair. But this is a single mother, virtually the same age, with two young children. She's going to identify, whether she's black, white or anything else. She's a single mother with young children, that's the last person I would

want on the jury, regardless of their color.

The court responded that:

Well, the computer picks these jurors and you've got to give me a better reason to excuse her than she's a single mother with two children.

MR. GARY (plaintiff's counsel): If I may, your Honor, she's the one that said, when he asked her, gave her the microphone, she was one of the few, could you walk out of here and find for the defendant against this lady. She said, yes, I could do it.

MR. SPICER (defense counsel): I don't believe it, Your Honor. And I've given you my reasons. If you took twenty lawyers and you didn't say what color she was, they would tell you they don't want a single mother with two young children on this jury. There would not be a defense attorney that would want this juror on their trial.

Defense counsel renewed his request to exercise a peremptory strike as to Ms. Williams at the end of jury selection, but the court again denied the motion.

Melbourne v. State, 679 So.2d 759, 764 (Fla.1996), clarified the process for challenging peremptory strikes of jurors on the grounds of racial bias:

A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

(footnotes omitted). The supreme court pointedly limited the review of appellate courts in such determinations on challenges to peremptory strikes:

Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner. Second, *the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.* The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense.

Id. at 764-65 (footnotes omitted)(emphasis added). Applying the principles of *Melbourne* to this case, we find that plaintiff's attorney adequately complied with step one ***834** by objecting that Ms. Williams was an African-American woman. Without really waiting for the court to request an explanation, in accordance with step two, the defense offered that its reason for striking Ms. Williams was because she was a single mother with two small children who might identify with the plaintiff. That is a race-neutral reason for the challenge (even though it is not gender-neutral). *See Smith v. State,* 662 So.2d 1336, 1338 (Fla. 2d DCA 1995). The court responded by stating that the reason was insufficient to justify excusing her. We interpret this as a determination that the reason was not genuine and was a pretext, thereby fulfilling step three of the analysis.

Having reviewed the record, we cannot conclude that the decision was clearly erroneous. Defense counsel began his explanation of the reason for striking by stating that he could strike anyone even if he didn't like the cut of their hair. This may have evinced to the court a lack of credibility of any of the following explanations. In addition, the

defense questioned Ms. Williams regarding her ability to put aside sympathy, to which she responded that she could. In questioning, the defense seemed more interested in Ms. Williams's ability to understand the trial proceedings than her sympathy for Ms. Byrd.

As appellate judges, we were not at the trial. We did not see the expressions, hear the tones of voices, or observe the general dynamics of the courtroom. That is why *Melbourne* left decisions with respect to peremptory challenges to the trial court. Because those decisions turn on credibility determinations which encompass the assessment of all the circumstances and dynamics of the trial setting, appellate review is very narrow indeed. We must respect that discretion. Since we cannot find that the decision is clearly erroneous, we affirm.

[2] The next point raised is more troubling to us from the standpoint of attorney conduct. Appellant complains of attacks on defense counsel's ethics during the trial. Defense counsel opened the door to such attacks because of what we perceive to be highly questionable conduct at trial. Two of plaintiff's experts were former clients of defense counsel and he sought to impeach these experts with details regarding the cases in which he had represented them. When plaintiff's counsel objected, particularly with respect to the ethics of such an attack, defense counsel informed the court that he had been in contact with the Florida Bar and had received an opinion over the phone that this type of questioning was not unethical as long as privileged information was not brought up.[FN1] The court allowed general questions as to the first doctor.

> FN1. We are unaware of any rule that allows admissibility of evidence to be determined by a telephone call to the Florida Bar.

Later, another medical expert for the plaintiff, a neuropsychologist, testified to the injuries sustained by Ms. Byrd's son. During cross-examination, defense counsel went into questions about his background, ability and competence:

> Q. Doctor, is there anything about your background that Mr. Lucas did not talk about that reflects upon your credibility and your ability?
>
> A. Maybe you need to refresh my memory.
>
> Q. I'll be glad to do so if you can't think of anything.

Plaintiff's counsel objected, and during a bench conference, it became known that defense counsel had represented this doctor in a grievance proceeding filed by a patient. The doctor had been put on probation, was not allowed to see female patients without supervision, and was charged with incompetence. He was on probation at the time of the examination conducted on Ms. Byrd's son. At the bench conference, plaintiff's counsel objected to this line of questioning and maintained that it was conduct unbecoming of a lawyer. Defense counsel replied that the grievance was "public record," and that any lawyer in the state could use any public record. Plaintiff's counsel objected that the grievance was irrelevant and immaterial. Nevertheless, the court decided to let it in.

***835** Defense counsel then questioned the doctor extensively about the charges filed by the State Board of Psychological Examiners, alleging that he was incompetent and had committed an act constituting sexual battery on a patient. The doctor admitted that he was charged but stated that he was acquitted or put on probation. When pressed, he said "I was put on probation. They didn't find me guilty. There's no proof of it. *Your firm represented me, you should know.*" Defense counsel persisted in going through the entire grievance, including the fact that, as part of his probation, the doctor had to put letters in female patients' files regarding the charges. The doctor protested that what was done was pursuant to defense counsel's firm's advice. The doctor questioned what this had to do with the diagnosis he offered in connection with this case, which is a question we also ask.

On redirect, plaintiff's counsel asked the doctor for the name of the law firm which had represented him in the grievance proceeding, to which the doctor replied, "I will be in contact with them today; Bobo Spicer." At that point, defense counsel objected and maintained that the doctor had no right to accuse him of anything since the Bar had said that the questioning was permissible. The court allowed plaintiff's counsel to ask a few additional questions to clarify that the doctor acted on the advice of his lawyers in the grievance proceeding. On recross, defense counsel showed the doctor a copy of the State of Florida file on his license and asked whether anything he questioned him on was not contained in this public document. To that, the doctor replied, "I don't know. I would have to sit here for an hour and read this public record. I think it's highly unethical you bring these things up to harm a child and discredit me." After a few more questions and similar answers, the questioning concluded. Despite this highly extraordinary cross-examination with matters involving the doctor's handling of female patients, the defense never put on any evidence of its own to impeach his opinions with respect to the condition of Ms. Byrd's son. That testimony went unchallenged.

[3] We agree with the appellee that the court should never have allowed such cross-examination in the first place. It was entirely irrelevant as it was not a proper attack on the witness's credibility. *See* §§ 90.608 - .610, Fla. Stat. (1997); *Farinas v. State,* 569 So.2d 425, 429 (Fla.1990); *Miles v. Allstate Ins. Co.,* 564 So.2d 583, 584 (Fla. 4th DCA 1990). But having let it in, defense counsel's cross-examination of the doctor on the incident opened the door to the doctor's claims of unethical conduct. [FN2] We ourselves have substantial concerns as to the ethics of defense counsel's attacks on his former client. *See* R.Regulating Fla.Bar 4-1.6, 4-1.9. While defense counsel claimed that anything in a public document can be revealed, even against a former client, the rule states that an attorney may not use information relating to the representation of a former client to the disadvantage of that client except as rule 4-1.6 would permit with respect to a client or "when the information has become generally known." R.Regulating Fla.Bar 4-1.9(b). We are not prepared to state that all information contained in any public document is "generally known" within the meaning of the rule. It seems to us highly questionable that an attorney could attack, embarrass, and malign a former client with matters on which he represented and counseled that client, where such matters have no relevance to the proceeding in which the client is a witness and are not proper impeachment. We are aware that on the criminal side of the bench, public defenders frequently withdraw from representation of a current client when a former client may be required to be impeached on matters involving the public defender's representation of that client. We do not think the standards of ethics on the civil side should be any less. However, it is not our responsibility to interpret the rule of professional conduct in this case. Suffice it to say that, given this extraordinary and uncalled for attack on a former client, defense counsel opened the door about as wide as he could to ***836** the counter charge of ethical violations. We find no error.

> FN2. The charges of unethical behavior made in front of the jury were made by the doctor-witness, not the lawyers for the plaintiff.

[4] Appellant also challenges comments by the plaintiff's attorney in closing argument. Since defense counsel made no objections, the issue is not preserved. *See Murphy v. International Robotics Sys., Inc.,* 710 So.2d 587, 587-88 (Fla. 4th DCA 1998). Although some of counsel's remarks in closing argument were improper,[FN3] we do not deem the unobjected comments to rise to the level of fundamental error. *Id.*

> FN3. We specifically condemn counsel's use of the term "hired gun" to refer to a defense expert. *See Budget Rent A Car v. Jana,* 600 So.2d 466, 468 (Fla. 4th DCA 1992).

Finally, we find no error in the trial court's order determining the date when Ms. Byrd became aware of the possibility of medical negligence. Based on Dr. King's own argument at the summary judgment hearing, the court determined that she did not have knowledge of any actual medical malpractice prior to 1992. While the appellant argues on appeal that the court erred because there was evidence that she could have discovered it at an earlier time, this was not the argument presented to the trial court and appears to us to be made for the first time on appeal.

For these reasons, we affirm the final judgment of the trial court.

GLICKSTEIN and SHAHOOD, JJ., concur.

Fla.App. 4 Dist.,1998.
King v. Byrd
716 So.2d 831, 23 Fla. L. Weekly D1980

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EXHIBIT D

832 So.2d 129, 27 Fla. L. Weekly D2006
(Cite as: 832 So.2d 129)

H

District Court of Appeal of Florida,
Second District.
Erin MANHARDT, as next friend and parent of Christopher Manhardt, a minor, and Erin Manhardt, individually, Appellant,
v.
Shameem TAMTON, M.D., Susan W. Short Pediatrics, P.A., Naples Community Hospital, Inc., and Department of Health and Rehabilitative Services, Collier County Public Health Unit, Appellees.

No. 2D00-2044.
Sept. 4, 2002.
Rehearing Denied Dec. 5, 2002.

Mother brought medical malpractice action for injuries caused when her newborn son contracted meningitis at birth. After a verdict was entered for defendants in the Circuit Court, Collier County, Jack R. Schoonover, J., mother appealed. The District Court of Appeal, Covington, J., held that trial court abused its discretion in failing to grant mother new trial.

Reversed and remanded.

West Headnotes

[1] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and impeachment. Most Cited Cases
Whether medical expert had ever been sued was irrelevant in medical malpractice case, and questioning him on cross-examination about prior malpractice suits against him was improper attack on expert's credibility.

[2] Trial 388 ⚿124

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k124 k. Comments on character or conduct of party. Most Cited Cases
Closing argument of pediatrician's attorney in which he gratuitously announced that this was pediatrician's first lawsuit was improper in medical malpractice case, given court's instruction prohibiting mention of prior lawsuits.

[3] Trial 388 ⚿114

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k114 k. In general. Most Cited Cases
During trial, prejudicial information can be conveyed by comment from trial counsel purportedly made in jest.

[4] Trial 388 ⚿106

388 Trial
388V Arguments and Conduct of Counsel
388k106 k. Control by court in general. Most Cited Cases
Counsel's trial conduct must always be so guarded that it will not impair or thwart orderly processes of fair consideration and determination of cause by jury.

[5] New Trial 275 ⚿29

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k29 k. Conduct of counsel. Most Cited Cases

New Trial 275 ⚿32

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k32 k. Harmless error. Most Cited
New trial was required in medical malpractice action where totality of all errors and inproprieties, which included improper attack on credibility of plaintiff's expert witness and gratuitous comment in closing argument by pediatrician's counsel that this was pediatrician's first law suit, was pervasive enough to raise doubts as to overall fairness of trial court proceedings and errors were pervasive enough to prejudice plaintiff's case as to all defendants.

***129** Scott Trell of Law Offices of Scott Trell, Miami, and Marvin Weinstein of Grover, ***130** Weinstein & Trop, P.A., Miami, for Appellant.

Esther E. Galicia of George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, Fort Lauderdale, for Appellees Shameem Tamton, M.D., and Susan W. Short Pediatrics, P.A.

Tricia B. Valles, Ronald J. Lamb, and William E. Hahn of Hahn, Morgan & Lamb, P.A., Tampa, for Appellee Naples Community Hospital, Inc.

Jeffrey D. Kottkamp of Henderson, Franklin, Starnes & Holt, Fort Myers, for Appellee Department of Health and Rehabilitative Services, Collier County Public Health Unit.

COVINGTON, Judge.

The appellant, Erin Manhardt, individually and as next friend and parent of Christopher Manhardt, a minor, brought this medical malpractice action against the appellees, Shameem Tamton, M.D., Christopher's pediatrician; Susan W. Short Pediatrics, P.A., Dr. Tamton's employer; Naples Community Hospital, Inc., the employer of the nurses who cared for Christopher immediately following his birth; and Florida Department of Health and Rehabilitative Services and the Collier County Public Health Unit, the employers of Dr. Auditori, the obstetrician who delivered Christopher. The lawsuit initially arose from physical injuries Christopher suffered upon contracting meningitis at birth. The suit continued, however, subsequent to Christopher's death. After a jury trial, a verdict was rendered in favor of the appellees. Ms. Manhardt now contends that numerous errors vitiated the fairness of the proceedings in the trial court. We agree and reverse.

At 4:30 a.m. on September 15, 1991, Ms. Manhardt presented at Naples Community Hospital for labor and delivery. At that time, she had a history of vaginal Group B strep infection. The infection, however, caused no overt disease in Ms. Manhardt.

Ms. Manhardt's son, Christopher, was born at 11:19 a.m. on the aforementioned date. According to hospital records, Christopher's initial newborn assessment revealed that, for all intents and purposes, he was a normal, healthy, full-term baby. At 3:45 a.m. on September 16, 1991, however, a nurse reported that Christopher was having trouble breathing and that he was beginning to run a fever. The results of a blood culture revealed that Christopher had contracted meningitis caused by Group B streptococci. Antibiotics were thereafter administered to the infant. At 12:50 p.m., he was transferred to another hospital for treatment.

For a time, Christopher survived the meningitis , but he was rendered severely handicapped as a result. Thus, in December 1993, the instant lawsuit was filed for compensatory damages. The complaint alleged that the appellees were negligent in failing to render proper medical care and treatment to Ms. Manhardt and Christopher at the time of Christopher's birth. It was averred that, but for the appellees' negligent care and treatment, Christopher's meningitis and resulting injuries could have been prevented.

Christopher died on November 5, 1996, at age five. In September 1997, Ms. Manhardt filed a third-amended complaint. It essentially alleged,

among other things, that but for the negligence of the appellees, Christopher would not have suffered the severe and permanent injuries that culminated in his death.

In November 1999, a ten-day jury trial proceeded on Ms. Manhardt's third-amended complaint. After the jury rendered its verdict for the appellees, Ms. Manhardt filed a motion for new trial. She claimed that various trial errors prejudiced ***131** the jury and that the verdict was otherwise against the manifest weight of the evidence. In December 1999, the trial court entered a final judgment upon the jury's defense verdict. In March 2000, a hearing was held on Ms. Manhardt's new trial motion. In April 2000, the trial court denied the motion for new trial, and this timely appeal ensued.

On appeal, Ms. Manhardt contends she is entitled to a new trial on the basis of myriad trial errors. We address two of Ms. Manhardt's claims, in particular. It is our conclusion, however, that a combination of errors and improprieties casts doubt on the integrity of the proceedings in the trial court.

A trial court's ruling on a motion for new trial should not be disturbed on appeal, absent a showing of an abuse of discretion. *Brown v. Estate of Stuckey,* 749 So.2d 490, 495-96 (Fla.1999); *Allstate Ins. Co. v. Manasse,* 707 So.2d 1110, 1111 (Fla.1998); *Cloud v. Fallis,* 110 So.2d 669, 672-73 (Fla.1959). The showing necessary to overturn the denial of a motion for new trial is not as great as that necessary to overturn an order granting such a motion. *Castlewood Int'l Corp. v. LaFleur,* 322 So.2d 520, 522 (Fla.1975) (citing *Cloud,* 110 So.2d at 673). " '[D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court.' " *Manasse,* 707 So.2d at 1111 (quoting *Huff v. State,* 569 So.2d 1247, 1249 (Fla.1990)); *see also Ramey v. Winn Dixie Montgomery, Inc.,* 710 So.2d 191, 192 (Fla. 1st DCA 1998) (quoting *DeLong v. Wickes Co.,* 545 So.2d 362, 366 (Fla. 2d DCA 1989)). Nonetheless, a "trial judge should always grant a motion for a new trial when 'the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.' " *Brown,* 749 So.2d at 497 (quoting *Cloud,* 110 So.2d at 673); *see also McCloud v. Sherman Mobile Concrete Co.,* 579 So.2d 773, 774 (Fla. 2d DCA 1991); *Surety Mortgage Inc. v. Equitable Mortgage Res., Inc.,* 534 So.2d 780, 782 (Fla. 2d DCA 1988). Under those circumstances, "[t]he trial judge's discretion permits the grant of a new trial although it is not clear, obvious, and indisputable that the jury was wrong." *Brown,* 749 So.2d at 497.

In this case, counsel for Dr. Tamton asked one of Ms. Manhardt's experts, Dr. Noel, if he had ever been sued. Dr. Noel gave an inaudible response, and counsel for Ms. Manhardt objected. The trial court overruled the objection, and the following exchange ensued:

> [Dr. Tamton's Counsel]: Did you think you did anything wrong when you were sued?
>
> [Dr. Noel]: I didn't.
>
> [Dr. Tamton's Counsel]: Did you defend your- self?
>
> [Dr. Noel]: Yes.

At that point, Ms. Manhardt's counsel unsuccessfully moved for a mistrial. Counsel argued that the foregoing line of questioning was irrelevant and prejudicial. The trial court denied the motion. Sometime later, however, the issue was revisited. The trial court then instructed counsel for both parties to refrain from asking any party or expert about prior lawsuits.

[1] The questions propounded to Dr. Noel were irrelevant to Dr. Noel's expertise and otherwise constituted an improper attack on his credibility. *See Tormey v. Trout,* 748 So.2d 303, 306 (Fla. 4th DCA 1999) (citing *Farinas v. State,* 569 So.2d 425, 429 (Fla.1990), and holding that, in a personal injury case, cross-examination of medical expert about prior administrative discipline was improper

credibility attack); *see also Liberty Mut. Ins. Co. v. Wolfson,* 773 So.2d 1272, 1273 (Fla. 4th DCA 2000) (stating that credibility of medical expert ***132** was improperly attacked when she was asked about peer review that caused suspension of her surgery privileges at certain hospitals). The impropriety was exacerbated by the fact that Dr. Noel, of all the medical experts who testified, was the only witness whom the trial court allowed to be questioned about prior lawsuits. We therefore conclude the jury was likely deceived as to the force and credibility of the medical evidence in this cause and that such deception likely prejudiced Ms. Manhardt's case.

[2] This court also concludes that the prejudice arising from the improper credibility attack on Dr. Noel was compounded by inappropriate commentary from Dr. Tamton's counsel during closing argument. At that time, counsel gratuitously announced and otherwise emphasized that this was Dr. Tamton's first lawsuit. Defense commentary of that nature is usually intended to prejudice a plaintiff's case in the eyes of the jury. *See Ridarsick v. Amirkanian,* 147 So.2d 580, 581 (Fla. 3d DCA 1962) (involving counsel's misconduct in repeatedly offering evidence that the trial court had already excluded). That is especially true here, given the trial court's instruction prohibiting the mention of prior lawsuits. Untoward practices of the kind at issue can be very effective in medical malpractice cases, which always involve "a battle of expert witnesses." *Cenatus v. Naples Cmty. Hosp., Inc.,* 689 So.2d 302, 304 (Fla. 2d DCA 1997) (citing *Lake v. Clark,* 533 So.2d 797, 799 (Fla. 5th DCA 1988)).

We take this opportunity to note further concern regarding a comment from Dr. Tamton's counsel as to the "Miami Beach" accent of one of Ms. Manhardt's attorneys. At one point during trial, Ms. Manhardt's counsel, Mr. Weinstein, attempted to impeach Dr. Tamton based on various aspects of her pretrial deposition. In doing so, Mr. Weinstein had some difficulty communicating with Dr. Tamton, who is from India. Because of that difficulty, Mr. Weinstein repeated many of his questions. Thereafter, Dr. Tamton's counsel, Mr. Stevens, began his examination of Dr. Tamton by stating, "Dr. Tamton, I promise you three things: I won't repeat myself, I won't use your deposition, and I won't speak with an accent from Miami Beach ...." Mr. Weinstein immediately objected. He argued, among other things, that the remark constituted an improper reference to his religion. Mr. Stevens insisted that he did not intend to cast religious aspersions but only made the comment in jest.

[3][4] In *Ridarsick,* the Third District observed that "a question asked during a trial may convey prejudicial information even though the answer is excluded." 147 So.2d at 580 (citing *Blanton v. Butler,* 81 So.2d 745 (Fla.1955)). We note that, during a trial, prejudicial information can likewise be conveyed by a comment from trial counsel purportedly made in jest. We thus remind counsel, as we have reminded others in the past, that trial conduct " 'must always be so guarded that it will not impair or thwart the orderly processes of a fair consideration and determination of the cause by the jury.' " *Murphy v. Murphy,* 622 So.2d 99, 102 (Fla. 2d DCA 1993) (quoting *Seaboard Air Line R.R. Co. v. Strickland,* 88 So.2d 519, 523 (Fla.1956)); *see also Anderson v. Watson,* 559 So.2d 654 (Fla. 2d DCA 1990).

[5] Therefore, based on the foregoing, we conclude the trial court abused its discretion in failing to grant Ms. Manhardt a new trial. The totality of all errors and improprieties, including those not discussed herein, was pervasive enough to raise doubts as to the overall fairness of the trial court proceedings. Collectively, the errors here were also pervasive enough to prejudice Ms. Manhardt's case ***133** as to all of the appellees. *See Mitchell v. Bonnell,* 770 So.2d 1292, 1294 (Fla. 3d DCA 2000); *see also Klose v. Coastal Emergency Servs. of Ft. Lauderdale, Inc.,* 673 So.2d 81, 83 n. 1 (Fla. 4th DCA 1996).

Accordingly, this cause is reversed and remanded for a new trial. Points on appeal not otherwise discussed are either without merit or are moot because of our holding. *See, e.g., Murphy,* 622 So.2d at 100.

Reversed and remanded.

BLUE, C.J., and NORTHCUTT, J., concur.

Fla.App. 2 Dist.,2002.
Manhardt v. Tamton
832 So.2d 129, 27 Fla. L. Weekly D2006

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EXHIBIT E

836 S.W.2d 424
(Cite as: 836 S.W.2d 424)

Court of Appeals of Kentucky.
Len W. MORROW, D.M.D., and Daniel and Morrow, P.S.C., Appellants,
v.
Robert R. STIVERS, Appellee.

No. 90–CA–997–MR.
Jan. 24, 1992.
Rehearing Denied April 10, 1992.
Discretionary Review Denied By Supreme Court Oct. 14, 1992.

Physician appealed from judgment of the Circuit Court, Fayette County, George E. Barker, J., entered on verdict in medical malpractice action. The Court of Appeals, Dyche, J., held that: (1) depositions of patient's experts who were not called to testify and whose depositions came into possession of defendant physician through inadvertence were properly excluded; (2) fact that one expert's license had been suspended for five years because he had passed hepatitis to patients was a collateral matter which could not be the subject of cross-examination; and (3) award of damages was not excessive.

Affirmed.

West Headnotes

[1] Pretrial Procedure 307A ⚿203

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak203 k. Parties entitled to use and availability of deponent. Most Cited Cases

Trial court properly excluded deposition of expert who was not called at trial by patient and whose deposition came into possession of physician's counsel through inadvertence, in the absence of showing of exceptional circumstances. Rules Civ.Proc., Rule 26.02(4)(b).

[2] Witnesses 410 ⚿267

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k267 k. Control and discretion of court. Most Cited Cases

Scope and duration of cross-examination rests in the sound discretion of the trial court in both civil and criminal cases.

[3] Trial 388 ⚿186

388 Trial
388VII Instructions to Jury
388VII(A) Province of Court and Jury in General
388k186 k. Comments by judge on evidence in general. Most Cited Cases

Trial court's admonition to jury to disregard any reference to physician's report which had been ruled inadmissible did not impermissibly detract from properly admitted opinion of another physician who had reached the same conclusion.

[4] Witnesses 410 ⚿270(1)

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k270 Cross-Examination as to Irrelevant, Collateral, or Immaterial Matters
410k270(1) k. In general. Most Cited Cases

Witness cannot be cross-examined on collateral matter which is irrelevant to the issues at hand.

[5] Evidence 157 ⚿558(7)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts

157k558 Cross-Examination
157k558(7) k. Discrediting witness or disparaging testimony in general. Most Cited Cases
Fact that physician testifying as expert had his license suspended for five years because he had passed hepatitis to several patients was collateral to his knowledge or ability to testify as to causation and he thus could not be cross-examined about it.

[6] Pretrial Procedure 307A ⚿204

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak204 k. Purpose. Most Cited Cases
Trial court properly precluded introduction of discovery deposition prior to playing of video taped evidentiary deposition from the same witness where the discovery deposition was offered to show inconsistencies and could have been read during the video taping of deposition, at which point the opposing party would have had the opportunity to rehabilitate the witness.

[7] Evidence 157 ⚿555.4(3)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(3) k. Hearsay or evidence otherwise incompetent. Most Cited Cases
Once its application is justified, rule providing that statement made to an expert is not inadmissible hearsay if it is the kind of information that the expert customarily relies upon in the practice of his profession is broad enough to encompass statements made to psychologists. Fed.Rules Evid.Rule 803(4), 28 U.S.C.A.

[8] Trial 388 ⚿62(2)

388 Trial
388IV Reception of Evidence
388IV(B) Order of Proof, Rebuttal, and Reopening Case
388k62 Evidence in Rebuttal
388k62(2) k. Scope of evidence in rebuttal. Most Cited Cases
Expert testimony that patient did not suffer a stroke during surgery was appropriate rebuttal testimony, in medical malpractice action, to respond to defense testimony suggesting that patient suffered stroke during surgery when his blood pressure dropped too low, insofar as the new element of causation, low blood pressure, was not, and could not have been, addressed on direct.

[9] Appeal and Error 30 ⚿302(6)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k302 Sufficiency and Scope of Statement of Grounds
30k302(6) k. Sufficiency of evidence and amount of recovery. Most Cited Cases
Where motion for new trial alleged excessiveness only as to the awards for future medical expenses and lost earning capacity, reviewing court could not consider the amount awarded for current medical expenses and physical pain and suffering.

[10] Damages 115 ⚿127.3

115 Damages
115VII Amount Awarded
115VII(A) In General
115k127.3 k. Excessive damages in general. Most Cited Cases
(Formerly 115k128)
Under the "first blush rule," damages award is excessive if the mind is immediately shocked and surprised at the great disproportion of the size of the verdict in relation to the amount authorized by the evidence, such that it must have been the result of passion and prejudice.

[11] Health 198H ⚖832

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk828 Damages
198Hk832 k. Amount. Most Cited (Formerly 299k18.110 Physicians and Surgeons)

Evidence of patient's present and future medical expenses due to injury, decrease in his ability to earn money in the future in the amount of $97,000, and difficulty in performing his present occupation, supported jury award of $20,000 for future medical expenses and $57,000 for lost earning expenses.

***425** Leslie Rosenbaum, Rosenbaum & Rosenbaum, P.S.C., Lexington, for appellants.

William J. Gallion, Barbara Ann Kriz, Gallion, Baker & Bray, P.S.C., Lexington, for appellee.

Before DYCHE, HAYES and STUMBO, JJ.

DYCHE, Judge.

In this malpractice case, the appellant, Dr. Len W. Morrow, an oral surgeon, appeals a judgment of the Fayette Circuit Court in which a patient was awarded damages for Dr. Morrow's misdiagnosis and negligent treatment of facial pain.

The appellee, Robert R. Stivers, is fifty-eight and has worked for Lexington Building Supply for the last twenty-six years. Stivers developed a severe pain in the left facial area on or about April 10, 1983. Stivers was examined by Dr. Richard F. Hench, who had treated him for high blood pressure and seen him for regular checkups. Dr. Hench performed tests on Stivers and diagnosed his condition as "atypical facial pain" for which he prescribed medication.

In June of 1983, Stivers continued to suffer pain and was examined by Dr. Minyard, a dentist. Dr. Minyard recommended that Stivers be seen by the appellant, Dr. Len W. Morrow, and his partner, Dr. Daniel.

***426** Dr. Morrow examined Stivers and diagnosed the pain as " trigeminal neuralgia " and recommended the removal of his infra-orbital nerve. On August 18, 1983, Dr. Morrow performed a peripheral neurectomy on Stivers, removing the nerve.

The peripheral neurectomy was done through the tissue on the left gum inside of Stivers's mouth. The infra-orbital nerve exits an opening or foramen in the bone on the left cheek just below the left eye. Dr. Morrow exposed the nerve and cut it. He then put alcohol into the opening to destroy the remaining nerve. During the operation, Stivers's left eye became dilated and upon awakening from anesthesia, he suffered from diplopia or double vision.

On August 16, 1984, Stivers brought an action against Dr. Morrow and his practice group, Daniel and Morrow, P.S.C. Stivers alleged that Dr. Morrow was negligent in the diagnosis and treatment of his facial condition, resulting in painful and permanent injuries. Stivers also alleged that he was not informed by Dr. Morrow of the risks of the infra-orbital neurectomy and alcohol application and thus he did not give his informed consent.

Stivers's theory was that the alcohol administered by Dr. Morrow leaked back into the orbit of the eye, damaging nerves which control eye and pupil movement. Further, Stivers alleged that he suffered from atypical facial pain, for which a peripheral neurectomy is not a proper treatment. Dr. Morrow denied that the alcohol was responsible for this damage and maintained that diplopia and the other symptoms were due to a stroke suffered by Stivers during the operation.

At the conclusion of a trial held from March 19, 1990, to March 27, 1990, the jury found for Stivers in the total amount of $187,227.00.

The disputed issues on appeal largely revolve

around the trial court's rulings involving the admissibility of certain evidence.

While taking the deposition of Dr. Dennis Sprague, a psychologist who testified at trial for Stivers, Dr. Morrow's counsel came into possession of a report from a neurologist, Dr. David B. Clark, a report by Dr. C. Lee, a radiologist, and a magnetic resonance imaging (MRI) scan.

Dr. Clark's report, dated March 5, 1986, was issued pursuant to an examination of Stivers, at his request. Based on that examination, Dr. Clark questioned whether the diplopia and the temporary dilation of the pupil were caused by the alcohol applied by Dr. Morrow. Dr. Clark suggested that Stivers might have suffered a vascular accident (stroke) in the upper part of the brainstem because such an injury would account for these symptoms. Dr. Clark recommended that the MRI scan be performed on Stivers to see if there were any evidence of stroke.

The MRI scan was performed on April 11, 1986. Dr. Lee examined the images which revealed an abnormality in the right side of the brainstem. Dr. Lee stated in his report that the abnormality "raises the question of a brainstem infarct."

A deposition taken of Dr. Adrienne Millett, an opthalmologist, on March 21, 1990, was placed into evidence. Dr. Millett testified that the cause of Stivers's condition was very likely the operation and the alcohol placed on the infra-orbital nerve, resulting in damaged nerve fiber controlling his eye movement and his pupil.

Dr. Millett was asked on cross-examination about the reports of Drs. Clark and Lee and the MRI scan which had been supplied to her after she reached her opinion regarding causation. The questions basically centered around whether a stroke in the brainstem could cause Stivers's condition. Dr. Millett stated that it was unlikely that a stroke in the brainstem would damage the specific areas injured without any wider effects. Dr. Millett added, however, that she would not rule out that possibility and would defer to the opinion of a neurologist.

On September 15, 1989, a hearing was held on the use and admissibility of the MRI scan and the reports of Drs. Lee and Clark. The trial court ruled that the MRI scan was admissible. Dr. Lee's report and Dr. Clark's report were ruled to be inadmissible *427 based on CR 26.02(4). The trial court also would not allow admission of depositions of Dr. Clark or Dr. Lee.

The trial court reasoned that if the rules prohibit the discovery of the evidence, such evidence would not be properly admissible. As a result, the trial court would not allow Dr. Morrow's experts to rely on the reports of Dr. Clark or Dr. Lee.

During the trial, Stivers planned to introduce the videotaped deposition of Dr. Millett. Prior to playing the videotape to the jury, Stivers sought to have all references to the reports from Drs. Clark and Lee deleted. The trial court ruled that, because Stivers supplied the reports to Dr. Millett, the reports had lost their privileged status. Dr. Morrow was then entitled to cross-examine her about these reports, concluded the trial court. The reports themselves were not admitted.

The trial court prohibited the use of the reports with other witnesses. Consequently, the reports of Drs. Clark and Lee or their opinions were not admissible despite Dr. Morrow's attempts in connection with the testimony of Dr. Roger J. Harris, Stivers's liability expert, Dr. John M. Gregg, an oral surgeon testifying on behalf of Dr. Morrow, and Dr. Jerry Anderson, also a defense witness.

[1] Dr. Morrow first contends that the trial court erred in refusing the admission of evidence from Drs. Clark and Lee which had been obtained outside the discovery procedures outlined in Kentucky Rules of Civil Procedure.

CR 26.02(4)(b) provides that:

> A party may discover facts known or opinions held by an expert who has been retained or spe-

> cially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Dr. Morrow notes that CR 26.01 describes discovery methods as, *inter alia,* depositions, interrogatories, requests for admission. He argues that CR 26.02(4)(b) applies only to discovery and not to a situation, such as in the instant case, where the expert's facts and opinions became known outside the discovery process.

In *Crenna v. Ford Motor Company,* 12 Wash.App. 824, 532 P.2d 290 (1975), an expert who was consulted by the plaintiffs was named by them in their answers to interrogatories approximately nine months before trial. However, the plaintiffs indicated that they did not know whether the expert would be called at trial. The defendant sought, five days before trial, to find out whether the expert would be testifying at trial and was told a decision had still not been made. The defendant then sought to subpoena the expert. The plaintiffs responded with a motion to quash the subpoena and to bar the expert's testimony which was granted. At trial, the defendant attempted to call the expert as a rebuttal witness. The trial court ruled that the defendant could not call the expert.

The trial court's rulings were based on CR 26(b)(4)(B) which is practically identical to Kentucky CR 26.02(4)(b). The Washington rule does not contain the language in CR 26.02(4)(b) referring to facts and opinions of an expert "who has been retained or specially employed...." Washington's rule for discovery of experts is more restrictive than is Kentucky's because the former renders the expert nondiscoverable if he is expected to testify at trial, but Kentucky adds the requirement that he also be retained or specially employed in anticipation of litigation or preparation for trial. We do not perceive this difference to be significant in the instant case.

The Court in *Crenna, supra,* 532 P.2d at 295, stated:

> We read CR 26(b)(4)(B) as a recognition that a trial is still an adversary proceeding and that, so conceived, fundamental fairness requires that 'discovery' not be used to defeat a litigant by probing for real or apparent weaknesses in his case ***428** which may have been revealed in his trial preparation.

The Court concluded that the rulings by the trial court had been proper.

We agree with the holding in *Crenna, supra.* To allow Dr. Morrow to use the reports of Drs. Clark and Lee, or to admit their depositions, would undermine the purpose of CR 26.02(4)(b), which in part is to encourage prelitigation consultative evaluations. This Court in *Newsome v. Lowe,* Ky.App., 699 S.W.2d 748, 752 (1985), stated that consultive expert evaluations and the reports rendered under CR 26.02(4)(b) were "privileged." We reasoned that "if there is no confidentiality in them, the procedure will not be utilized." *Id.*

A factual difference between the instant case and *Crenna, supra,* is that Dr. Morrow came into possession of the reports inadvertently, while the defendants in *Crenna, supra,* were supplied with the information through answers to interrogatories. We do not believe that the reports of Drs. Clark and Lee should be given special status, and thus rendered admissible, simply because they were not obtained by a discovery method. Such a result would encourage litigants to bypass the discovery process.

Dr. Morrow cites *Heitmann v. Concrete Pipe Machinery,* 98 F.R.D. 740 (E.D.Mo.1983), in which the Court ruled that the report of a nontestifying expert was out of the coverage of Fed.R.Civ.P. 26(b)(4)(B) when the report was supplied to and re-

lied upon by a testifying expert. The Court in *Heitmann, supra,* reasoned that the report was needed for effective cross-examination of the testifying witness.

Dr. Sprague testified in his deposition that he did not rely on any medical records in forming his opinions. Dr. Millett also did not rely on these reports. Thus, *Heitmann, supra,* is not applicable.

CR 35.02 is also cited as support for Dr. Morrow's position. CR 35.02 concerns reports of examining physicians upon the request of the examined party. In this case, there is nothing in the record to show a request and delivery of any reports which would require Stivers, under CR 35.02, to supply the reports of Drs. Clark and Lee.

Dr. Morrow next contends that the trial court erred in limiting the cross-examination of all but one witness in regard to the reports of Drs. Clark and Lee.

The trial court's reason for this difference was that, though undiscoverable under CR 26.02, the reports were supplied to Dr. Millett. The other witnesses, except Sprague, were not at any time supplied with the reports.

[2] It is a general rule that the scope and duration of cross-examination rests in the sound discretion of the trial court in both civil and criminal cases. *Moore v. Commonwealth,* Ky., 771 S.W.2d 34 (1988), *cert. denied,* 494 U.S. 1060, 110 S.Ct. 1536, 108 L.Ed.2d 774 *reh. denied,* 495 U.S. 941, 110 S.Ct. 2196, 109 L.Ed.2d 524 (1990); *Perry v. Ernest R. Hamilton Associates, Inc.,* Ky., 485 S.W.2d 505 (1972); *Commonwealth, Department of Highways v. Smith,* Ky., 390 S.W.2d 194 (1965).

The trial court in the case at bar prohibited the cross-examination for the purposes of furthering the ends of CR 26.02(4). We do not view such action as an abuse of discretion.

Dr. Morrow next contends that the trial court erred in admonishing the jury during the cross-examination of a defense expert to disregard any reference to Dr. Lee's interpretation of the 1986 MRI.

[3] Dr. Jerry Anderson testified as a witness for Dr. Morrow. Dr. Anderson had examined the 1986 MRI, and under cross-examination he made references to Dr. Lee's interpretation. A bench conference ensued and Stivers sought an admonition. The trial court subsequently admonished the jury to disregard any references to Dr. Lee's report because it had been ruled inadmissible.

In *Seaton v. Rosenberg,* Ky., 573 S.W.2d 333 (1978), relied upon by Dr. Morrow, an expert gave opinion testimony concerning a person's cause of death. The trial court made remarks about this opinion to the jury which the Supreme Court found were prejudicial. Its reasoning was that "the ***429** trial court's remarks at least diluted the effect of this evidence and at most effectively removed this evidence from consideration by the jury." *Id.* at 337.

The admonition in the case at bar did not have the same effect as the trial court's remarks in *Seaton, supra.* The jury heard Dr. Anderson's full opinion. We do not believe that the admonition detracted from Dr. Anderson's opinion simply because he and Dr. Lee had reached the same conclusion. The trial court directed the jury to disregard references to Dr. Lee's interpretation only because it had previously been ruled inadmissible. In *Seaton, supra,* the trial court made statements directly questioning the accuracy of the expert's opinion. We find no error here.

Dr. Morrow next contends that the trial court improperly limited his cross-examination of Stivers's liability expert, Dr. Roger J. Harris.

Dr. Morrow wanted to show that Dr. Harris had had his license suspended for five years because he had passed hepatitis to several patients. That Dr. Harris did not practice for a time due to the infection received from an institutionalized patient was

admitted, but he maintained that he voluntarily relinquished his license. Dr. Morrow also wanted to introduce testimony that Dr. Harris could only have transmitted hepatitis through dirty instruments, sexual intercourse, or other exchange of body fluids. The trial court would not admit Dr. Morrow's claims.

[4] The general rule is that a witness cannot be cross-examined on a collateral matter which is irrelevant to the issue at hand. *Shirley v. Commonwealth,* Ky., 378 S.W.2d 816 (1964); *Commonwealth v. Jackson,* Ky., 281 S.W.2d 891 (1955).

In *Elswick v. Commonwealth,* Ky.App., 574 S.W.2d 916 (1978), this Court held that it was not abuse of discretion to exclude testimony on cross-examination when its inflammatory nature outweighed its probative value.

[5] The crucial question then is whether the evidence excluded in this case is collateral. We think it is. The matter of having hepatitis and thus not practicing for a time does not reflect on his knowledge or ability to testify on the matters at hand, i.e., the causation of Stivers's condition and any deviation by Dr. Morrow from the standard of care. Further, the inflammatory effect, if the jury heard testimony such as that Dr. Harris may have had sex with his patients, although unproven, would outweigh any probative value it might have. There was no abuse of discretion in excluding this evidence.

[6] Dr. Morrow also complains that he was improperly kept from using a deposition to show Dr. Harris's lack of knowledge about the possibility that Stivers had a stroke.

Dr. Morrow maintains that the reason the trial court prohibited the use of the deposition was that it was only a discovery deposition as opposed to an evidentiary deposition. That statement is somewhat of an oversimplification and is misleading.

Dr. Morrow wanted to read a portion of a discovery deposition to the jury prior to the playing of a videotaped evidentiary deposition which was made months after the discovery deposition. Dr. Morrow wanted to show inconsistencies between the two depositions for impeachment purposes. The trial court stated that Dr. Morrow could have used the portions of the discovery deposition he wanted to read during the videotaped deposition. The trial court reasoned that if Dr. Harris was impeached, Stivers would have no way of rehabilitating him by asking Dr. Harris further questions. We think the ruling was sound.

Dr. Morrow next contends that incompetent evidence was received from Dr. Sprague. This alleged incompetent evidence consisted of the use of medical history as related directly to Dr. Sprague by Stivers and the diagnosis that Stivers had suffered a psychological injury as a result.

In *Drumm v. Commonwealth,* Ky., 783 S.W.2d 380, 384 (1990), the only case cited by Dr. Morrow in regard to this issue, the Court adopted Rule 803(4) of the Federal Rules of Evidence which "blurs but does not abolish the distinction between testifying*430 and treating physicians." Under Fed.R.Evid. 803(4), a statement made to an expert is not inadmissible hearsay if the statement is "the kind of information which the expert customarily relies upon in the practice of his profession." *Drumm, supra.* The rule specifically includes statements of medical history pertinent to diagnosis.

[7] Dr. Morrow's argument appears to be that Sprague's testimony is not admissible under Fed.R.Evid. 803(4) because the rule applies to medical purposes but not psychological ones. When its application is justified, Fed.R.Evid. 803(4) is broad enough to encompass the statements made to psychologists. *See Morgan v. Foretich,* 846 F.2d 941 (4th Cir.1988). The medical history supplied to Dr. Sprague was the kind of information customarily relied on by psychologists in the practice of their profession.

Dr. Morrow next contends that the rebuttal

testimony of Dr. William O. Witt should not have been allowed.

[8] Dr. Witt, an anesthesiologist, testified that, based on the blood pressure readings in the anesthesia records for Stivers's surgery, he did not suffer a stroke during the surgery. Dr. Witt was called as a rebuttal witness by Stivers to address a question which had been raised by one of Dr. Morrow's witnesses, Dr. Joseph Zerga, i.e., that Stivers suffered a stroke during surgery when his blood pressure dropped too low. The trial court ruled that Dr. Witt could testify in rebuttal because there was a new element as to causation, i.e., low blood pressure, which was not, and could not have been, addressed on direct. We see no abuse of the trial court's discretion on this point.

Dr. Morrow next contends that, even if the alleged errors were harmless individually, the cumulative effect of the errors requires a reversal.

Most, if not all, of the errors alleged were not simply harmless but were not errors. Moreover, because of the complexities of the case, particularly the inadvertent disclosure by Stivers, the trial court did a remarkable job in balancing the competing rights and interests of the parties. Stivers had a full opportunity to prosecute his case and Dr. Morrow had a full opportunity to defend himself. Dr. Morrow was allowed to use the MRI scan by showing it to his experts who then gave testimony concerning their findings to the jury. The reports of Drs. Clark and Lee were far less conclusive that Stivers had suffered a stroke than Dr. Morrow would have us believe. There was no cumulative effect of errors in this case.

Lastly, Dr. Morrow argues that the damages awarded were excessive.

The jury awarded Stivers a total of $187,227.00 in damages. This award consisted of $2,227.00 for current medical expenses, $20,000.00 for future medical expenses, $108,000.00 for physical pain and suffering, and $57,000.00 for lost earning capacity.

[9] We note initially that appellant's motion for a new trial alleged excessiveness only as to the awards for future medical expenses and lost earning capacity; we may not consider the amount awarded for current medical expenses and physical pain and suffering, as the trial court was not given an opportunity to rule thereon. *Skaggs v. Assad By and Through Assad,* Ky., 712 S.W.2d 947, 950 (1986).

[10] Dr. Morrow claims that the award is excessive under the "first blush" rule. That rule provides that a damage award is excessive if the mind is immediately shocked and surprised at the great disproportion of the size of the verdict in relation to the amount authorized by the evidence, such that it must have been the result of passion and prejudice. *Wilson v. Redken Laboratories, Inc.,* Ky., 562 S.W.2d 633 (1978); *Townsend v. Stamper,* Ky., 398 S.W.2d 45 (1965).

> The "first blush" rule is a mechanism to assist the *trial court* in performing its responsibility when called upon to decide whether the award is so excessive as to appear "to have been given under the influence of passion or prejudice." CR 59.01(d). In its entirety it is that "a verdict may be set aside as excessive ***431** only if 'it is (so) to such an extent as to cause the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury.' " *Wilson v. Redken Laboratories, Inc., supra,* 562 S.W.2d at 636.
>
> On the other hand, the appellate function is properly described in *Prater v. Arnett,* Ky.App., 648 S.W.2d 82 (1983):
>
> > "Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge ... to determine if his actions consti-

tuted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous. Further, the action of the trial judge is presumptively correct ..." 648 S.W.2d at 86.

Our earlier opinion discussing review of the question of excessive damages in *City of Louisville v. Allen,* Ky., 385 S.W.2d 179 (1964) expresses essentially the same analysis as *Prater v. Arnett* of the different functions of trial and appellate courts. The basic guideline for appellate review is set out in the *Allen* case as follows:

"It serves to emphasize the initial and primary role of the trial judge in determining these issues; that his decision shall be *prima facie correct* and final; and that only in rare instance when it can be said that he *has clearly erred,* i.e., abused his discretion, will he be reversed." (Emphasis original.) 385 S.W.2d at 183–184.

Once the issue is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals substitute our judgment on excessiveness for his unless clearly erroneous.

In short, the rules governing appellate practice do not direct the appellate judge to decide if the verdict shocks his conscience or causes him to blush. Those rules charge us with the responsibility to review the record and decide whether, when viewed from a standpoint "most favorable" to the prevailing party, there is evidence to support the verdict and judgment. *Rogers v. Kasdan,* Ky., 612 S.W.2d 133 (1981).

Davis v. Graviss, Ky., 672 S.W.2d 928, 932–933 (1984) (emphasis original).

[11] There is evidence in the record of Stivers's substantial present and future medical expenses due to the injury. There is also evidence of the decrease in his ability to earn money in the future of $97,780.53 as well as testimony about his difficulty performing his present occupation. Stivers testified about the pain resulting from this injury and the difficulties in life due to the pain and double vision. We find no clear error nor abuse of discretion in the trial court's action.

The judgment of the Fayette Circuit Court is affirmed.

All concur.

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END OF DOCUMENT

EXHIBIT F

735 S.W.2d 63
(Cite as: 735 S.W.2d 63)

Missouri Court of Appeals,
Eastern District,
Division Five.

Martha J. NOBLE, Plaintiff-Appellant,
v.
W. Edward LANSCHE, and Orthopedic Associates, Inc., Defendants-Respondents.

No. 51459.
June 16, 1987.
Motion for Rehearing and/or Transfer Denied July 21, 1987.
Application to Transfer Denied Sept. 15, 1987.

Patient brought medical malpractice action against physician who had performed surgery for bilateral bunions and hammertoes on patient's feet. The Circuit Court, County of St. Louis, Phillip J. Sweeney, J., entered judgment for physician, and appeal was taken. The Court of Appeals, Carl R. Gaertner, J., held that: (1) evidence that medical malpractice plaintiff's expert witness, a physician, had voluntarily surrendered his license to dispense certain narcotic drugs was inadmissible to impeach witness, and (2) erroneous admission of testimony concerning witness' surrender of license to dispense narcotics was not harmless.

Reversed and remanded for new trial.

West Headnotes

[1] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases

Evidence that medical malpractice plaintiff's expert witness, a physician, had voluntarily surrendered his license to dispense certain narcotic drugs was inadmissible to impeach witness.

[2] Appeal and Error 30 ⚿1048(7)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)9 Witnesses
30k1048 Rulings on Questions to Witnesses
30k1048(7) k. Credibility, Impeachment, Contradiction, and Corroboration of Witnesses. Most Cited Cases
(Formerly 299k18.130 Physicians and Surgeons)

Erroneous admission of evidence that expert for medical malpractice plaintiff had voluntarily surrendered his license to dispense certain controlled narcotics was not harmless; forced disclosure of past drug abuse affected neither expert's qualifications nor his credibility, but rather, served only to besmirch his character, and expert's testimony was crucial to plaintiff's case.

*63 Norton Y. Beilenson, Dolgin, Beilenson, Klein, Lake & Nodiff, Clayton, for plaintiff-appellant.

William L. Davis, Moser, Marsalek, Carpenter, Cleary, Jaeckel & Keaney, St. Louis, for defendants-respondents.

CARL R. GAERTNER, Judge.

Plaintiff Martha J. Noble appeals from a judgment for defendants W. Edward Lansche, M.D., and Orthopedic Associates, Inc. in this medical malpractice action. She claims trial court error (1) in allowing defense counsel (a) to engage in improper cross-examination of her expert witness and (b) to go outside the evidence in the case in closing argument, (2) by refusing to admit certain photographs into evidence and (3) in overruling plaintiff's motion to strike for cause a particular member of the venire. We reverse and remand.

Defendant Lansche performed surgery for bi-

lateral bunions and hammertoes on plaintiff's feet in May, 1981. Plaintiff alleges an inappropriate procedure was used with regard to the bilateral bunions and the operation was negligently performed as to the hammertoes. As a result she claims damages because her feet were severely *64 disfigured and she was unable to participate in her normal activities. Further surgery, to alleviate the problems allegedly caused by defendants, was performed by Dr. Anthony Halinsky. Halinsky was the only expert witness to testify at trial for plaintiff.

Prior to trial, plaintiff filed a motion in limine seeking to exclude any evidence concerning Halinsky's surrender of his license to dispense certain controlled narcotics. The trial court overruled the motion with the provision that defendants would be permitted to establish that Halinsky had indeed surrendered this license and further that the surrender was because the doctor had diverted drugs to his own use.

Plaintiff's first point on appeal is that the trial court erred in allowing defendants to delve into Dr. Halinsky's voluntary surrender of his license to dispense narcotics on cross-examination and in closing argument, the latter including a statement that Halinsky had personally abused a particular narcotic. It is well-settled that the scope of cross-examination lies within the discretion of the trial court. On appeal, we will not reverse unless abuse of that discretion is clearly shown. *Powell v. Norman Lines, Inc.,* 674 S.W.2d 191, 195 (Mo.App.1984). Further, with regard to cross-examination of an expert witness, "wide latitude is allowed to test his qualifications, credibility, skill or knowledge and the value and accuracy of his opinion." *Id.* at 196 (citations omitted).

[1] The evidence in dispute here concerns Halinsky's surrender of his license to dispense certain narcotics. On cross-examination of Halinsky the defendants established that Halinsky voluntarily surrendered the license because he had a medical problem with narcotics which was resolved. The effect of this surrender upon his medical practice, however, was merely to prevent him from personally dispensing narcotics to his patients. Instead, he would give his patients a prescription to be filled at a pharmacy. We reject defendants' argument that a license to dispense narcotics is so integral to a physician's practice that the jury must be made aware of its voluntary surrender. The ability to prescribe appropriate narcotics may well be essential to the care and treatment of a physician's patient, but the right to personally dispense the narcotics is of little significance. Moreover, evidence concerning Halinsky's former problem with drug abuse is unrelated to his skill, knowledge and qualification to express an opinion upon the propriety of the surgical procedure selected by defendant Lansche and the quality of Lansche's surgical performance.

It is important to emphasize that Halinsky lost his license to dispense through voluntary surrender and not a criminal conviction, as the latter would be a proper mode of impeachment on cross-examination. § 491.050, RSMo.1986, *Eichelberger v. Barnes Hosp.,* 655 S.W.2d 699, 704 (Mo.App.1983). This voluntary action has no more impact upon his credibility than an unprosecuted arrest on a criminal charge. We have consistently held that evidence of an arrest not resulting in conviction is improper impeachment. *State v. Lockhart,* 507 S.W.2d 395, 396 (Mo.1974); *Kehr v. Garrett,* 512 S.W.2d 186, 193 (Mo.App.1974). Specifically, we have held that evidence of drug abuse is not admissible as impeachment of a witness's testimonial credibility and, in the absence of some showing of relevance to the witness's testimony, evidence of prior drug use is properly excluded. *Ransom v. Adams Dairy Co.,* 684 S.W.2d 915, 919 (Mo.App.1985). In *State v. Thompson,* 697 S.W.2d 575, 579 (Mo.App.1985), cross-examination concerning a prior history of alcohol abuse was held improper, although not warranting reversal under the circumstances.

[2] The prejudice to plaintiff from this improper cross-examination was amplified in closing argument when defense counsel stated Halinsky had

testified that "he got into personal trouble from using Demerol." No such evidence was in the record, and no such specificity may reasonably be inferred from Halinsky's statement "I had a medical problem with narcotics which was resolved." Counsel is allowed wide latitude in arguing legitimate inferences from the evidence of record, *65*State ex rel. Missouri State Hy. Comm'n v. Hensel Phelps Constr. Co.,* 634 S.W.2d 168, 176 (Mo. banc 1982). However, it is "axiomatic counsel should neither argue nor draw inferences from matters not in evidence and that a trial court errs in permitting such a discourse." *Bergel v. Kassebaum,* 577 S.W.2d 863, 872 (Mo.App.1978) (citing *Hodges v. Johnson,* 417 S.W.2d 685, 689 (Mo.App.1967)). Further compounding the prejudicial effect of the improper impeachment were other aspects of the jury argument made by defendants' attorney, opening with "let's look at the substance of this guy" whose license to dispense narcotic drugs had been "surrendered to those guys in Jefferson City that watch doctors...." After the overruling of plaintiff's objection, defendants' attorney concluded with a sarcastic reference to the hospital through which Dr. Halinsky dispensed drugs. This argument does not even purport to suggest how the surrender of his drug dispensing license affected his skill, knowledge or qualifications as an expert medical witness. Rather, its calculated effect was to cast a pall of disparagement over the doctor's testimony by reason of irrelevant misconduct. We cannot conclude that this argument, impliedly approved by the trial court's overruling of the objection and request for an instruction to disregard, did not influence the jury to discount the testimony of plaintiff's only expert witness.

Usually the injection of irrelevant evidence does not engender the level of prejudice which "materially affect[s] the merits of the action," thus requiring reversal. Rule 84.13(b). However, this is not such an instance. Halinsky's testimony was crucial to plaintiff's case.

The forced disclosure of Dr. Halinsky's past drug abuse affected neither his qualification as an expert witness nor his credibility. It served only to besmirch his character. To conclude that such evidence, pertaining to the one witness whose testimony was essential to plaintiff's case, did not materially affect the merits of the case would be to ignore the poison inherent in the public perception of drug abuse.

The judgment is reversed and the cause is remanded for a new trial.

SNYDER, C.J., and SIMEONE, Senior Judge, concur.

Mo.App. E.D. 1987.
Noble v. Lansche
735 S.W.2d 63

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EXHIBIT G

Westlaw.

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(Cite as: 244 Kan. 147, 768 P.2d 253)

H

Supreme Court of Kansas.
Charles R. STICKNEY, Appellant,
v.
The WESLEY MEDICAL CENTER, A Corporation, and Ron Morford, M.D., Appellees.

No. 60773.
Jan. 20, 1989.

Automobile accident victim brought medical malpractice action against hospital and emergency room physician. The District Court, Sedgwick County, Kenneth C. Kimmel, J., entered judgment in favor of the defendants, and the plaintiff appealed. The Court of Appeals, 758 P.2d 755 (unpublished opinion), reversed, and defendants petitioned for review. The Supreme Court, Holmes, J., held that: (1) erroneous admission of collateral source evidence in medical malpractice action pursuant to statute held to be unconstitutional was harmless where jury found in favor of physician and hospital, and (2) plaintiff was not entitled to impeach defendant physician's expert witness by use of extrinsic evidence dealing with a collateral matter, the negligence of hospital in an unrelated lawsuit.

Reversed.

Allegrucci, J., filed an opinion concurring in part and dissenting in part.

West Headnotes

[1] Evidence 157 ⚿560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases

In medical malpractice action, trial court did not abuse its discretion in ruling that hospital could introduce impeachment evidence that patient's deceased expert witness' hospital staff privileges had been terminated if patient introduced deposition of expert witness.

[2] Health 198H ⚿820

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk820 k. Admissibility. Most Cited Cases
(Formerly 299k18.70 Physicians and Surgeons)

Admission of testimony of emergency room nurse assistant, which consisted of her observations and treatment of patient and one personal instance when she had been involved in an auto accident, did not constitute an abuse of discretion in medical malpractice action brought by automobile accident victim.

[3] Health 198H ⚿820

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk820 k. Admissibility. Most Cited Cases
(Formerly 299k18.70 Physicians and Surgeons)

Question asked of emergency room nurse's assistant as to whether, in her experience, paralysis had ever resulted from movement of a patient's head was irrelevant in medical malpractice action brought by automobile accident victim who did not allege that he suffered paralysis following his treatment in emergency room.

[4] Appeal and Error 30 ⚿1052(7)

30 Appeal and Error
30XVI Review

30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1052 Defect Supplied or Objection Removed Subsequently
30k1052(7) k. Evidence as to One Issue Made Immaterial by Finding on Another. Most Cited Cases
(Formerly 299k18.130 Physicians and Surgeons)
Erroneous admission of collateral source evidence in medical malpractice action pursuant to statute held to be unconstitutional was harmless where jury found in favor of physician and hospital. K.S.A. 60-3403 (Repealed).

[5] Evidence 157 ⚷560

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k560 k. Contradiction and Impeachment. Most Cited Cases
Patient was not entitled to impeach defendant physician's expert witness by use of extrinsic evidence dealing with a collateral matter, the negligence of defendant hospital in an unrelated lawsuit.

[6] Witnesses 410 ⚷268(2)

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k268 Scope and Extent of Cross-Examination in General
410k268(2) k. Knowledge or Source of Information. Most Cited Cases

Witnesses 410 ⚷269(1)

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k269 Limitation of Cross-Examination to Subjects of Direct Examination
410k269(1) k. In General. Most Cited Cases
In medical malpractice action, patient was not entitled to cross-examine a defense witness with respect to matters which exceeded scope of direct examination and as to procedures of which defense witness had no knowledge or expertise.

***253 *147 Syllabus by the Court*

In an appeal by the plaintiff in a medical malpractice action, the record is examined and it is held that the trial court did not commit reversible error in: (1) ruling that impeachment evidence would be admissible if plaintiff introduced the discovery deposition of a deceased witness; (2) its rulings upon the admissibility of evidence; (3) its rulings upon objections to certain areas of cross-examination of various witnesses; and (4) the admission of collateral source benefits evidence.

William L. Fry of Fry, Reynolds & Reeves, P.A., Wichita, argued the cause and was on the brief for appellant.

****254** Carl L. Wagner of Boyer, Donaldson & Stewart, Wichita, argued the cause and was on the brief for appellee Wesley Medical Center.

Timothy B. Mustaine of Foulston, Siefkin, Powers & Eberhardt, Wichita, argued the cause and was on the brief for appellee Ron Morford, M.D.

HOLMES, Justice:

Charles R. Stickney, the plaintiff in a medical malpractice action, appeals from a jury verdict finding that neither of the defendants committed medical malpractice nor was negligent in the treatment of the plaintiff. The Court of Appeals, in an unpublished opinion filed July 15, 1988, 758 P.2d 755, reversed the judgment and ordered a new trial on the basis that the admission of collateral source benefits evidence was inherently prejudicial. The Court of Appeals did not address the other issues asserted by Mr. Stickney in his appeal. We granted petitions for review filed by The Wesley Medical Center (Wesley) and Ron Morford, M.D., the two original defendants.

On September 30, 1983, at about 3:30 a.m.,

Charles R. Stickney was involved in an auto accident in Wichita while en route to work. He was transported by ambulance to Wesley. Ambulance personnel had placed Stickney on a spine board and had protected his neck against movement with a cervical collar and foam ***148** wedges. These precautions were standard procedure routinely undertaken with victims of automobile accidents. Stickney and the spine board were transferred from the ambulance to a hospital gurney at Wesley and wheeled to its emergency room.

Upon Stickney's arrival at the emergency room, Jeanmarie Epperly, a nurse assistant, and Dr. Ron Morford, the emergency room physician, attended to the plaintiff. Stickney did not report any neck pain or tenderness, and neither Epperly nor Morford, during their initial examinations of Stickney, observed any other signs normally associated with neck injuries.

Dr. Morford sent Stickney to the x-ray lab for the purpose of obtaining x-rays of his chest and left elbow. Stickney was still confined to the spine board with his neck protected by the cervical collar and foam restraints. During this period Stickney's wife and daughter arrived at Wesley. Upon his return from x-ray, Stickney was asked to sit up or stand up so the spine board could be removed from the gurney and returned to the ambulance personnel. He sat up and put his legs over the side of the gurney. Epperly testified that after 10 to 15 seconds Stickney insisted on standing up, even though she had told him to wait two to three minutes before he stood up. His daughter testified that Stickney slid off the side of the gurney toward the floor, his head slumping forward, and that her mother blocked his fall with her arm. Stickney broke out in a sweat, appeared to be short of breath, and complained of dizziness, chest pain, and neck pain. Epperly testified that she held Stickney's arm while calling for help, that he was laid back down on the gurney, and that he did not fall to the floor.

After Stickney's condition stabilized, Dr. Morford ordered an x-ray of his cervical spine, which revealed a fracture of the second cervical vertebra. Stickney subsequently developed a number of complications, necessitating a prolonged hospital stay.

Stickney filed this lawsuit on September 26, 1985, seeking damages for injuries and other losses sustained because of the alleged malpractice of Wesley and Dr. Morford. After a lengthy trial, the jury returned a verdict finding none of the parties to be at fault.

At the trial, collateral source benefits evidence was admitted pursuant to K.S.A. 1987 Supp. 60-3403 (subsequently held unconstitutional***149** in *Farley v. Engelken,* 241 Kan. 663, 740 P.2d 1058 [1987], and since repealed). The Court of Appeals reversed the judgment in this case in reliance upon *Farley* and our recent decision in *Harrier v. Gendel,* 242 Kan. 798, 751 P.2d 1038 (1988). Additional facts will be set forth as they become relevant to the various issues on appeal.

****255** [1] The first issue is whether the trial court erred in ruling that, if plaintiff introduced Dr. Charles Girod's deposition into evidence, the defendants would be permitted to admit certain evidence for impeachment purposes. In the pretrial conference order filed January 27, 1987, Charles Girod, M.D., deceased, was identified by the plaintiff as a witness by deposition. Dr. Girod had been deposed during discovery proceedings by attorneys for the defendants. Dr. Girod died after the deposition was taken but before trial. Defendant Wesley had filed a motion in limine to prohibit introduction of Dr. Girod's deposition, arguing that the deposition allowed inadequate opportunity for cross-examination of Dr. Girod as plaintiff's expert witness. The motion was denied.

On February 13, 1987, Wesley filed a motion seeking permission to introduce evidence that Dr. Girod's staff privileges at El Dorado Hospital had been terminated. Following a hearing on the motion, the court ordered production of the documents alleged to be pertinent to the matter and ordered that they be made available to all counsel. The

judge specifically reserved until trial the issue of whether the documents or related testimony would be admissible. Although no record was made of the February 20 hearing on the motion, a journal entry reflecting the proceedings and the trial court's orders was filed February 27, 1987. The journal entry was approved by plaintiff's counsel.

On March 6, 1987, plaintiff filed a motion in limine, in part asking the court to prohibit defendants from presenting any evidence maligning the reputation of Dr. Girod. At trial, counsel for Wesley again requested that the court disallow Dr. Girod's discovery deposition. The trial court declined to reverse the earlier ruling allowing admission of the deposition. Wesley then renewed its motion to admit impeachment evidence. Specifically, Wesley sought to introduce evidence that Dr. Girod had falsified hospital records pertinent to a medical malpractice case in which he was involved while on the medical staff of El ***150** Dorado Hospital and that following peer review proceedings his privileges at the hospital were terminated. Dr. Girod's deposition testimony had been to the contrary in that he asserted he had not been the subject of any disciplinary proceedings, had not been subjected to peer review proceedings by the hospital, had been cleared of everything, and had voluntarily resigned because of politics and disagreement with the hospital administrator. The trial court held that the defendants would be permitted to impeach Dr. Girod's deposition testimony. Plaintiff's counsel then moved for a mistrial, arguing that the court's ruling was unfair and a complete surprise. The court denied the motion. Plaintiff proceeded with the trial but elected not to introduce Dr. Girod's deposition.

The plaintiff argues that the trial court reversed its earlier ruling prohibiting defendants from introducing the impeachment evidence. He contends that the ruling was a complete surprise and was a gross abuse of discretion and that the hospital documents proposed by the defense for introduction were inadmissible hearsay evidence under K.S.A. 1987 Supp. 60-460. He also argues that the impeachment evidence would have been so highly prejudicial as to render Dr. Girod's deposition worthless. Plaintiff's arguments that he was surprised and that the court's ruling was a reversal of a prior ruling are totally without merit. In a journal entry filed over three months prior to trial, which was approved by plaintiff's counsel, the court stated: "The Court specifically reserves until the time of trial any and all rulings upon the admissibility into evidence of any of the above documents [the hospital records relating to Dr. Girod's hospital privileges] or testimony relating to said documents." Plaintiff's counsel should not have been surprised by the position asserted by Wesley or by the court's ruling on this matter.

On cross-examination of an expert witness, great latitude is necessarily indulged in order that the intelligence of the witness, his powers of discernment, and his capacity to form a correct judgment may be submitted to the jury so it may have an opportunity for determining the value of the testimony. ****256***Bourgeois v. State Highway Commission,* 179 Kan. 30, 34, 292 P.2d 683 (1956). In *Bott v. Wendler,* 203 Kan. 212, 228, 453 P.2d 100 (1969), this court stated:

> "The latitude permitted in the cross-examination of an expert witness is even ***151** wider than in the case of an ordinary opinion witness. No rule can be laid down that would determine the extent and limitation of cross-examination allowable in every case. Generally speaking, the matter must rest in the sound discretion of the judge trying the case."

It is true that the evidence the defendants proposed to use to impeach Dr. Girod's testimony would have been extremely prejudicial and damaging. However, it is also clear that, if it had not been for the untimely death of Dr. Girod, the evidence could have been used in cross-examination of his live testimony. We think it was equally admissible when plaintiff desired to use the discovery deposition taken by defendants to his own advantage.

Plaintiff's brief on appeal, although not entirely clear, seems to assert that the impeaching documents would amount to inadmissible hearsay evidence pursuant to K.S.A. 1987 Supp. 60-460. The hearsay argument was not specifically raised before the trial court, but even if the issue is properly before this court, the documents would appear to be admissible as business records pursuant to the exception in K.S.A. 1987 Supp. 60-460(m). We find no abuse of discretion by the trial court on this issue.

The second issue is whether the trial court erred in permitting Jeanmarie Epperly to testify as an expert and to relate a personal experience as a victim of an automobile accident. Plaintiff also argues that the trial court should have permitted plaintiff's counsel to question Epperly concerning whether, in her experience, paralysis had ever resulted from movement of a patient's head.

[2] Jeanmarie Epperly was called by the plaintiff as an adverse witness. On direct examination, plaintiff's counsel asked Epperly about her scholastic training and brought out that she was not a registered nurse. On cross-examination, counsel for Wesley presented evidence as to her educational and employment history. There is no support in the record for plaintiff's contention that Epperly testified as an expert witness for the defendants. All of her testimony was directed to her observations and treatment of the plaintiff and to one personal instance when she had been involved in an auto accident. She was allowed to testify that in her own case she had been transported to the hospital on a spine board with her neck in restraints and was not given a cervical spine x-ray after her arrival. One of plaintiff's theories was that a cervical spine x-ray should have been performed immediately, since he was transported to Wesley on a spine board, immobilized***152** by a cervical collar and foam wedges. We find no abuse of discretion in the allowance of the testimony, which had some relevance to one of the claims asserted by the plaintiff.

[3] On redirect examination, plaintiff's counsel asked Epperly the following question: "Have you ever had an occasion where a patient in the Emergency Room at Wesley, whose head had been permitted to be moved and as a result of that movement the patient was paralyzed?" Counsel for Wesley immediately objected, arguing the question was too vague and general. The court sustained the objection.

Generally, the relevance of testimony elicited by a party from any witness, and the scope of both direct and cross-examination of a witness, is subject to reasonable control by the trial court. Exercise of reasonable control will not constitute reversible error absent a showing of abuse of discretion resulting in prejudice. *Manley v. Rings,* 222 Kan. 258, 261, 564 P.2d 482 (1977).

Plaintiff did not allege that he suffered paralysis following his treatment in the Wesley emergency room. The question posed to Epperly was irrelevant to this case. Whether or not head movement had ever caused a patient paralysis in Epperly's experience at Wesley had no bearing on any material issue in this case. No error or abuse of discretion has been shown.

****257** [4] The next issue involves the admission of collateral source benefits evidence pursuant to K.S.A. 1987 Supp. 60-3403. At trial, evidence was admitted indicating that plaintiff had Teamster's Union insurance and that nearly all his medical expenses had been reimbursed.

Subsequent to the trial of this case a majority of this court held K.S.A. 1987 Supp. 60-3403 unconstitutional in *Farley v. Engelken,* 241 Kan. 663, 740 P.2d 1058 (1987). In *Harrier v. Gendel,* 242 Kan. 798, 751 P.2d 1038 (1988), the jury in a medical malpractice action found the defendant doctor had not been negligent in any degree, the same as in the present case. In *Harrier* the defendant doctor argued that the evidence of collateral source benefits related solely to the issue of damages and that the erroneous introduction of the evidence was harmless, since the jury returned a verdict of no

negligence on the doctor's part. The plaintiff argued that the introduction of the collateral source benefits evidence was prejudicial, since it might have improperly influenced the jury on the issues of liability and negligence. This court stated:

> ***153** "It is impossible to say that the jury's verdict was free from the prejudicial impact of the collateral source benefit evidence. To allow the introduction of evidence that the plaintiff received collateral source benefits is inherently prejudicial and requires reversal." 242 Kan. at 802, 751 P.2d 1038.

Justice Lockett, in a well-reasoned short dissent stated:

> "I agree with the majority's statement that evidence that a party received collateral source benefits is not admissible in a trial. *Farley v. Engelken,* 241 Kan. 663, 740 P.2d 1058 (1987). Under the instructions, however, the jury was not required to determine the collateral source issue. First, the jury was instructed to determine whether the defendant, Dr. Gendel, was negligent in his treatment of the plaintiff. If the jury found that the defendant was negligent, only then could it consider the fact that the plaintiff received collateral benefits while determining the compensation due the plaintiff.
>
> "The burden is upon the plaintiff to show that jurors disregarded their oath, not as a matter of speculation, but as a demonstrable reality. There must be more than speculation that it was reasonably certain defendant did not receive a fair trial. *State v. Ruebke,* 240 Kan. 493, 498-99, 731 P.2d 842 (1987). Where a party claims error in the admission of certain evidence, there is no presumption of prejudice from the introduction of evidence alone; in addition, the party claiming error must also prove that the error prejudiced the party. *Walters v. Hitchcock,* 237 Kan. 31, 35, 697 P.2d 847 (1985).
>
> "Unlike the majority, I cannot find that as a matter of law the improper introduction of evidence of collateral source benefits into the trial was so inherently prejudicial that it caused the jurors to disregard their oath and the judge's instructions and to decide the case on an improper ground. It is true the plaintiff did not receive a perfect trial, but he did receive a fair trial. I would affirm the judgment." 242 Kan. at 802, 751 P.2d 1038.

In view of our holding in *Harrier,* the Court of Appeals reversed the present case and ordered the case remanded for a new trial. Our holding in *Harrier* that the admission of collateral source benefits evidence was "inherently prejudicial and requires reversal" was controlling at the time of the Court of Appeals' opinion in this case.

However, in the very recent case of *Wisker v. Hart,* 244 Kan. 36, Syl. ¶ 4, 766 P.2d 168 (1988), we overruled *Harrier* and held:

> "The erroneous admission of collateral source evidence pursuant to K.S.A. 1987 Supp. 60-3403 (held unconstitutional in *Farley v. Engelken,* 241 Kan. 663, 740 P.2d 1058 [1987], and since repealed) is held to be harmless error where the jury found the plaintiff's decedent to be 60 percent at fault and, accordingly, did not determine damages. Our holding in *Harrier v. Gendel,* 242 Kan. 798, 751 P.2d 1038 (1988), to the contrary is overruled."

****258** *Wisker* controls this issue now before the court and requires that ***154** we reverse the Court of Appeals' opinion herein. In view of the very recent opinion in *Wisker,* we see no need to dwell upon this issue further.

[5] The fourth issue is whether the trial court committed reversible error in refusing to permit plaintiff's counsel to cross-examine Dr. Greg Snyder regarding Snyder's alleged claim against Wesley in a prior malpractice action. Plaintiff alleges that this line of questioning was designed to challenge Dr. Snyder's credibility.

Dr. Snyder, a neurosurgeon, was called as an expert witness on behalf of Dr. Morford. Dr. Snyder had examined and treated Stickney soon after his arrival at Wesley. He testified that in his opinion Stickney's spinal cord injury occurred during the auto accident. He also testified that in his opinion nothing done in the emergency room in any way caused or contributed to Stickney's prolonged hospital stay.

On cross-examination, plaintiff's counsel inquired about a previous malpractice action naming Dr. Snyder, Wesley, and others as defendants. The witness was asked whether he had claimed in that suit that the plaintiff's injuries were caused by Wesley and the defendant radiologists. He responded, "I didn't make any claim that was true." The court sustained the objection by Wesley's counsel on the ground that the question was immaterial. Out of the hearing of the jury, plaintiff's counsel proffered that in the prior lawsuit Dr. Snyder was found not at fault and 100 percent of the fault was attributed to Wesley and the other defendants. Under the doctrine of comparative fault, certain pleadings filed on behalf of Dr. Snyder had alleged that if there was any negligence it was that of Wesley and the other defendants and not Dr. Snyder. Counsel argued he was entitled to show that Dr. Snyder's statement that he had made no claim against Wesley was incorrect.

Although the witness had answered the question before the court had an opportunity to rule on the objection, the ruling sustaining the objection was correct. When read in the context of a cold record the answer, at best, is ambiguous. In any event, the entire line of questioning which related to an unconnected case was not material or relevant to the issues in this case. Extrinsic evidence of a prior inconsistent statement may be admitted for impeachment purposes only if the subject matter of the inconsistency***155** is material to the instant case. Lilly, An Introduction to the Law of Evidence § 84 (1978). In this case, the plaintiff sought to impeach the witness using extrinsic evidence dealing with a collateral matter-the negligence of Wesley in an unrelated lawsuit. The evidence was therefore properly excluded by the trial court. See *State v. Carter,* 148 Kan. 472, 473, 83 P.2d 689 (1938); *State v. Ray,* 54 Kan. 160, 161, 37 Pac. 996 (1894). In *State v. Alexander,* 89 Kan. 422, Syl. ¶ 3, 131 Pac. 139 (1913), this court held: "Evidence should not be admitted to contradict a statement of a witness elicited upon cross-examination upon a purely collateral matter which does not tend to prove or disprove an issue in the case, the contradictory evidence being offered by the party eliciting the statement."

The scope and extent of cross-examination for impeachment purposes rests largely in the trial court's discretion. *State v. Nixon,* 223 Kan. 788, 794, 576 P.2d 691 (1978); *State v. Nix,* 215 Kan. 880, 884, 529 P.2d 147 (1974). We find no abuse of discretion in the court's ruling.

Plaintiff also apparently complains that the trial court erred in sustaining objections to other questions propounded to Dr. Snyder on cross-examination. This line of questioning pertained to whether a cervical spine x-ray should have been taken prior to the time Stickney was permitted to sit up without wearing a cervical collar, and whether a cervical spine x-ray was indeed taken prior to that incident. Since plaintiff has not specifically briefed his arguments pertaining to this issue, it is waived or abandoned. *Feldt v. Union Ins. Co.,* 240 Kan. 108, 112, 726 P.2d 1341 (1986); *Steele v. Harrison,* 220 Kan. 422, 429, 552 P.2d 957 (1976).

****259** [6] The fifth issue is whether the trial court erroneously denied plaintiff his right to cross-examine Dr. Philip Mills by sustaining various objections lodged by the defendants.

Dr. Mills testified for defendant Wesley. He is a physician whose specialty is physical medicine and rehabilitation. He was initially consulted in the Stickney case on December 9, 1983, and was responsible for directing Stickney's rehabilitation therapy from that date until after his discharge from

the hospital.

The record does not support plaintiff's argument that he was denied his right to cross-examine Dr. Mills. Although the court did sustain several objections to particular questions raised on ***156** cross-examination, none of the rulings constitute reversible error. The scope of cross-examination lies within the sound discretion of the trial court. *Kearney v. Kansas Public Service Co.,* 233 Kan. 492, 501, 665 P.2d 757 (1983). The evidence plaintiff sought to elicit concerned events which took place when Stickney was first brought to the emergency room. The questions not only exceeded the scope of direct examination, but Dr. Mills repeatedly testified he had no knowledge or expertise regarding emergency room procedures. No abuse of discretion has been shown.

The last issue is whether the jury's verdict must be set aside and a new trial granted because the jury was permitted to read and examine certain depositions that were not admitted in evidence. This issue was never raised before the trial court and is not properly before this court for review. *Kansas Dept. of Revenue v. Coca Cola Co.,* 240 Kan. 548, 552, 731 P.2d 273 (1987). In addition, the record is not sufficient to afford meaningful review.

The decision of the Court of Appeals is reversed and the judgment of the trial court is affirmed.

SIX, J:, not participating.
ALLEGRUCCI, Justice, concurring in part and dissenting in part:

I concur with the majority in all but section (4) of the syllabus and the corresponding portion of the opinion. This court's decision in *Harrier v. Gendel,* 242 Kan. 798, 751 P.2d 1038 (1988), was correct and I would reverse and remand the case for a new trial.

Kan.,1989.
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IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE

This is a medical malpractice case set for trial before this court on November 5, 2013. Pending before the court are the defense motions in limine. While most of the six defense motions in limine are self-explanatory, below is additional authority for consideration by the court in support of the defense motions.

1. Plaintiff Should Be Prohibited From Any Mention Of Liability Insurance.

Defendants move to prohibit Plaintiff Charles Ballard, his counsel, or any of his witnesses from in any way, directly or indirectly, mentioning to the jury, during either *voir dire*, Plaintiff's case in chief, cross-examination or rebuttal, or opening or closing statements, introducing evidence, submitting jury instructions, mentioning, or offering testimony or reports relating to the issue of Defendants' liability insurance.

Rule 402 of the Idaho Rules of Evidence (I.R.E.) prohibits a party from introducing any evidence that is not relevant. According to I.R.E. 401, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." The disputed facts and issues in this matter relate to Plaintiff's allegations of medical malpractice. The Defendants' possession of liability insurance is not likely to make the existence of any fact needed for the determination of this claim more or less probable. Therefore, evidence of Defendants' insurance is not relevant to this case and Plaintiff should be barred from introducing it at trial.

In the alternative, if this Court finds that information regarding liability insurance is relevant, under I.R.E. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, any potential probative value of evidence regarding the Defendants' insurance coverage is substantially outweighed by the risk of unfair prejudice. Plaintiff can prove his claim for malpractice without a necessary reference to the Defendants' liability insurance. The prejudicial effect of an unnecessary reference to liability insurance, however, is substantial. Evidence of a party's insurance coverage is likely to be misused by the jury.

Under I.R.E. 411, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." The Advisory Committee on the Federal Rules of Evidence explained that Rule 411 is based on "the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds." **Fed. R. Evid. 411** advisory committee's note (1972). Although evidence of liability insurance may be admissible for a limited purpose, none of the limited applications are appropriate for the case at bar. ***See*** I.R.E. 411. The mention of liability insurance will only put in the minds of the jury that Defendants are insured. ***See Lehmkuhl v. Bowland***, 114 Idaho 503, 508; 757 P.2d 1222, 1227 (Ct. App. 1998) (review denied) (Idaho Rule of Evidence 411 may be utilized to assure that issues of liability based upon insurance are not introduced). Such an inference will unfairly and unnecessarily prejudice the jury to conclude that it will not be the Defendants' own personal money that would pay any potential verdict.

The decision whether to allow inquiries relating to insurance during *voir dire* is a matter within the trial court's discretion. ***See Harris v. Alessi***, 141 Idaho 901, 907, 120 P.3d 289, 295 (Ct. App. 2005). However, "[t]he fact that this practice is not forbidden by Idaho law does not mean that a trial court must allow it. " ***Id.*** (citing ***Kozlowski v. Rush***, 121 Idaho 825, 831, 828 P.2d 854, 860 (1992)). Here, there is no indication that allowing Plaintiff's counsel to make statements regarding liability insurance during *voir dire* will contribute to a purported aim of ferreting out juror bias. Any reference to liability insurance during *voir dire* will be highly prejudicial in that it will signal to the jury that the Defendants are insured.

For the foregoing reasons, the Court should enter an order prohibiting Plaintiff from discussing, in any way, the issue of Defendants' liability insurance.

2. Plaintiff Should Be Prohibited From Discussing The Issue Of Whether Any Defendant or Defense Expert Has Been Sued For Malpractice Or Has Any Prior Board Or Licensing Matters.

Defendants move to prohibit Plaintiff Charles Ballard, his counsel, or any of his witnesses from in any way, directly or indirectly, mentioning to the jury, during either *voir dire*, Plaintiff's case in chief, cross-examination or rebuttal, or opening or closing statements, introducing evidence, submitting jury instructions, mentioning, or offering testimony or reports relating to whether any Defendant or defense expert has been sued for malpractice or has been the subject of any prior administrative licensing matter. Information regarding any such issue is irrelevant and would be unfairly prejudicial to the Defendants.

Per I.R.E. 401, information regarding an expert's previous lawsuit history would be irrelevant and therefore under I.R.E. 402, inadmissible. The disputed facts and issues in this matter relate to Plaintiff's allegations of medical malpractice. Whether any of the defendants or defense experts have ever been sued for medical malpractice or have been involved in any board proceeding has no tendency to make the existence of facts related to Plaintiff's allegations of malpractice more or less probable. Therefore, information regarding previous lawsuits of any defense expert is irrelevant and is not admissible.

Even if this Court were to find information regarding any of the defense expert's medical malpractice lawsuits or prior board proceedings to somehow be relevant, its probative value is grossly outweighed by the risk of unfair prejudice to the

Defendants and should be excluded under I.R.E 403. "It is well established that a trial court has considerable discretion to exclude evidence for reasons ... that the evidence is confusing, and could [be] interpreted in many different ways." ***Burgess v. Salmon River Canal Co., Ltd.***, 127 Idaho 565 574, 903 P.3d 730, 739 (1994). Any mention that a Defendant or defense expert has been sued or has been the subject of a prior board matter is unfairly prejudicial because such information could be interpreted by the jury in myriad ways which are not applicable to the case at bar. The raising of such a collateral issue by Plaintiffs' counsel will result in a protracted mini-trial on such issues which will only serve to confuse and distract the jury from the actual limited malpractice issues before them.

Attached to the affidavit of counsel in support of the Defendants' motions in Limine are the reported decisions from a number of other jurisdictions wherein the issue of using prior disciplinary matters and/or prior malpractice claims for impeachment purposes was held improper, see ***Noble v. Lansche***, 735 S.W. 2d (Mo. Ct. App. 1987) (holding evidence that medical malpractice Plaintiff's expert witness physician had voluntarily surrendered his license to dispense narcotics was inadmissible impeachment); ***King v. Byrd***, 716 So.2d 831, 835 (Fla. 4th DCA 1998) (error for trial court to allow defense counsel to cross examine plaintiff's expert witness with questions concerning past disciplinary proceedings since such questions are an improper attack on the witness' credibility); ***Heshelman v. Lombardi***, 454 N.W. 2d 603 (Mich. Ct. App. 1990) (trial court abused discretion in allowing cross examination of medical expert regarding prior claims of malpractice as it is not probative of his truthfulness or competency and knowledge – such allegations of malpractice are analogous to unproven charges of

criminal activity); ***Stickney v. Wesley Medical Center***, 768 P.2d 253 (Kan. 1989) (affirming in part on grounds that plaintiff sought to improperly impeach defense medical expert with extrinsic evidence involving an unrelated lawsuit); ***Manhardt v. Tamton***, 832 So.2d 129 (Fla. 2nd DCA 2002) (Plaintiff entitled to new trial, in part, after defense counsel improperly questioned plaintiff expert about prior lawsuits); ***Morrow v. Stivers***, 836 S.W.2d 464 (Kent. Ct. App. (1992) (trial court properly precluded counsel from asking plaintiff medical expert on cross examination whether he had his license to practice medicine suspended for five years due to passing hepatitis to several patients, citing general rule that a witness cannot be cross examined on a collateral matter which is irrelevant to the issue at hand); ***Hathcock v. Wood***, 815 So.2d 502 (Ala. 2001)(affirming district court's refusal to allow counsel from asking plaintiff medical expert on cross examination as to the probationary status of his professional license, citing that under Rule 608(b), the only kind of evidence that may be presented as to an expert's character for truthfulness is evidence regarding the expert's general reputation in the community for untruthfulness or opinion testimony from another competent witness).

Although no such reported decisions exist on this narrow topic in Idaho, the majority of these case authorities have adopted rules of evidence which are identical or nearly identical to those in Idaho. These decisions aptly demonstrate the improper nature of cross examination questions which seek to delve into an experts past lawsuits and board matters. Such allegations are analogous to unproven accusations which may not be used for impeachment purposes. The attempt at impeachment using such evidence does not address the expert's skill, knowledge, or qualifications as an expert medical witness; instead, its calculated effect is to simply cast a pall of disparagement

over the doctor's testimony by reason of irrelevant misconduct. For these reasons, such evidence should be excluded at the trial.

In Idaho, medical malpractice actions are governed by Idaho Code § 6-1012. In this case, Plaintiff's claim against Dr. Kerr is judged relative to his compliance with the standard of health care practice applicable to a physician engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. Any discussions of any other suits involving any other case or expert, would involve injecting into the trial collateral issues, a different standard of health care practice and a different time for which no expert testimony has been disclosed. For the foregoing reasons, the Court should enter an order prohibiting Plaintiff from presenting evidence or testimony regarding any Defendant or defense expert's prior medical malpractice lawsuits, claims and/or licensing matters of any kind.

3. Plaintiff Should Be Prohibited From Presenting Evidence, Or Discussing In Any Way, Defense Expert Gregory Laurence, M.D.'S Yet To Be Resolved Indictment By A Federal Grand Jury.

Defendants move to prohibit Plaintiff Charles Ballard, his counsel, or any of his witnesses from in any way, directly or indirectly, mentioning to the jury, during either *voir dire*, Plaintiff's case in chief, cross-examination or rebuttal, or opening or closing statements, introducing evidence, submitting jury instructions, mentioning, or offering testimony or documents of any kind relating to the issue of Dr. Gregory Laurence's federal grand jury indictment.

Dr. Gregory Laurence is a defense standard of practice expert from Tennessee. At his October 2013 deposition, Dr. Laurence was questioned by Plaintiff's counsel regarding a federal grand jury indictment filed against him and others which was

filed in Colorado for alleged violation of 26 U.S.C. § 7212(a) and 18 U.S.C. § 2 – Corrupt Endeavor to Obstruct or Impede Due Administration of the Internal Revenue Laws and Aiding and Abetting) and for alleged violation of 18 U.S.C. § 1503 – Obstruction of Justice). The indictment was handed down in May 2013 and this matter is still simply at the indictment phase. No trial date, plea or conviction of any kind has been entered against Dr. Laurence. The defense contends that to allow any reference to Dr. Laurence's indictment at the trial would be unfairly prejudicial, irrelevant and arguably raise an appeal issue.

Under I.R.E. 401, information regarding a defense expert's grand jury indictment is irrelevant and under I.R.E 402, is not admissible. The disputed facts and issues in this matter relate to Plaintiff's allegations of medical malpractice involving the death of Krystal Ballard. Whether Dr. Laurence, who is acting as a defense expert, has been indicted by a federal grand jury on an unrelated contested tax issue is an entirely collateral issue which has absolutely no tendency to make the existence of facts related to Plaintiff's allegations of medical malpractice more or less probable. Therefore, information regarding his indictment is irrelevant and not admissible.

Even if this Court were to conclude that information regarding Dr. Laurence's grand jury indictment to be somehow relevant, its probative value is grossly outweighed by the risk of unfair prejudice to the Defendants. As a result, it should be excluded under I.R.E 403. More to the point, I.R.E. 608(b) prohibits the admission of extrinsic evidence of a witness's prior misconduct to impeach a witness's credibility. While there is an exception under I.R.E. 609 for impeachment by evidence of conviction of a crime, that exception does not apply to Dr. Laurence's indictment which is not a

conviction of any kind. Rule 609(a) states:

> For the purpose of attacking the credibility of a witness,, evidence of the fact that the witness **has been convicted of a felony** and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness.

(Emphasis added). Furthermore, under Federal Rule of Evidence 609, which I.R.E. 609 was modeled after, "the following do not qualify as convictions, i.e., are inadmissible [under Rule 609]: an indictment, an arrest, acts that may be criminal but have not been prosecuted ...." ***Frazier v. IMED Corp.***, 2003 WL 1984366, *3 (Del. Super. Ct. April 25, 2003) (citing 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 609.03, at 609-13 to 609-14 (citations omitted) (Joseph M. McClaughlin ed., 2d ed. 2002) (internal quotations omitted). In the instant case, extrinsic evidence regarding Dr. Laurence's grand jury indictment is inadmissible because not been convicted of a felony.

If allowed into evidence, Dr. Laurence would be unfairly impeached by the jury without him ever being able to defend himself. It would open up an entirely irrelevant issue which would consume court time and force the defense to interrupt the trial in order to present a mini-trial on the collateral issue of why Dr. Laurence is not guilty of tax evasion. Finally, use of the indictment would not even be relevant for impeachment purposes because Dr. Laurence did not deny its existence, but rather he truthfully admitted in his deposition all about the indictment before opposing counsel elected to produce the indictment.

For the foregoing reasons, the Court should enter an order prohibiting

Plaintiff from presenting any evidence or testimony regarding defense expert Dr. Laurence's grand jury indictment.

DATED this 21st day of October, 2013.

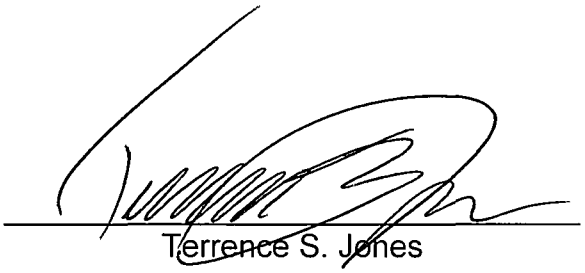
QUANE JONES McCOLL, PLLC

By /s/
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2013, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Terrence S. Jones

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Tard
10-22-13
DJ

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF HEARING

TO: THE ABOVE ENTITLED PARTIES/PLAINTIFFS and their attorneys of record:

YOU WILL PLEASE TAKE NOTICE that on Tuesday, the 5th day of November, 2013, at 9:30 a.m. of said day, or as soon thereafter as counsel can be heard,

before the Honorable Deborah A. Bail, at the Ada County Courthouse, Boise, Idaho, the undersigned will call up for hearing before the Court Defendants' Motions in Limine.

DATED this 21st day of October, 2013.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2013, I served a true and correct copy of the foregoing NOTICE OF HEARING by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896

_____
Terrence S. Jones

ORIGINAL

Jeremiah A. Quane, ISB No. 977
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM

COME NOW, Defendants, by and through their counsel of record, Quane Jones McColl, PPLC, respectfully request the following jury instruction Nos. 1 through 28 and Special Verdict Form.

DATED this 21st day of October, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2013, I served a true and correct copy of the foregoing DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

_____
Jeremiah A. Quane

DEFENDANTS' REQUESTED

INSTRUCTION NO. 1

These instructions define your duties as members of the jury and the law that applies to this case. Your duties are to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. In so doing, you must follow these instructions. You must consider them as a whole, not picking out one or disregarding others. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rule of law. At times during the trial, I may sustain an objection to a question without permitting the witness to answer it or to an offered exhibit without receiving it into evidence. I will do this when the question called for testimony that was not admissible or when the exhibit itself was inadmissible. In reaching your decision, you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. In addition, where an answer is given or an exhibit received, I may instruct that it be stricken from the record, that you disregard it and that you dismiss it from your minds. I will do this when it becomes apparent that the evidence

GIVEN X
REFUSED
MODIFIED X
COVERED
OTHER

was inadmissible only after it had been presented to you. In reaching your decision, you may not consider this testimony or exhibit. Except as explained in this instruction, none of my rulings are intended by me to indicate any opinion concerning the evidence in this case.

The arguments and remarks of the attorneys involved in this case are intended to help you in understanding the evidence and applying the instructions, but they are not themselves evidence. If any argument or remark has no basis in the evidence, then you should disregard it. However, there are two exceptions to this rule: (1) An admission of fact by one attorney is binding on his party; and (2) stipulations of fact by all attorneys are binding on all parties.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In evaluating the testimony, you should consider such items as: the interest, bias or prejudice of any witness in the outcome of this case; the age and appearance of the witness and the manner in which he gives his testimony; the

GIVEN X
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

opportunity that the witness had to observe the facts about which he testified; the contradiction, if any, of a witness's testimony by other evidence; any statements made by the witness at other times that are inconsistent with his present testimony; any evidence regarding a witness's general reputation for truth, honesty or integrity; and any felony conviction of a witness.

In evaluating the exhibits, you should consider such items as: the circumstances under which the exhibit was prepared; and the probability that the exhibit accurately reflects what it is intended to show in light of the other evidence of the case.

IDJI 100

GIVEN X
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 2

As you can well surmise, this case is important to both sides, and each party to the suit is entitled to your full and fair consideration. You are not to associate in any way with the parties, their attorneys, agents or witnesses. You are likewise not to discuss the case with anyone, or permit anyone to discuss the case with you, whether within or without the courthouse, during the course of the trial; and you are not yourself to contact anyone in an attempt to discuss or gain a greater understanding of the case. In the event that anyone attempts to discuss the case with you or to influence your decision, you will report it to me promptly. You are not even to discuss the case among yourselves until you retire to the jury room to deliberate at the close of the entire case, and you are not to form or express any opinion on the case until you have heard all of the testimony and have had the benefit of my instructions as to the law which applies to the case. You should not go to the place where any alleged event occurred unless the Court orders a supervised jury visit to that place.

IDJI 109

GIVEN
REFUSED
MODIFIED X
COVERED X
OTHER

DEFENDANTS' REQUESTED

INSTRUCTION NO. 3

The Defendants deny the claims of the Plaintiff.

IDJI 104

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER N/A

DEFENDANTS' REQUESTED

INSTRUCTION NO. 4

I remind you, ladies and gentlemen of the jury, that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case until after I finally submit the case to you.

IDJI 110

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED X
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 5

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

IDJI 112. (Modified.)

GIVEN X
REFUSED
MODIFIED
COVERED
OTHER

DFB but not modified.
I and IDJI 1.20.1

DEFENDANTS' REQUESTED

INSTRUCTION NO. 6

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves one of the facts on which a party has the burden of proof in the case, without resorting to inference. Circumstantial evidence is evidence that indirectly proves one of the facts on which a party has the burden of proof in the case, by means of proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI 123

GIVEN 
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 7

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion.

IDJI 124. (Modified.)

GIVEN
REFUSED
MODIFIED
COVERED
OTHER

But not modified. DMB

DEFENDANTS' REQUESTED

INSTRUCTION NO. 8

A deposition is testimony taken under oath before the trial and preserved in writing or upon videotape. This evidence is entitled to neither more nor less consideration than you would give the same testimony had the witness testified here.

IDJI 124. (Modified.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED X
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 9

Certain evidence is about to be presented to you by an interrogatory and an answer to the interrogatory. An interrogatory is a written question from one party and answered by another during the course of a case. This evidence is entitled to the same consideration you would give had the witness been asked the interrogatory and then answered it from the witness stand.

You will only have the interrogatory and the answer read to you in court. Although there is a record of the interrogatory and answer to the interrogatory, this record will not be available to you during your deliberations.

I.R.E. 801(d)(2)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED X
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 10

Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose.

Your attention was called to these matters when the evidence was admitted.

IDJI 127. (Modified.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER Not necessary

DEFENDANTS' REQUESTED

INSTRUCTION NO. 11

The Plaintiff has the burden of proving, by direct expert testimony and by a preponderance of all the competent evidence, that at the time and place of the incident in question Defendant Dr. Brian Kerr failed to meet the applicable standard of health care practice of the community in which such care was provided as such standard then existed with respect to the class of health care provider to which Defendant Dr. Brian Kerr belonged and in which he was functioning.

In addition, the Plaintiff has the burden of proving that the failure of Defendant Dr. Brian Kerr to meet the applicable standard of health care practice caused the injuries of the Plaintiff.

The Defendants have no burden of proof on any issue in the case.

Idaho Code § 6-1012

GIVEN
REFUSED
MODIFIED
COVERED
OTHER

DEFENDANTS' REQUESTED

INSTRUCTION NO. 12

Individual providers of health care, such as Dr. Brian Kerr in this case, shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account their training, experience, and fields of medical specialization.

Idaho Code § 6-1012

GIVEN _____
REFUSED _____
MODIFIED ~~X~~ IDJI with IDJI
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 13

The standard of health care practice means the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the events in question.

Shane v. Blair, 139 Idaho 126, 75 P.3d 180 (2003); ***McDaniel v. Inland and Northwest Renal Care Group Idaho, LLC***, 159 P.3d 856 (2007), 144 Idaho 219

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

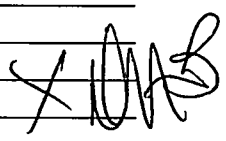
DEFENDANTS' REQUESTED

INSTRUCTION NO. 14

You must determine the applicable standard of health care practice and professional learning, skill and care required of Dr. Brian Kerr only from the testimony of those persons, including Dr. Brian Kerr, who have testified as expert witnesses as to such standard in this case.

Idaho Code § 6-1013 and § 6-1012

GIVEN
REFUSED
MODIFIED
COVERED
OTHER



DEFENDANTS' REQUESTED

INSTRUCTION NO.15

The quality or appropriateness of the standard of health care practice is not for you to decide.

You must apply the standard of health care practice that you determine to be applicable and you must not consider or decide whether that standard of health care practice is appropriate, inappropriate or deficient.

Based on I.C. § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 16

You are not permitted to assume or conclude that the standard of health care practice applicable to Dr. Brian Kerr is uniform throughout the State of Idaho.

Ramos v. Dixon, 144 Idaho 32 (2007), I.C. § 6-1012.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER ~~Not necessary~~ but standard covered by DJI. IDAB

DEFENDANTS' REQUESTED

INSTRUCTION NO. 17

As used in these instructions, the term "community" refers to that geographical area ordinarily served by the licensed general hospital where the medical care complained of was provided.

Idaho Code § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER Not necessary

DEFENDANTS' REQUESTED

INSTRUCTION NO. 18

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

IDJI 230; ***Hilden v. Ball***, 117 Idaho 314, 787 P.2d 1122 (1989); ***Fussell v. St. Clair***, 120 Idaho 591, 595, 818 P.2d 295, 299 (1991).

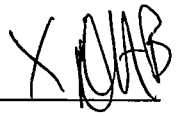
GIVEN _____
REFUSED _____
MODIFIED _____
COVERED X w/ IDJI DMB
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 19

In instructing you on the subject of damages, I do not express any opinion as to whether Plaintiff is or is not entitled to damages.

IDJI 900

GIVEN 
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 20

You are instructed, in considering the issue of damages, that a physician is not liable for any pre-existing injury, disease, condition or disability which is not the natural and proximate result of the actions of the physician. In other words, you cannot award damages to the Plaintiff if the damage resulted from the natural progress of any injury, disease, condition or disability which is attributable to causes other than the actions of the physician.

22 Am.Jur.2d ***Damages*** § 122, at 174. (Modified).

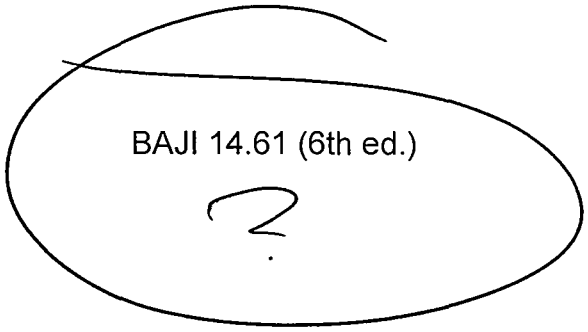
There is no evidence of any pre-existing condition. Not applicable to any issue posed by the facts of law in this case. DNB

GIVEN
REFUSED X
MODIFIED
COVERED
OTHER

DEFENDANTS' REQUESTED

INSTRUCTION NO. 21

You may not include as damages any amount that you might add for the purpose of punishing the Defendants or to make an example of them for the public good or to prevent other incidents. Such damages would be punitive and they are not authorized in this action.



GIVEN _____
REFUSED _____
MODIFIED _____
COVERED X By IDJI
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 22

An award of damages is not subject to any income taxes, and you should not consider such taxes if you decide to make such an award.

IDJI 937

GIVEN
REFUSED ___X___ This is no longer a recommended
MODIFIED _____ instruction in the
COVERED _____ Idaho Jury Instructions. MAB
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 23

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

BAJI 1.00 (6th ed.). (Modified)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED X by IDJI _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 24

The law forbids you to determine any issue in this case by chance. Thus, if you determine that the Plaintiff is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take the independent estimate of each juror of the amount to be awarded and then to average such estimates to set the amount of your award.

IDJI 143

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 25

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused; and he may hesitate to change his position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

IDJI 140

GIVEN _____
REFUSED _____
MODIFIED X
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 26

On retiring to the jury room, select one of your number as a Foreperson, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the one conforming to your conclusions and return the other unused.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon a verdict, you should fill it out, if necessary, and have it signed. If your verdict is unanimous, your Foreperson alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict(s), you will notify the bailiff, who will then return you into open court.

IDJI 144

GIVEN X
REFUSED
MODIFIED X
COVERED
OTHER

DEFENDANTS' REQUESTED

INSTRUCTION NO. 27

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

IDJI 142

GIVEN _____
REFUSED _____
MODIFIED X
COVERED X
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 28

In this case, you will be given a Special Verdict form to use in returning your verdict. I will read the Verdict Form to you now:

We, the Jury, answer the Special Verdict form as follows:

QUESTION NO. 1: Did Defendant Dr. Brian Kerr fail to meet the applicable standard of health care practice of the community in which such care was provided, as such standard existed at the time such care was provided, with respect to the class of health care provider to which Dr. Brian Kerr belonged and in which he was functioning, and did such failure proximately cause the death of Krystal Ballard?

ANSWER: YES_____ NO_____

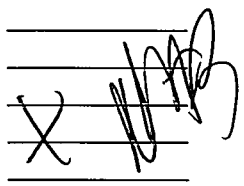
If you answered the above question "No," then simply sign the verdict form and inform the bailiff that you are done. If you answered the above question "Yes," please answer Question No. 2.

QUESTION NO. 2: What is the total amount of damages sustained by the Plaintiff for

Economic damages: $_____

Non-Economic damages: $_____

GIVEN
REFUSED
MODIFIED
COVERED
OTHER



DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

These instructions define your duties as members of the jury and the law that applies to this case. Your duties are to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. In so doing, you must follow these instructions. You must consider them as a whole, not picking out one or disregarding others. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rule of law. At times during the trial, I may sustain an objection to a question without permitting the witness to answer it or to an offered exhibit without receiving it into evidence. I will do this when the question called for testimony that was not admissible or when the exhibit itself was inadmissible. In reaching your decision, you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. In addition, where an answer is given or an exhibit received, I may instruct that it be stricken from the record, that you disregard it and that you dismiss it from your minds. I will do this when it becomes apparent that the evidence was inadmissible only after it had been presented to you. In reaching your decision, you may not consider this testimony or exhibit. Except as explained in this instruction, none of my rulings are intended by me to indicate any opinion concerning the evidence

in this case.

The arguments and remarks of the attorneys involved in this case are intended to help you in understanding the evidence and applying the instructions, but they are not themselves evidence. If any argument or remark has no basis in the evidence, then you should disregard it. However, there are two exceptions to this rule: (1) An admission of fact by one attorney is binding on his party; and (2) stipulations of fact by all attorneys are binding on all parties.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In evaluating the testimony, you should consider such items as: the interest, bias or prejudice of any witness in the outcome of this case; the age and appearance of the witness and the manner in which he gives his testimony; the opportunity that the witness had to observe the facts about which he testified; the contradiction, if any, of a witness's testimony by other evidence; any statements made by the witness at other times that are inconsistent with his present testimony; any evidence regarding a witness's general reputation for truth, honesty or integrity; and any felony conviction of a witness.

In evaluating the exhibits, you should consider such items as: the circumstances under which the exhibit was prepared; and the probability that the exhibit accurately reflects what it is intended to show in light of the other evidence of the case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

As you can well surmise, this case is important to both sides, and each party to the suit is entitled to your full and fair consideration. You are not to associate in any way with the parties, their attorneys, agents or witnesses. You are likewise not to discuss the case with anyone, or permit anyone to discuss the case with you, whether within or without the courthouse, during the course of the trial; and you are not yourself to contact anyone in an attempt to discuss or gain a greater understanding of the case. In the event that anyone attempts to discuss the case with you or to influence your decision, you will report it to me promptly. You are not even to discuss the case among yourselves until you retire to the jury room to deliberate at the close of the entire case, and you are not to form or express any opinion on the case until you have heard all of the testimony and have had the benefit of my instructions as to the law which applies to the case. You should not go to the place where any alleged event occurred unless the Court orders a supervised jury visit to that place.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The Defendants deny the claims of the Plaintiff.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

I remind you, ladies and gentlemen of the jury, that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case until after I finally submit the case to you.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves one of the facts on which a party has the burden of proof in the case, without resorting to inference. Circumstantial evidence is evidence that indirectly proves one of the facts on which a party has the burden of proof in the case, by means of proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

A deposition is testimony taken under oath before the trial and preserved in writing or upon videotape. This evidence is entitled to neither more nor less consideration than you would give the same testimony had the witness testified here.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Certain evidence is about to be presented to you by an interrogatory and an answer to the interrogatory. An interrogatory is a written question from one party and answered by another during the course of a case. This evidence is entitled to the same consideration you would give had the witness been asked the interrogatory and then answered it from the witness stand.

You will only have the interrogatory and the answer read to you in court. Although there is a record of the interrogatory and answer to the interrogatory, this record will not be available to you during your deliberations.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose.

Your attention was called to these matters when the evidence was admitted.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The Plaintiff has the burden of proving, by direct expert testimony and by a preponderance of all the competent evidence, that at the time and place of the incident in question Defendant Dr. Brian Kerr failed to meet the applicable standard of health care practice of the community in which such care was provided as such standard then existed with respect to the class of health care provider to which Defendant Dr. Brian Kerr belonged and in which he was functioning.

In addition, the Plaintiff has the burden of proving that the failure of Defendant Dr. Brian Kerr to meet the applicable standard of health care practice caused the injuries of the Plaintiff.

The Defendants have no burden of proof on any issue in the case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Individual providers of health care, such as Dr. Brian Kerr in this case, shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account their training, experience, and fields of medical specialization.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The standard of health care practice means the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the events in question.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You must determine the applicable standard of health care practice and professional learning, skill and care required of Dr. Brian Kerr only from the testimony of those persons, including Dr. Brian Kerr, who have testified as expert witnesses as to such standard in this case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The quality or appropriateness of the standard of health care practice is not for you to decide.

You must apply the standard of health care practice that you determine to be applicable and you must not consider or decide whether that standard of health care practice is appropriate, inappropriate or deficient.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You are not permitted to assume or conclude that the standard of health care practice applicable to Dr. Brian Kerr is uniform throughout the State of Idaho.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

As used in these instructions, the term "community" refers to that geographical area ordinarily served by the licensed general hospital where the medical care complained of was provided.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

In instructing you on the subject of damages, I do not express any opinion as to whether Plaintiff is or is not entitled to damages.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You are instructed, in considering the issue of damages, that a physician is not liable for any pre-existing injury, disease, condition or disability which is not the natural and proximate result of the actions of the physician. In other words, you cannot award damages to the Plaintiff if the damage resulted from the natural progress of any injury, disease, condition or disability which is attributable to causes other than the actions of the physician.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You may not include as damages any amount that you might add for the purpose of punishing the Defendants or to make an example of them for the public good or to prevent other incidents. Such damages would be punitive and they are not authorized in this action.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

An award of damages is not subject to any income taxes, and you should not consider such taxes if you decide to make such an award.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The law forbids you to determine any issue in this case by chance. Thus, if you determine that the Plaintiff is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take the independent estimate of each juror of the amount to be awarded and then to average such estimates to set the amount of your award.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused; and he may hesitate to change his position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a Foreperson, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the one conforming to your conclusions and return the other unused.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon a verdict, you should fill it out, if necessary, and have it signed. If your verdict is unanimous, your Foreperson alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict(s), you will notify the bailiff, who will then return you into open court.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

In this case, you will be given a Special Verdict form to use in returning your verdict. I will read the Verdict Form to you now:

We, the Jury, answer the Special Verdict form as follows:

QUESTION NO. 1: Did Defendant Dr. Brian Kerr fail to meet the applicable standard of health care practice of the community in which such care was provided, as such standard existed at the time such care was provided, with respect to the class of health care provider to which Dr. Brian Kerr belonged and in which he was functioning, and did such failure proximately cause the death of Krystal Ballard?

ANSWER: YES_____ NO_____

If you answered the above question "No," then simply sign the verdict form and inform the bailiff that you are done. If you answered the above question "Yes," please answer Question No. 2.

QUESTION NO. 2: What is the total amount of damages sustained by the Plaintiff for

Economic damages: $_____

Non-Economic damages: $_____

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 SPECIAL VERDICT

We, the jury, answer the Special Verdict as follows:

QUESTION NO. 1: Did Defendant Dr. Brian Kerr fail to meet the applicable standard of health care practice of the community in which such care was provided, as such standard existed at the time such care was provided, with respect to the

class of health care provider to which Dr. Brian Kerr belonged and in which he was functioning, and did such failure proximately cause the death of Krystal Ballard?

ANSWER: YES_____ NO_____

If you answered the above question "No," then simply sign the verdict form and inform the bailiff that you are done. If you answered the above question "Yes," please answer Question No. 2.

QUESTION NO. 2: What is the total amount of damages sustained by Plaintiffs?

Economic damages: $_____

Non-Economic damages: $_____

DATED this ____ day of _____, 2013.

_____
Foreperson

_____

_____

_____

_____

_____

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S CONSOLIDATED MOTIONS *IN LIMINE*

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Idaho Code § 9-102, Idaho Rule of Evidence 103(c), and the Court's Amended Scheduling Order of September 9, 2013, and moves for an order *in limine* regarding the following matters:

I. The Possibility that Charles Ballard Might Remarry or Enter Into Another Relationship;

II. Krystal Ballard's Purported Noncompliance;

III. The Absence of Infection in Other Silk Touch Patients to Prove Compliance with the Standard of Care as to Krystal Ballard;

IV. Life Insurance and Other Collateral Sources;

V. Dr. Charles Garrison's Untimely Opinion Regarding Fat Embolism and All Undisclosed Expert Opinions;

VI. Defense Experts Who Failed to Properly Familiarize Themselves as to the Applicable Standard of Practice;

VII. Dr. Kerr's Communication with Krystal Ballard's Aunt;

VIII. Dr. Lundeby's Testimony as to Krystal Ballard's Cause of Death;

IX. Evidence, Argument, and Special Verdict Pertaining to Third Party Liability;

X. Testimony of Dr. Kerr Regarding a Medical Malpractice Action Involving Plaintiff's Expert, Dr. Sorensen;

XI. Speaking Objections, Unsworn Testimony of Counsel, and References to the Parties' Motion Practice While in the Jury's Presence;

XII. *Ad Hominem* Arguments and Remarks;

XIII. Settlement Negotiations;

XIV. Expert Testimony That Invades the Province of the Jury; and

XV. Cumulative Expert Testimony.

The order *in limine* should forbid Defendants and Defendants' counsel at trial from causing or permitting the jury to hear, read, or otherwise become aware of the foregoing matters in any way, whether through the testimony of its witnesses, in cross-examination of Plaintiff's witnesses, in colloquy or argument, or in any other manner, and whether in the case-in-chief, rebuttal, or surrebuttal.

A memorandum in support of these motions follows. An Affidavit of Counsel, to which all exhibits referenced herein are attached, is filed contemporaneously with these motions.

MEMORANDUM

I. THE POSSIBILITY THAT CHARLES BALLARD MIGHT REMARRY OR ENTER INTO ANOTHER RELATIONSHIP

By his Complaint, Charles Ballard asserts a claim for wrongful death and alleges that his wife, Krystal Ballard, died as a direct and proximate result of Defendants' negligence and other wrongful conduct in connection with a cosmetic surgical procedure performed on July 21, 2010. (*See* Compl., March 16, 2012.) Plaintiff specifically alleges, among other things, that the sterilization procedures and techniques implemented, used, and performed . . . while providing cosmetic surgery services to Krystal Ballard . . . fell below the standards of care owed to the patient . . . ." (*Id.* at ¶16.)

During his deposition in this matter, Mr. Ballard testified that he has not remarried since his wife's passing. (**Exhibit A**, Ballard Dep. 169:13-15, Feb. 1, 2013.) Plaintiff now moves the Court, *in limine*, to preclude evidence and argument pertaining to the possibility that Charles Ballard might remarry or become involved in another relationship because such evidence and argument is wholly irrelevant and because such evidence and argument necessitates impermissible speculation.

Idaho's wrongful death statute provides, "When the death of a person is caused by the wrongful act or neglect of another, his or her heirs . . . may maintain an action for damages against the person causing the death . . . ." Idaho Code § 5-311(1). "In every action under this section, such damages may be given as under all the circumstances of the case as may be just." *Id.* Notably, however, the remarriage of a decedent's spouse is entirely irrelevant in wrongful death actions. *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 922-924, 821 P.2d 973, 977-979 (1991).

In *Westfall*, the appellant, Caterpillar, Inc., argued "that the [trial] court improperly granted plaintiffs' motion in limine which . . . excluded all evidence of Karla Westfall's remarriage subsequent to the loss of her husband." *Westfall*, 120 Idaho at 922, 821 P.2d at 977. "According to Caterpillar, evidence of remarriage should [have been] considered by the jury, because under I.C. § 5-311, 'all the circumstances' should be taken into account to determine an award for wrongful death." *Id.* In rejecting Caterpillar's argument, the *Westfall* Court held that "there are a number of soundly based reasons for not admitting evidence of [Ms. Westfall's] remarriage, and we are made aware of no good reason for allowing any defendant to inversely profit by a court ruling which would be other than that reached by [the trial court]." *Id.*

First, the Court looked to Idaho Code § 5-311 and noted that "[w]rongful death actions are designed to reimburse heirs for their expectations of parental beneficence they would have received had the decedent lived."[1] The Court continued, "This regime does not allow for consideration of financial and other circumstances that arise subsequent to the death of a parent who is survived by heirs." *Id.*

The Court also considered the origins of the Idaho wrongful death statute, as well as its

[1] Idaho wrongful death actions are equally designed to reimburse heirs, where applicable, for expectations of spousal beneficence, as the term "heirs" is defined to expressly include "the decedent's spouse." Idaho Code § 5-311(2)(b).

conformity with "[t]he American doctrine," which "has its foundation in the refusal of [courts] to allow the defendant to benefit by his own wrong . . . ." *Westfall*, 120 Idaho at 923, 821 P.2d at 978. In so doing, the Court observed that "[t]he true question is: What had these plaintiffs the right to expect to receive from the parent during his life? And for the loss of this they are to be compensated. What they got after his death does not enter into the case." *Id.* (*quoting Stahler v. Philadelphia & Reading Ry. Co.*, 199 Pa. 383, 49 A. 273 (1901)). For these reasons, the Court ruled that "Caterpillar was not entitled to benefit from the fact that decedent's spouse had remarried." *Westfall*, 120 Idaho at 924, 821 P.2d at 979.

Unlike *Westfall*, in which the decedent's wife had remarried, this case involves a plaintiff who has not yet remarried, and who may never remarry. Likewise, Mr. Ballard may or may not become involved in another relationship. Therefore, the prejudice caused by the information's irrelevance is compounded by the speculation necessitated by its introduction. Evidence and argument centering on Charles Ballard's *potential* to remarry or *potential* to become involved in a romantic relationship would invite the jury to not only assign weight to completely irrelevant evidence, but it would simultaneously encourage the jury to hazard a guess as to the likelihood and mitigating value of any such potential remarriage or relationship. For these reasons, it would be improper for Defendants to benefit at trial by suggesting that Plaintiff *may* suffer diminished damages on account of a hypothetical remarriage or relationship, which would serve no probative value even if Mr. Ballard had remarried or entered into a relationship. Accordingly, at the trial of this matter, evidence and argument pertaining to same should be precluded.

II. KRYSTAL BALLARD'S PURPORTED NONCOMPLIANCE

By their Answer in this matter, Defendants state as their Third Defense that "Plaintiff and Krystal Ballard were guilty of negligence and careless misconduct at the time of and in connection with the manners [sic] and damages alleged, which proximately caused and

contributed to said events and resultant damages, if any." (Ans. 2, April 16, 2012.) Defendants intend to pursue a comparative negligence theory by attempting to establish that Krystal Ballard engaged in a "pattern of noncompliance," though these purportedly noncompliant acts were not, in fact, noncompliance, and more importantly, though these purportedly noncompliant acts have no causal relationship to Krystal Ballard's death. Accordingly, and because Defendants' "noncompliance" arguments rely upon speculation, as opposed to facts contained within the record of this case, evidence and argument pertaining to same should be precluded.

Dr. Kerr testified at deposition[2] that "[o]ne of the aspects of Krystal's post-operative care was her pattern of not doing the things that we had asked her to do." (**Exhibit B**, B. Kerr Dep. 86:19-21, Jan. 30, 2013.)

> It became apparent that she was non-compliant with a number of the things that we had . . . advised her to do because, in fact, she was trying to hide the procedure from both her husband, Charles, and, in our opinion, from the military, and it's my opinion that this compromised her ability to properly take care of herself.

(*Id.* at 86:22 – 87:4.) Dr. Kerr continued, "[M]y experience with patients is that when they are trying to hide the procedure, they don't -- they can't change their bandages appropriately, they will oftentimes overexert . . . [and they] may not take their medications as prescribed." (*Id.* at 87:6-14.)

Dr. Kerr admits that he did not observe Krystal Ballard "around-the-clock" postoperatively. (*Id.* at 87:5-6.) He relies only upon a comment made by Mrs. Ballard days after the subject procedures whereby she stated that she may have been too active, as well as a "suspicion" that Mrs. Ballard may have been planning to take an Air Force physical training exam subsequent to her liposuction and fat transfer procedures. (*Id.* at 127:8-14, 129:5-10,

[2] Dr. Kerr testified in two separate depositions in this matter: once on his own behalf, and once as a designee of the corporate defendant. The instant reference is to Dr. Kerr's testimony on his own behalf.

130:6-11.) Dr. Kerr does not recall ever asking Krystal Ballard to elaborate on her postsurgical activity, and he conceded, "I have no basis in fact that she [participated in a physical training exam]." (*Id.* at 133:14-20.) As a result, Dr. Kerr can opine only that "[Krystal Ballard] *may have* done activities, leave the wound sites open to drainage, and that certainly can be a pathway to introduce bacteria." (*Id.* at 87:20-23 (emphasis added).)

Dr. Kerr saw Krystal Ballard on July 23, 2010, two days after her liposuction and fat transfer procedures, and noted no evidence or suspicion that Krystal Ballard had failed to properly attend to her postsurgical wounds. (**Exhibit C**, Postoperative Examination Record, July 23, 2010.) Moreover, Donna Berg, an employee of Silk Touch, acknowledged that Krystal Ballard stayed home from work on July 23, 2010, and therefore, did not participate in any workplace testing that day. (**Exhibit D**, Email from D. Berg to S. Kerr, July 28, 2010.)

Defendants also intend to advance a noncompliance theory based upon Krystal Ballard's arrival for surgery without anyone to drive her home. (B. Kerr Dep. 136:9-15.) According to Dr. Kerr, patients are instructed to have someone else drive them home after cosmetic surgery to avoid driving while under the influence of sedatives and for any "other conditions secondary to the procedure that would preclude [a patient] from driving home." (*Id.* at 141:6-15.) Dr. Kerr eliminated both of these concerns by not administering a sedative during Krystal Ballard's procedure, and by conducting postoperative observation of Mrs. Ballard for a sufficient amount of time to assure himself that Mrs. Ballard could drive home safely. (*Id.* at 141:16-21.) He performed the scheduled procedures despite his knowledge that Krystal Ballard had no one to drive her home.

According to Dr. Geoffrey Stiller, Defendants' general and cosmetic surgery expert, it was Dr. Kerr's choice to proceed, or to not proceed, with Mrs. Ballard's liposuction and fat

transfer on account of there being no person to drive Mrs. Ballard home, and it was appropriate for Dr. Kerr to proceed with the subject surgery in the absence of a third party driver for Krystal Ballard's post-operative transportation. (**Exhibit E**, Stiller Dep. 118:12-19, 120:19-20, 121:22-23, July 19, 2013.) Even so, Dr. Stiller remains critical of Krystal Ballard "[b]ecause she didn't listen to [Dr. Kerr] in the first place." (*Id.* at 121:3-4.)

Defendants also intend to demonstrate noncompliance by the fact that Krystal Ballard failed to take postoperative, narcotic pain medication. (B. Kerr Dep. 117:6-7.) There is no dispute that Dr. Kerr prescribed Norco, a drug containing hydrocodone, to manage Krystal Ballard's post-operative pain. (B. Kerr Dep. 117:6-11; **Exhibit F**, Lundeby Dep. 95:19-22, July 26, 2013.) It is also uncontested that Norco does nothing to stop or fight infection. (B. Kerr Dep. 118:6-8.)

Dr. Kerr's order called for Mrs. Ballard to take a pill by mouth every four hours *as needed* for pain. (B. Kerr Dep. 118:15 – 119:2; Lundeby Dep. 96:1-6.) Krystal Ballard voiced a preference for Motrin, as opposed to a narcotic pain medication, out of concern for drug testing at her place of employment, the Mountain Home Air Force Base. (B. Kerr Dep. 122:21 – 123:2.)

During his deposition, defense expert, Dr. Lundeby, acknowledged that Norco had been prescribed on an as needed basis, and furthermore, that a patient should not be considered noncompliant by preferring Motrin over a narcotic pain medication. (Lundeby Dep. 96:1-6, 96:19-23.) Furthermore, when asked whether Krystal Ballard's decision to avoid Norco led to bacteria entering her body, Dr. Kerr himself admitted that it did not. (B. Kerr Dep. 119:23 – 120:2.)

For his part, Dr. Stiller also concedes that Krystal Ballard should not be faulted for preferring Motrin over a narcotic pain medication:

Q. Okay. Well, let me ask you this. You don't know one way or the other. I mean, you know she got a prescription for Norco?
A. Correct.
Q. Okay. That's the day she came in two days postop?
A. She got it actually the day of the operation as well.
Q. True. Well, did she take it?
A. She said she didn't.
Q. Okay. Is there anything wrong if she decides to manage it with non-narcotics?
A. There isn't anything wrong with that, you're correct.

(Stiller Dep. 125:17 – 126:5.)

Defendants' infectious disease expert, Dr. Thomas Coffman, testified that the only significance that can be attributed to Krystal Ballard's election to avoid narcotic pain medication is that Krystal Ballard's pain must not have been significant enough to justify its usage. (**Exhibit G**, Coffman Dep. 48:16-21, Aug. 20, 2013.) Nevertheless, Dr. Kerr remains steadfast that "[p]ain *can* . . . alter a person's behavior." (B. Kerr Dep. 120:11-12 (emphasis added).) "*[I]f* she was not getting adequate pain control . . . then she would not have followed the instructions on how to care for herself . . . ." (*Id.* at 123:6-10 (emphasis added).)

Lastly, Defendants intend to establish noncompliance by the fact that Krystal Ballard failed to inform the Air Force of her cosmetic medical procedures. (Stiller Dep. 140:5-8.) And while Dr. Stiller admitted that any such failure had no relationship to Krystal Ballard's cause of death, it is Dr. Stiller's belief that any deviation from military protocol "shows a pattern of noncompliance." (*Id.* at 140:5-17.)

Defendants' evidence of purported noncompliance should be precluded because the cited acts have no causal connection to Krystal Ballard's death, because Defendants' opinions are grounded in speculation rather than factual evidence, and lastly, because some of the purportedly noncompliant acts are admitted by Defendants and their experts to be appropriate patient conduct. The Idaho Code provides as follows with regard to contributory negligence:

> Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

Idaho Code § 6-801.

"The burden of proof of the affirmative defense of contributory negligence is upon the party pleading such defense, unless it appears from the evidence introduced by plaintiff." *Riley v. Larson*, 91 Idaho 831, 834, 432 P.2d 775, 778 (1967) (citations omitted). And in the absence of any such evidence introduced by the Plaintiff, Defendants must prove, by a preponderance of the evidence, "[t]he elements of a cause of action based upon negligence[, which] can be summarized as (1) a duty, recognized by law, requiring [Krystal Ballard] to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between [Krystal Ballard's] conduct and the resulting injuries; and (4) actual loss or damage." *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 583, 548 P.2d 80, 83 (1976) (*citing* Prosser, Law of Torts 30 (4th ed. 1971)).

Not one of these elements can be satisfied by exclusive reliance upon unreasonable inferences, which would "permit a jury to base its verdict [as to comparative negligence] on mere speculation and conjecture." *Owen v. Burcham*, 100 Idaho 441, 448, 599 P.2d 1012, 1019 (1979) (citation omitted). In fact, "[a]n expert's opinion which is unsubstantiated by facts in the record, but which is speculative or conclusory, has little or no probative value, and therefore may be excluded because its probative value is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Ryan v. Beisner*, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct. App. 1992) (*quoting* Idaho R. Evid. 403).

Defendants' noncompliance theory rests upon irrelevant, highly prejudicial, factually unsupported, speculative, and causally disconnected information. Defendants hope to tell the jury that a patient is noncompliant with doctor's orders when she fails to take narcotic pain medication, which the doctor prescribed on an as needed basis. And apart from the fact that the "as needed" element of this prescription renders Defendants' position completely nonsensical, Defendants' experts openly admit that a patient cannot be faulted for taking Motrin in an effort to avoid narcotics.

Furthermore, Defendants offer no plausible reason to believe that Krystal Ballard's avoidance of a narcotic pain medication had any causal relationship to the infection that ultimately killed her. Dr. Kerr offers only speculation: "*[I]f* she was not getting adequate pain control . . . then she would not have followed the instructions on how to care for herself . . . ." Meanwhile, Defendants' infectious disease expert, Dr. Thomas Coffman, testified that the only significance that can be attributed to Krystal Ballard's election to avoid narcotic pain medication is that Krystal Ballard's pain must not have been significant enough to justify its usage.

Defendants also hope to demonstrate a purported pattern of noncompliance by the fact that Krystal Ballard arrived for surgery without someone to drive her home. Again, the record in this matter provides absolutely no indication of a causal relationship between Krystal Ballard's purported noncompliance and her death.

The same is true with regard to Krystal Ballard's failure to inform her husband, or the Air Force, of her liposuction and fat transfer procedures. In essence, Defendants intend to suggest that Krystal Ballard *may have* compromised her postoperative recovery by placing secrecy above recovery. This is true even though Defendants' own expert, Dr. Stiller, testified that there is no causal relationship between Krystal Ballard's failure to inform the Air Force and her death. In

fact, none of Defendants' experts can testify within a reasonable degree of medical certainty that Krystal Ballard's purported noncompliance had *any* causal relationship with her death. To the contrary, Defendants' experts admit that no such causal relationship exists. Therefore, in the absence of any relevant, probative purpose speaking to Krystal Ballard's purported negligence, the true purpose of this evidence becomes clear: to encourage the jury to come to highly prejudicial conclusions about Krystal Ballard as a person.

Because there is no record evidence linking Krystal Ballard's septic death with a lack of postoperative care on her part, Defendants intend to showcase irrelevant information that relies upon, and demands, impermissible speculation and conjecture. Defendants hope to offer a *suspicion* that Krystal Ballard *intended* take a physical training exam, though there is no record evidence to suggest that she, in fact, took the exam, and though there is evidence directly contradicting that suspicion. They hope to interject irrelevant evidence pertaining to Krystal's reluctance to take a narcotic medication *as needed*, for pain. They aim to paint Krystal Ballard as noncompliant for failing to arrive for surgery with a designated driver. And Defendants intend to state that Krystal Ballard *may have* compromised her recovery by failing to communicate fully with her husband.

Because Defendants' noncompliance theory rests upon irrelevant, highly prejudicial, factually unsupported, speculative, and causally disconnected information, evidence and argument pertaining to Krystal Ballard's purported noncompliance should be precluded.

III. THE ABSENCE OF INFECTION IN OTHER SILK TOUCH PATIENTS TO PROVE COMPLIANCE WITH THE STANDARD OF CARE AS TO KRYSTAL BALLARD

On June 6, 2012, Plaintiff served his first set of discovery upon Defendants. (*See* **Exhibit H**, Pl.'s First Set of Interrogatories, Requests for Production, and Requests for Admissions.) Interrogatory No. 20 requests as follows:

> Identify each witness known to you to have information and relevant materials to the claims presented in this action or to any defense asserted thereto, and for each such person please give a brief summary of each such witness's expected trial testimony.

(*Id.* at 11.) Request for Production of Documents No. 1 requests "[a]ll documents identified or referred to in answering any of the foregoing interrogatories." (*Id.* at 14.)

During his deposition in this matter, Dr. Kerr was asked to explain the basis or bases for his opinion that bacteria had been introduced into Krystal Ballard's body after she left Silk Touch. (**Exhibit B**, B. Kerr Dep. 82:11-23, Jan. 30, 2013.) Dr. Kerr responded, "Because I've never had another infection of that nature." (*Id.* at 82:24-25.) Dr. Kerr clarified that a limited number of his post-lipolysis patients had experienced infections, and he admitted that he never formally tracked the number of post-surgical patients who experienced infections. (*Id.* at 83:1-13.)

Seven months later, at the deposition of defense expert, Dr. Thomas J. Coffman, Defendants, for the first time, provided Plaintiff's counsel with a document, which purportedly sets forth the first names of Silk Touch patients, their dates of treatment, and a brief description of the procedures performed for each such patient. (**Exhibit G**, Coffman Dep. 40:19 – 41:4, Aug. 20, 2013; **Exhibit I**, Untitled Spreadsheet.) Dr. Coffman reviewed no other information pertaining to these patients. (Coffman Dep. at 41:11-16.)

On August 27th, defense counsel sent a letter to defense expert, Dr. Gregory N. Laurence, which stated, "The staff of Dr. Kerr and his wife have gone through every patient chart for operative procedures of every type performed starting in December of 2007." (**Exhibit J**, Laurence Dep. 165:1-13, Oct. 2, 2013.) Dr. Laurence reviewed the spreadsheet, but never reviewed any charts associated with the patients or procedures listed on the spreadsheet. (*Id.* at 167:1-3.)

On September 16, 2013, less than two months prior to trial, over a month after written discovery had closed, and ten days after the discovery deposition deadline had passed, Defendants served a supplemental response to Plaintiff's Interrogatory No. 20. (*See* **Exhibit K**, Defs.' Supp. Ans. to Pl.'s Interrogatory No. 20; Am. Scheduling Order 1-2, Sept. 9, 2013.) By that response, Defendants disclosed that Susan Kerr's "expected testimony will relate to records of Silk Touch, records and data she compiled of Silk Touch for infections, patients, drawings of Krystal Ballard, photos of Krystal Ballard and experience in training and cosmetic procedures." (Defs.' Supp. Ans. to Pl.'s Interrogatory No. 20 at 3.)

By letter to defense counsel dated September 20, 2013, Plaintiff's counsel noted the vagueness of Defendants' supplemental answer to Interrogatory No. 20, requested immediate production of the records and data compiled by Ms. Kerr, and sought a date upon which Ms. Kerr could be re-deposed in light of the newly disclosed information. (**Exhibit L**, Letter from P. Gregory Haddad to Jeremiah A. Quane.) Defense counsel responded by letter on September 26, 2013, and stated that "[t]he records and data under discussion was prepared shortly before August 20, 2013 for the purpose of being a trial exhibit and it did not exist before and therefore it was not available for production . . . ." (**Exhibit M**, Letter from J. Quane to P. Gregory Haddad 1.) Defense counsel continued, "In fact, since it will be used only as a trial exhibit, the court Order governing further proceedings does not require its identification and disclosure until either 14 or 7 days before trial." (*Id.*) Additionally, defense counsel characterized Plaintiff's request to re-depose Susan Kerr as untimely. (*Id.*)

On September 27, 2013, Plaintiff noticed the reconvened deposition of Susan Kerr. (**Exhibit N**, Notice to Take Video Conference Deposition Duces Tecum of Susan Kerr.) The Notice requested that Ms. Kerr bring all records and data underlying her testimony, as disclosed

by Defendants' supplemental response to Plaintiff's Interrogatory No. 20. (*Id.*) Defendants refused to produce Ms. Kerr to be re-deposed, and to date, Defendants have failed to further supplement their discovery responses to include any data or documentary support for the proposed trial exhibit or any additional detail regarding Ms. Kerr's anticipated testimony.

Evidence pertaining to unrelated patients, or Defendants' postsurgical infection rate, is irrelevant, unfairly prejudicial to Plaintiff, and lacks any indicia of reliability to serve as the basis for expert opinion. Moreover, Defendants should not be allowed to benefit by failing to seasonably supplement their discovery responses, by subsequently obstructing Plaintiff's access to clearly discoverable information, or by advancing a trial by ambush strategy.

As an initial matter, "[t]he purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose." *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Idaho R. Civ. P. 26(b)(1). "[A]n important inquiry in determining whether a response was given 'seasonably' is: was the opposing party *given an opportunity for full cross examination?*" *Edmunds*, 142 Idaho at 875, 136 P.3d at 346 (*citing Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 213, 846 P.2d 207, 215 (1993) (Bakes, C.J. concurring)).

In terms of trial evidence, "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Idaho R. Evid. 401. And

"[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Idaho R. Evid. 403.

Moreover, "[o]nce qualified as an expert, a witness may testify in the form of an opinion if the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." *State v. Konechny*, 134 Idaho 410, 417, 3 P.3d 535, 542 (Ct. App. 2000) (*citing* Idaho R. Evid. 702). "The information, theory or methodology upon which the expert's opinion is based need not be commonly agreed upon by experts in the field, but it must have sufficient indicia of reliability to meet I.R.E. 702 requirements." *State v. Konechny*, 134 Idaho 410, 417, 3 P.3d 535, 542 (Ct. App. 2000) (*citing State v. Merwin,* 131 Idaho 642, 646, 962 P.2d 1026, 1030 (Ct. App. 1998)).

In the instant case, other patients' alleged lack of infections is irrelevant in establishing whether Defendants satisfied the standard of practice as to Krystal Ballard, or whether any such deviation from the applicable standard of practice caused or contributed to Krystal Ballard's death. Additionally, all evidence and argument pertaining to a lack of infections in Defendants' patients should be precluded because Defendants, by their untimely, vague, and incomplete supplementation of discovery responses, as well as their refusal to produce Susan Kerr for a deposition *duces tecum*, ensured that meaningful cross-examination on the topic would be impossible.

To the degree any relevance can be attributed to the subject evidence, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The admission of evidence pertaining to the lack of infections in

unrelated patients creates an implicit invitation for the jury to draw extraordinarily prejudicial inferences from that information. Specifically, the jury would be enticed to adopt the idea that, because Defendants postsurgical infection rate is either low or lower than average, there is a reduced likelihood that Defendants exposed Krystal Ballard to bacteria or a resulting infectious process.

What's more, both the methodology used to compile the data, and the data itself, is patently unreliable. Susan Kerr, who is not a physician or health care provider, and who is not qualified to make determinations as to the signs and symptomology of infections in patients, compiled a list of patients who, according to her review of Defendants' records, suffered no postoperative infections. And in light of Defendants' failure to recognize Krystal Ballard's infection before she died, there is more than sufficient reason to question the accuracy and reliability of data purportedly compiled to demonstrate Defendants' low, postsurgical infection rate. This unreliability, in combination with the information's irrelevance and its misleading, unfairly prejudicial impact, strongly warrants preclusion of the subject evidence.

Defendants obviously provided their expert, Dr. Coffman, with the spreadsheet marked Exhibit I prior to his deposition on August 20, 2013. Almost a month later, less than two months prior to trial, a month *after* written discovery had closed, and ten days *after* the discovery deposition deadline had passed, Defendants supplemented their discovery responses to include Susan Kerr's anticipated testimony relative to infections in unrelated patients. And when Plaintiff pressed Defendants to produce the discoverable and responsive information underlying Ms. Kerr's compilation, Defendants not only claimed that Plaintiff acted in an untimely fashion in attempting to obtain it, but they suggested that they had done Plaintiff a favor by producing a trial exhibit that Defendants were under no obligation to produce until late October in any event.

Now, Plaintiff is left wholly unable to properly and fairly challenge Defendants' alleged infection rate information by cross-examination at trial. Defendants quite apparently violated discovery rules, and should not be rewarded for engaging in obstructive tactics so clearly at odds with the purpose underlying the discovery process. For these reasons, evidence and argument pertaining to Defendants' postsurgical infections should be precluded.

IV. LIFE INSURANCE AND OTHER COLLATERAL SOURCES

Krystal Ballard applied for, and was covered by, Service Group Life Insurance. (**Exhibit A**, Ballard Dep. 103:6 – 104:14, 105:18-22; 107:5-11, Feb. 1, 2013.) Krystal Ballard was also covered by Tri-Care health insurance, which she received automatically through her service in the Air Force. (*Id.* at 106:9-15.) The jury should hear nothing of these insurance-related issues.

"The collateral source rule is a common law doctrine under which an injured party's damage award may not be reduced by payments, also intended to compensate the harm caused by the tortfeasor, received from third parties. Restatement (Second) of Torts § 920A cmt. b & d (1979). Several jurisdictions, including Idaho, have enacted statutes that abrogate the common law rule, requiring collateral source payments to be deducted from damage awards. I.C. § 6–1606; *see also* Restatement (Second) of Torts § 920A at cmt. d." *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 753, 274 P.3d 1256, 1268 (2012).

However, because Idaho Code § 6-1606 expressly renders death benefits paid under life insurance contracts completely irrelevant at the trial of this matter, evidence and argument pertaining to same should be precluded. And to the degree evidence of Krystal Ballard's health or life insurance can offer any probative value, that evidence would be relevant only *after* the finder of fact renders an award. Accordingly, the jury should be offered no evidence pertaining to Krystal Ballard's life or health insurance coverage.

V. DR. GARRISON'S UNTIMELY OPINION REGARDING FAT EMBOLSIM AND ALL UNDISCLOSED EXPERT OPINIONS

On June 3, 2013, Defendants served a 108-page supplemental answer to Plaintiff's Interrogatory No. 3, which sets forth, in significant detail, the anticipated opinion testimony of Defendants' experts. (*See* **Exhibit O**, Defs.' First Supp. Ans. to Pl.'s First Set of Interrogatories.) During his deposition on September 23, 2013, which occurred six weeks prior to trial, defense expert, Dr. Charles Garrison, testified that fat embolism contributed to Krystal Ballard's death. (**Exhibit P**, Garrison Dep. 47:19-20.) According to Dr. Garrison, he arrived at his opinion prior to September 19, 2013, but failed to inform defense counsel until the day prior to his scheduled deposition. (*Id.* at 34:17 – 36:4.)

Defense counsel takes the position that "when you decide to depose an expert, the areas you get into constitute an automatic extension and supplementation of a prior disclosure." (*Id.* at 36:7-10.) Mr. Quane continued by stating, "And that's the risk you take when you depose experts in Idaho." (*Id.* at 36:10-11.) And while Defendants reproduced Dr. Garrison for deposition on October 17, 2013, to answer questions pertaining to his new causation opinion, Plaintiff is left to manage the implications of that new opinion fewer than three weeks prior to trial.

As stated above in reference to Defendants' unwillingness to provide responsive and discoverable information pertaining to Defendants' postoperative infection rate, "[t]he purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose." *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006).

"[Parties are] under a duty seasonably to supplement [their discovery responses] with respect to any question directly addressed to . . . the subject matter on which [an expert] is expected to testify, and the substance of the person's testimony." Idaho R. Civ. P. 26(e)(1). "This rule unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony where the initial responses have been rejected, modified, expanded upon, or otherwise altered in some manner." *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 813 P.2d 897, 900 (1991) (*citing Zolber v. Winters,* 109 Idaho 824, 712 P.2d 525 (1986) and *Wright and Miller, Federal Practice and Procedure, Supplementation of Responses,* § 2048 (1970)). "[A]n important inquiry in determining whether a response was given 'seasonably' is: was the opposing party *given an opportunity for full cross examination?*" *Edmunds*, 142 Idaho at 875, 136 P.3d at 346 (*citing Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 213, 846 P.2d 207, 215 (1993) (Bakes, C.J. concurring)).

It is well-recognized that "[a] trial court has authority to sanction parties for non-compliance with pretrial orders. I.R.C.P. 16(i); *Fish Haven Resort, Inc. v. Arnold,* 121 Idaho 118, 121, 822 P.2d 1015, 1018 (Ct.App.1991). Sanctions may include those enumerated in I.R.C.P. 37(b)(2)(B), (C) and (D) for discovery violations. I.R.C.P. 16(i). One such authorized sanction is the disallowance of specified evidence." *Priest v. Landon*, 135 Idaho 898, 900, 26 P.3d 1235, 1237 (Ct. App. 2001); *Radmer*, 120 Idaho at 89, 813 P.2d at 900 (*citing Coleco Industries, Inc. v. Berman,* 567 F.2d 569 (3d Cir.1977) ("Typically, failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence."). And "while trial courts are given broad discretion in ruling on pretrial discovery matters, reversible error has been found in allowing testimony where Rule 26 has not been complied with. *Radmer*, 120 Idaho 86, 89-90, 813 P.2d 897, 900-01 (1991) (*citing Smith v. Ford Motor Co.,* 626 F.2d 784 (10th Cir.1980)).

In this matter, Plaintiff has, once again, been placed in a position whereby he is forced to react to the untimely disclosure of discoverable information in close proximity to trial. Whether Dr. Garrison informed defense counsel of his fat embolism opinion of causation in a timely fashion is irrelevant. The prejudicial effect on Plaintiff, with trial quickly approaching, is clear, and Plaintiff is unaware of any authority suggesting that Defendants are alleviated from adhering to their well-recognized discovery obligations upon the untimely disclosure of an expert opinion via the expert's testimony at deposition. Accordingly, Dr. Garrison's opinion pertaining to fat embolism, and any undisclosed expert witness testimony, should be precluded.

VI. DEFENSE EXPERTS WHO FAILED TO PROPERLY FAMILIARIZE THEMSELVES AS TO THE APPLICABLE STANDARD OF PRACTICE

Defense experts, Dr. Geoffrey Stiller and Dr. Gregory N. Laurence, failed to adequately familiarize themselves with the applicable standard of practice in this matter. Therefore, they lack competency to offer expert testimony as to the applicable standard of practice in this case.

Dr. Stiller practiced as a general surgeon in the Boise area up until 2005. (**Exhibit E**, Stiller Dep. 69:5-8, July 19, 2013.) At the direction of defense counsel, Dr. Stiller conferred with a cosmetic physician, Dr. Kelly O'Neil to familiarize himself with the standard of practice for cosmetic physicians existing in Boise in 2010, the time of Krystal Ballard's liposuction and fat transfer. (*Id.* at 68:21 – 69:13; 69:25 – 70:2.) Dr. Stiller conferred with Dr. O'Neil for twenty to forty minutes. (*Id.* at 71:20-25.)

During that time, the two doctors discussed Dr. Kerr's use of Hibiclens, alcohol, and an unknown chemical to clean instruments. (*Id.* at 75:11 – 76:15.) According to Dr. Stiller, Dr. O'Neil "didn't see any issues with that." (*Id.* at 80:25 – 81:5.) When asked whether he discussed anything else with Dr. O'Neil pertaining to the cleaning of instruments, Dr. Stiller answered in the negative. (*Id.* at 76:12-15.) With regard to Dr. Kerr's sterilization practices, the

two doctors discussed Dr. Kerr's . . . steam autoclave, and the fact that [Dr. Kerr used] a chemical marker." (*Id.* at 77:14-18.) There appears to have been no application of these facts to a standard of care.

Dr. Stiller does not recall asking whether Dr. O'Neil used a mixture of alcohol and Hibiclens to clean medical equipment and supplies in 2010. (*Id.* 81:6-10.) Dr. Stiller did not ask Dr. O'Neil whether he used spore counts or whether other area cosmetic physicians conducted spore counts in 2010. (*Id.* at 81:11-17.) Dr. Stiller did not inquire whether other cosmetic physicians used alcohol to clean their hands in 2010. (*Id.* at 86:1-5.) He made no inquiry of Dr. O'Neil to determine whether the standard of practice required instruments to be soaked in a basin after cosmetic procedures in 2010. (*Id.* at 88:14-17.)

Dr. Stiller has no knowledge of Dr. O'Neil's background, including whether Dr. O'Neil had any kind of surgical residency. (*Id.* at 70:7-16.) Dr. Stiller failed to determine what types of machines Dr. O'Neil employed during cosmetic procedures. (*Id.* at 70:22-25.) Dr. Stiller never inquired whether Dr. O'Neil personally performed cleaning, disinfecting, or sterilization of reusable equipment and supplies at his practice, nor did he ask Dr. O'Neil to identify the people who performed those functions at his practice. (*Id.* at 71:1-6; 72:16-19.) Moreover, Dr. Stiller never determined whether Dr. O'Neil employed written policies or procedures to guide members of his practice in the cleaning, disinfecting, and sterilization of equipment. (*Id.* at 72:20-23.) At one point in Dr. Stiller's deposition, when asked whether his conversation with Dr. O'Neil was "just kind of a general conversation," Dr. Stiller responded, "Absolutely." (*Id.* at 74:1-4.)

At the direction of defense counsel, Dr. Laurence also conferred with Dr. O'Neil, and only Dr. O'Neil, to familiarize himself with the applicable standard of care. (**Exhibit J**, Laurence Dep. 55:6-14; 56:5-15, Oct. 2, 2013.) Dr. Laurence conferred with Dr. O'Neil on two

occasions, the second of which lasted thirty to forty-five minutes and serves as the basis of Dr. Laurence's familiarity with the applicable standard of care in this case. (*Id.* at 57:22-24; 63:7-16.)

During his communications with Dr. O'Neil, Dr. Laurence never determined that Dr. O'Neil actually performed liposuctions or fat transfers in 2010. (*Id.* at 70:1-6; 71:14-22.) According to Dr. Laurence, "[Dr. O'Neil] was clearly knowledgeable about fat transfer, but I don't know how much he did it." (*Id.* at 71:1-3.) When asked to describe how Dr. O'Neil knew of other physicians' liposuction and fat transfer practices and procedures, Dr. Laurence testified, "[H]e did not tell me how he knew other physicians did one thing or another." (*Id.* at 72:4-8.) According to Dr. Laurence, "I assumed that, likely, he had enough connections with staff or through other people that gave him a sense that other physicians in Boise had a similar approach." (*Id.* at 98:14-17.) Additionally, Dr. Laurence never determined "whether [Dr. O'Neil] operated out of . . . an office or an accredited facility." (*Id.* at 104:2-5.)

"An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time." *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002) (*citing Perry v. Magic Valley Reg'l Med. Ctr.,* 134 Idaho 46, 995 P.2d 816 (2000); *Rhodehouse v. Stutts,* 125 Idaho 208, 868 P.2d 1224 (1994)). "The expert must also state how he or she became familiar with that standard of care." *Id.* "One method for an out-of-area expert to obtain knowledge of the local standard of care is by inquiring of a local specialist." *Id.* (*citing Perry v. Magic Valley Reg'l Med. Ctr.,* 134 Idaho 46, 995 P.2d 816 (2000)).

The record in this case demonstrates convincingly that neither Dr. Stiller, nor Dr. Laurence adequately familiarized themselves with the applicable standard of care. In both instances, Dr. Stiller and Dr. Laurence called a physician referred to them by defense counsel, which, on its own, comports with Idaho law. However, their failure to elicit basic foundational information pertaining to Dr. O'Neil's qualifications, and their failure to elicit basic information as to the cleaning, disinfecting, and sterilization procedures that are at the center of this case renders each of them incompetent to offer expert testimony as to the applicable standard of care.

While it is clear that Idaho law demands explanation of *how* a particular expert became familiar with the applicable standard of care, this requirement would be of little meaning if an expert could simply waltz into court and claim to be a standard of care expert based upon a half-hour and half-hearted conversation yielding few probative, relevant considerations. Yet Defendants will surely assert that Dr. Laurence should be considered an expert anyway. And while Dr. Stiller could certainly state that he contacted a cosmetic physician who practiced in Boise in 2010, what value can possibly be attributed to such a contact when Dr. Stiller can offer little more than that Dr. O'Neil "didn't have a problem" with Dr. Kerr's use of Hibiclens, alcohol, and an unknown chemical to clean instruments?

Dr. Stiller does not recall asking whether Dr. O'Neil used a mixture of alcohol and Hibiclens to clean medical equipment and supplies in 2010; Dr. Stiller failed to determine whether Dr. O'Neil used spore counts or whether other area cosmetic physicians conducted spore counts in 2010; Dr. Stiller did not think to ask whether other cosmetic physicians used alcohol to clean their hands in 2010; he made no inquiry of Dr. O'Neil to determine whether the standard of practice required instruments to be soaked in a basin after cosmetic procedures in 2010; Dr. Stiller failed to determine what types of machines Dr. O'Neil employed during cosmetic

procedures; he never asked Dr. O'Neil to identify which personnel performed cleaning, disinfecting, or sterilization of reusable equipment and supplies at his practice; and Dr. Stiller never discerned whether Dr. O'Neil employed written policies or procedures to guide members of his practice in the cleaning, disinfecting, and sterilization of equipment. It was, absolutely, just kind of a general conversation.

And apart from the fact that Dr. Stiller so hastily addressed the many aspects of cleaning, disinfecting, and sterilization, which are so obviously implicated in this matter, both his, and Dr. Laurence's complete failure to ensure that Dr. O'Neil was qualified to provide the information in the first instance is extraordinary. Dr. Stiller made no inquiry into Dr. O'Neil's background or the setting in which Dr. O'Neil performed whatever services he performed in 2010. Dr. Laurence has no idea whether Dr. O'Neil performed *any* liposuctions or fat transfers in 2010. Apparently, he never thought to inquire.

Dr. O'Neil will never set foot in the courtroom during the trial of this matter, yet Defendants' experts hope to justify their competency to testify as to the applicable standard of care simply because they made brief telephone calls to a cosmetic physician who may or may not himself be qualified to shed sufficient light on the issue. And even if Dr. O'Neil was, or is, so qualified, Drs. Laurence and Stiller cannot make a satisfactory showing under *Delaney* in demonstrating how they gained sufficient familiarity based upon their communications with Dr. O'Neil because they couldn't have gained sufficient familiarity. Accordingly, they are not competent to offer standard of care testimony during the trial of this matter.

VII. DR. KERR'S COMMUNICATION WITH KRYSTAL BALLARD'S AUNT

Dr. Kerr testified at deposition that, after Krystal Ballard's death, he communicated telephonically with Krystal Ballard's aunt, Angela Neil, and furthermore, that he composed a

three-page "written narrative of that conversation." (**Exhibit B**, B. Kerr. Dep. 42:22 – 45:22; 105:14-22, Jan. 30, 2013; **Exhibit Q**, Handwritten Notes of Dr. Kerr.) Dr. Kerr explained that his written narrative is not included within Krystal Ballard's medical records "[b]ecause it didn't have anything to do with her medical care." (B. Kerr. Dep. 46:2-7.)

Dr. Kerr recounted the following with regard to his communication with Angela Neil:

> My recollection is that she had expressed that she had been -- she had actually talked with -- or family members had talked with Krystal about that time, that Krystal had told them that she was having -- that she had fallen down the stairs and hurt her back and had not talked about having had a medical procedure.

(*Id.* at 45:10-16.) Dr. Kerr continued, "We discussed some of the challenges that had presented themselves with -- with her post-operative compliance, and I think I ended with sharing my condolences . . . ." (*Id.* at 45:17-20.)

Evidence and argument pertaining to Dr. Kerr's communication with Angela Neil should be precluded as inadmissible hearsay. The Rules of Evidence provide that "[h]earsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Idaho R. Evid. 801(c). And unless a hearsay statement comports with an exception to the general rule of hearsay exclusion, evidence and argument pertaining to such a statement should be precluded. Idaho R. Evid. 802, 803, 804.

Any statements made by Angela Neil during her conversation with Dr. Kerr would constitute inadmissible hearsay to which no exception applies. The same is true of the hearsay contained within Dr. Kerr's written narrative memorializing his conversation with Ms. Neil. Accordingly, evidence and argument pertaining to same should be precluded.

VIII. DR. LUNDEBY'S TESTIMONY AS TO KRYSTAL BALLARD'S CAUSE OF DEATH

During his deposition in this case, Dr. Lundeby testified that "when I looked at this entire record, I was very -- it was difficult to figure out exactly why this patient died." (**Exhibit F**,

Lundeby Dep. 83:13-15, July 26, 2013.) Plaintiff's counsel then asked, "At this point in time, you don't know whether or not you have enough information to form an opinion as to the cause of this patient's death; is that fair?" (*Id.* at 83:21-24.) Dr. Lundeby responded, "Yeah, I think -- I think that's fair."

"[E]xpert medical opinion testimony must be based upon a "reasonable degree of medical probability" in order to be admissible. *Roberts v. Kit Mfg. Co., Inc.,* 124 Idaho 946, 948, 866 P.2d 969, 971 (1993). *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846, 934 P.2d 17, 19 (1997) (*citing Roberts v. Kit Mfg. Co., Inc.,* 124 Idaho 946, 948, 866 P.2d 969, 971 (1993)). Dr. John P. Lundeby cannot offer an opinion with any degree of medical certainty as to Krystal Ballard's cause of death. Therefore, he should offer no such opinion at trial.

IX. EVIDENCE, ARGUMENT, AND SPECIAL VERDICT PERTAINING TO THIRD PARTY LIABILITY

As her health declined subsequent to the liposuction and fat transfer procedures at issue, Elmore Ambulance Service transported Krystal Ballard to Elmore Medical Center; shortly thereafter, Life Flight transported Krystal Ballard to St. Alphonsus Regional Medical Center, where she died. Because Defendants failed to assert third party claims against these, or any other, parties, and because the record in this matter is wholly undeveloped as to third party liability, Defendants are not entitled to present the issue of third party liability to the jury, whether by argument, by special verdict, or otherwise.

"In Idaho, I.C. § 6-802 provides that the court, at the request of any party, may direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party." *Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001). "The decision whether the special verdict shall inquire as to the alleged negligence of a non-party raises a question of law, namely whether evidence

exists which warrants submission of the matter to the jury." *Id.* (*citing Zintek et al. v. Perchik*, 163 Wis.2d 439, 471 N.W.2d 522 (1991)). "It is the general rule that before nonparties are placed on jury verdict forms, there must be a showing that the requisite elements of a cause of action against them have been presented at trial. There must have been admitted into evidence proof sufficient to make a case in negligence where applicable ... before any non-party can be included on the form." *Id.* (*quoting Vannoy v. Uniroyal Tire Co.,* 111 Idaho 536, 551, 726 P.2d 648, 663 (1985) (Bistline J., concurring)).

In the instant action, Defendants should be precluded from offering evidence and argument pertaining to the culpability of absent third parties for a number of reasons. First, Defendants never asserted third party claims. If Defendants felt strongly about the culpability of third parties, they should have, and could have, pursued third party claims against those parties.

Relatedly, because Defendants asserted no third party claims in this case, the record in this matter is completely undeveloped as it pertains to third party liability. Defendants have not identified any allegedly negligent nonparties, much less offered evidence of a causal relationship between any such liability and Krystal Ballard's death. Therefore, permitting Defendants to advance a theory of third party liability would not only force Plaintiff to defend a theory that the parties never adequately discovered, but additionally, the jury would be left to speculate as to the true nature and scope of any absent parties' purported culpability. For these reasons Defendants should be precluded from advancing a theory of third party liability, whether by argument or by special verdict.

X. TESTIMONY OF DR. KERR REGARDING A MEDICAL MALPRACTICE CASE INVOLVING PLAINTIFF'S EXPERT, DR. SORENSEN

Defendants disclosed the following with regard to Dr. Kerr's anticipated trial testimony:

> Depending on the proof submitted at trial and the testimony of Dr. Sorensen and/or the tenor or implication of his testimony and opinions, Dr. Kerr may

> describe the lawsuit against Dr. Sorensen in Boise that resulted in the jury rendering a verdict of malpractice against him and assessing damages of a substantial amount against him.

(**Exhibit O**, Defs.' First Supp. Ans. to Pl.'s First Set of Interrogatories 18.) Because Dr. Kerr has no personal knowledge of the litigation involving Dr. Sorensen, and because the information is not of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subjects at issue in this case, Dr. Kerr's testimony as to Dr. Sorensen's medical malpractice case should be precluded.

Rule 602 of the Idaho Rules of Evidence provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses." Rule 703 provides as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Additionally, "an expert witness may provide an opinion '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Hansen v. Roberts*, 154 Idaho 469, 299 P.3d 781, 786 (2013) (*quoting* Idaho R. Evid. 702). "Therefore, after the court qualifies a witness as an expert, it "must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence." *Id.* (*citing State v. Pearce,* 146 Idaho 241, 246, 192 P.3d 1065,

1070 (2008)). "Pursuant to I.R.E. 704, an expert's testimony is not inadmissible merely because it embraces an ultimate issue to be decided in the case; however, '[e]xpert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible.'" *Id.* (*quoting State v. Ellington,* 151 Idaho 53, 66, 253 P.3d 727, 740 (2011)). "[E]vidence is generally inadmissible under I.R.E. 702 if it vouches for the credibility of another witness." *Id.* (*citing State v. Perry,* 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003)).

Dr. Kerr had no role in the medical malpractice action involving Dr. Sorensen. Therefore, he has no personal knowledge upon which he can rely in offering the subject testimony. And though Rule 703 allows expert witnesses to base opinions upon otherwise inadmissible facts and data learned during the course of litigation, those facts and that data must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. Of course, facts pertaining to a medical malpractice action defended by an adversary expert cannot, by any stretch of the imagination, be of a type reasonably relied upon by a Defendant expert testifying as to his compliance with the applicable standard of practice in this matter.

Defendants have at their disposal other means by which to elicit testimony pertaining to Dr. Sorensen's medical malpractice action. Dr. Kerr should not be allowed to attack the credibility of Dr. Sorensen for the sole purpose of invading the province of the jury to make its own determination as to Dr. Sorensen's credibility based upon properly admitted testimonial evidence. Because Dr. Kerr possesses no personal knowledge of the medical malpractice action at issue, because information pertaining to that medical malpractice action is wholly outside the scope of information reasonably relied upon by an expert in his field, because Dr. Kerr should

not be allowed to attack the credibility of an adversarial expert witness, and because Dr. Kerr's testimony is substantially outweighed by its prejudicial effect, Dr. Kerr should be precluded from offering testimony pertaining to a medical malpractice action defended by Dr. Sorensen.

XI. SPEAKING OBJECTIONS, UNSWORN TESTIMONY OF COUNSEL, AND REFERENCES TO THE PARTIES' MOTION PRACTICE WHILE IN THE JURY'S PRESENCE

At the trial of this matter, all counsel should be precluded from offering speaking objections, unsworn testimony, and references to the parties' motion practice in the jury's presence. "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Idaho R. Evid. 103(c); *see also State v. Gerardo*, 147 Idaho 22, 26-27, 205 P.3d 671, 675-676 (Ct. App. 2009) (finding error in trial court's failure to strike attorney's improper, unsworn "correction" of witness's testimony).

By this motion, Plaintiff seeks not only to preclude counsel from offering the substantive bases for objections and references to the parties' motion practice, but Plaintiff seeks to also preclude counsel from offering personal observations or experiences derived from other, unrelated cases in the jury's presence. Any such statements are likely to expose the jury to precisely the type of irrelevant and prejudicial information Rule 103(c) is designed to address, and which cannot be "unheard" whether or not a motion to strike is offered. Accordingly, speaking objections, references to the parties' motion practice, and unsworn attorney testimony should be precluded.

XII. *AD HOMINEM* ARGUMENTS AND REMARKS

Plaintiff's lead attorneys in this case practice with Bailey & Glasser, LLP, a firm based in Charleston, West Virginia. P. Gregory Haddad practices from Bailey & Glasser's office in

Morgantown, West Virginia; J.B. Perrine practices from Bailey & Glasser's office in Birmingham, Alabama.

Defendants should be precluded from arguing or suggesting that Plaintiff's attorneys, or that out-of-state-attorneys, lack credibility, or make any direct or indirect disparaging remarks concerning Plaintiff's counsel. Any such suggestion, or derivative thereof, is improper at any stage of this trial, including during opening statements and closing arguments. For this reason, Plaintiff respectfully requests that the Court preclude at the trial of this matter any and all *ad hominem* arguments and remarks.

XIII. SETTLEMENT NEGOTIATIONS

Evidence and argument pertaining to settlement negotiations should be strictly precluded pursuant to Rule 408 of the Idaho Rules of Evidence. Rule 408 provides as follows:

> Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass mediation.

Idaho R. Evid. 408.

Plaintiff foresees no permissible purpose for the introduction of evidence pertaining to settlement negotiations in this case. To the degree Defendants perceive a permissible purpose, Plaintiff requests that Defendants be required to proffer the related evidence out of the jury's presence, and that the Court conduct a Rule 403 balancing analysis in determining the admissibility of the proffered evidence prior to its presentation. (*See Davidson v. Beco Corp.*, 114 Idaho 107, 111, 753 P.2d 1253, 1257 (1987)).

XIV. EXPERT TESTIMONY THAT INVADES THE PROVINCE OF THE JURY

Defense experts in this case should be precluded from offering conclusions as to the ultimate issues to be decided in this matter when the jury is duly qualified to draw its own conclusion based upon common sense, life experience, evidence, and the law. Defense experts should also be precluded from offering testimony as to the credibility of other witnesses. Any such testimony would invade the province of the jury.

"[A]n expert witness may provide an opinion '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Hansen v. Roberts*, 154 Idaho 469, 299 P.3d 781, 786 (2013) (*quoting* Idaho R. Evid. 702). "Therefore, after the court qualifies a witness as an expert, it "must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence." *Id.* (*citing State v. Pearce,* 146 Idaho 241, 246, 192 P.3d 1065, 1070 (2008)). "Pursuant to I.R.E. 704, an expert's testimony is not inadmissible merely because it embraces an ultimate issue to be decided in the case; however, '[e]xpert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible.'" *Id.* (*quoting State v. Ellington,* 151 Idaho 53, 66, 253 P.3d 727, 740 (2011)). "Additionally, evidence is generally inadmissible under I.R.E. 702 if it vouches for the credibility of another witness." *Id.* (*citing State v. Perry,* 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003)).

In this case, Defendants' experts should not be allowed to present testimony as to the ultimate issues to be decided in this wrongful death case, nor should they be allowed to make credibility determinations pertaining to other witnesses. Jurors are typically well qualified to make these determinations without being spoon fed by either party's expert witnesses (or fact

witnesses, for that matter), and such testimony is likely to unfairly prejudice Plaintiff. Accordingly, Plaintiff respectfully requests that his Motion *in Limine* to Preclude Expert Testimony That Invades the Province of the Jury be granted.

XV. CUMULATIVE EXPERT WITNESS TESTIMONY

The parties argued Plaintiff's Motion to Exclude Cumulative Expert Witnesses in July of this year. At that time, Defendants argued for Plaintiff's motion to be denied because of the varied backgrounds of their expert witnesses.

Since the time of that hearing, it has become clear that all of Defendants' expert witnesses relied exclusively upon the same cosmetic physician, Dr. Kelly O'Neil, to become familiar with the applicable standard of care. Therefore, no matter how varied Defendants' experts' backgrounds are purported to be, any standard of care opinions offered by Defendants' experts must be considered needlessly cumulative because those opinions are based upon the standard of care perspective of *one* physician. Moreover, Defendants' expert witness disclosure demonstrates that the cumulative nature of defense experts' testimony does not end at the standard of care.

On June 3, 2013, Defendants served a supplemental answer to Plaintiff's Interrogatory No. 3, which calls for expert witness information. (*See* **Exhibit O**, Defs.' First Supp. Ans. to Pl.'s First Set of Interrogatories.) By their 108-page disclosure (not including attachments), Defendants explicitly identify four experts who they intend to offer as standard of care witnesses: the Defendant, Dr. Kerr; Gregory Laurence, M.D., John Lundeby, M.D., FACS, FAACS; and Geoffrey Stiller, M.D. (*Id.*) Additionally, Dr. Thomas Coffman will offer a standard of care opinion to the degree he opines "that Dr. Kerr was not required to test for spores or mold . . . ." (*Id.* at 52.)

According to Defendants, Drs. Kerr, Laurence, Garrison, Coffman, and Lundeby will testify as to "facts of the case," causation, and damages. (*Id.* at 2, 22, 43, 63.) Defendants intend to offer Dr. Stiller's testimony to address "facts of the case" and causation. All of these expert witnesses are intended to offer testimony on "the care and treatment of Krystal Ballard." (*Id.* at 2, 22, 43, 63, 85.)

Defendant's supplemental answer to Plaintiff's third interrogatory is replete with examples of cumulative evidence. With regard to the applicable standard of care, for example, Defendants intend for "Dr. Kerr [to] explain that there was no requirement, per the standard of health care practice or otherwise, for his facility to be certified, inspected, or approved by any organization or governmental agency . . . ." (*Id.* at 4-5.) Defendants intend for Dr. Lundeby to provide the exact same testimony. (*Id.* at 25.)

Additionally, Drs. Kerr, Lundeby, Coffman, and Stiller will all testify that Defendants employed proper techniques to maintain sterility at Silk Touch. (*Id.* at 15, 24, 53, 64, 87.) Relatedly, Defendants intend to offer Dr. Garrison to testify that there is no evidence to establish "that there was any breach of sterility in this case." (*Id.* at 47; *see also id.* at 48 ("[S]terilization procedures were adequate to maintain a proper sterile field.").) These are but some of the examples of cumulative expert testimony contained with the subject discovery response.

In an attempt to resolve this dispute without Court involvement, counsel exchanged correspondence on this issue. (**Exhibit R**, Letter from J.B. Perrine to Terrence S. Jones, June 20, 2013; **Exhibit S**, Letter from Terrence S. Jones to J.B. Perrine, June 21, 2013.) It is Defendants' position that they will not run afoul of Rule 403 because their disclosed experts are "from different specialties of medicine." (*Id.* at 1.) Plaintiff maintains disagreement with Defendants' position, and the dispute remains unresolved.

Plaintiff filed a Motion to Exclude Cumulative Expert Witnesses on June 26, 2013. The parties subsequently argued their positions before the Court. (*See* **Exhibit T**, Hr'g Tr., July 10, 2013.) At that time, Defendants argued that, though their expert opinions may overlap, any such overlap is excused due to their experts' varied backgrounds. (*Id.* at 11-13.) What Defendants failed to mention, however, is that all of their experts consulted with *one* cosmetic physician for the purpose of becoming familiar with the applicable standard of practice in this case, thus rendering their backgrounds far less relevant.

It is axiomatic that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Idaho R. Evid. 403; *see also Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995) (cumulative expert testimony properly excluded pursuant to Idaho R. Evid. 403). In this matter, the overtly cumulative nature of Defendants' anticipated expert witness testimony is unfairly prejudicial to Plaintiff. Defendants' 108-page answer to Plaintiff's third interrogatory contains numerous examples of cumulative testimony as to multiple elements of Plaintiff's cause of action. Because Defendants' disclosed expert witness testimony is so blatantly in violation of Rule 403, Defendants should be precluded from introducing such cumulative evidence at trial.

Defendants are simply wrong to suggest that they will not run afoul of Rule 403 on account of their expert witnesses' varied medical specialties. The fact remains that those experts have been retained to offer opinions as to a single cause of action. To some degree, all experts have different backgrounds, yet that does not justify duplication of testimony on the same subject matter. This is especially true where, as in this case, all of Defendants' out-of-state experts were directed to the same cosmetic physician to become acquainted with the applicable standard of

care.

Plaintiff takes no issue with the fact that Defendant may elect to offer expert testimony to supplement that of Dr. Kerr on any particular element of Plaintiff's cause of action. However, the breadth, scope, and depth of cumulative testimony demonstrated within Defendants' discovery response is wholly inappropriate, as it is clearly and unfairly prejudicial.

Dated this 22nd day of October, 2013.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By_____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2013, I served a true and correct copy of the foregoing **Plaintiff's Consolidated Motions *in Limine*** by delivering the same to the following via hand delivery:

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL

ORIGINAL

AFFIDAVIT OF SCOTT MCKAY

STATE OF IDAHO,
COUNTY OF ADA, TO WIT:

I, Scott McKay, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am one of the attorneys representing Plaintiff in this litigation.

2. On this date, Plaintiff filed his Consolidated Motions *in Limine*.

3. True and accurate copies of the exhibits referenced within Plaintiff's Consolidated Motions *in Limine* are attached hereto as follows.

4. A true and accurate copy of excerpts of the deposition of Charles Ballard, dated February 1, 2013, is attached hereto at **Exhibit A**.

5. A true and accurate copy of excerpts of the deposition of Brian Calder Kerr, M.D., dated January 30, 2013, is attached hereto at **Exhibit B**.

6. A true and accurate copy of Dr. Kerr's postoperative examination record, dated July 23, 2010, is attached hereto at **Exhibit C**.

7. A true and accurate copy of an email from Donna Berg to Susan Kerr, dated July 28, 2010, is attached hereto at **Exhibit D**.

8. A true and accurate copy of excerpts of the deposition of Geoffrey Stiller, M.D., dated July 19, 2013, is attached hereto at **Exhibit E**.

9. A true and accurate copy of excerpts of the deposition of John P. Lundeby, M.D., dated July 26, 2013, is attached hereto at **Exhibit F**.

10. A true and accurate copy of excerpts of the deposition of Thomas J. Coffman, M.D., dated August 20, 2013, is attached hereto at **Exhibit G**.

11. A true and accurate copy of Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admissions is attached hereto at **Exhibit H**.

12. A true and accurate copy of Defendants' untitled spreadsheet purportedly containing the first names, dates of treatment, and procedures of unrelated Silk Touch patients is attached hereto at **Exhibit I.**

13. A true and accurate copy of excerpts of the deposition of Gregory N. Laurence, M.D., dated October 2, 2013, is attached hereto at **Exhibit J**.

14. A true and accurate copy of Defendants' Supplemental Answer to Plaintiff's Interrogatory No. 20 is attached hereto at **Exhibit K**.

15. A true and accurate copy of correspondence from P. Gregory Haddad to Jeremiah Quane, dated September 20, 2013, is attached hereto at **Exhibit L**.

16. A true and accurate copy of correspondence from Jeremiah Quane to P. Gregory Haddad, dated September 26, 2013, is attached hereto at **Exhibit M**.

17. A true and accurate copy of Plaintiff's Notice to Take Video Conference Deposition Duces Tecum of Susan Kerr, dated September 27, 2013, is attached hereto at **Exhibit N**.

18. A true and accurate copy of Defendants' First Supplemental Answer to Plaintiff's First Set of Interrogatories, dated June 3, 2013, is attached hereto at **Exhibit O**.

19. A true and accurate copy of excerpts of the deposition of Charles Garrison, M.D., dated September 23, 2013, is attached hereto at **Exhibit P**.

20. A true and accurate copy of Dr. Kerr's handwritten notes is attached hereto at **Exhibit Q**.

21. A true and accurate copy of correspondence from J.B. Perrine to Terrence S. Jones, dated June 20, 2013, is attached hereto at **Exhibit R**.

22. A true and accurate copy of correspondence from Terrence S. Jones to J.B. Perrine, dated June 21, 2013, is attached hereto at **Exhibit S**.

23. A true and accurate copy of the transcript of proceedings, which occurred before the Court on July 10, 2013, is attached hereto at **Exhibit T**.

And further affiant saith not.

Scott McKay

STATE OF IDAHO;
COUNTY OF ADA, to-wit:

Taken, subscribed and sworn to before me this 22nd day of October, 2013.

My Commission expires: 11-8-2013.

DEBI C. PRUDHER NOTARY PUBLIC STATE OF IDAHO

Notary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2013, I served a true and correct copy of the foregoing ***Affidavit of Counsel*** by delivering the same to the following via hand delivery:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

EXHIBIT A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792
	VIDEO DEPOSITION OF CHARLES KELLEN BALLARD
	FEBRUARY 1, 2013

REPORTED BY:
BARBARA BURKE, CSR No. 463
Notary Public

12:10:14 Q. Well, more than once.
12:10:15 A. Okay. About five times out of the year, maybe,
12:10:18 give or take a few.
12:10:20 Q. Okay.
12:10:21 A. It wasn't always the same destination, as well.
12:10:27 Q. Do you know if your -- if Krystal ever, during
12:10:45 the time you were married, ever filled out any written
12:10:52 applications for any kind of insurance?
12:10:57 A. It was -- sir, we have an SGLI on Base, so you
12:11:07 fill that out. You're not required to, but you're
12:11:10 encouraged to fill out an SGLI, an insurance package
12:11:15 through the Air Force.
12:11:15 THE REPORTER: Are you saying, "STLI"?
12:11:22 THE WITNESS: "SG" -- "SGLI" --
12:11:23 THE REPORTER: Thank you.
12:11:23 THE WITNESS: -- through the Air Force.
12:11:23 Q. (BY MR. QUANE) You're aware that she had
12:11:25 done that?
12:11:26 A. Yes, sir.
12:11:26 Q. What kind of insurance is that?
12:11:30 A. Life insurance.
12:11:31 Q. Okay. It's issued through the Air Force if
12:11:38 you acquire the life insurance?
12:11:41 MR. HADDAD: Hold on one second. Just -- to
12:11:43 the extent that life insurance is a collateral source,

12:11:47 I'll have a continuing objection, so go ahead and answer.
12:11:50 MR. QUANE: I'm just talking about an application.
12:11:52 MR. HADDAD: Go ahead.
12:11:53 THE WITNESS: I'm sorry. Can you say the
12:11:55 question again?
12:11:55 Q. (BY MR. QUANE) Well, what I'm getting at,
12:11:57 are you aware of Krystal ever applying -- filling out
12:12:02 papers to acquire any kind of insurance?
12:12:05 I'm interested in what she may have written
12:12:08 down on an application for insurance that might cover
12:12:12 something to do with her health. That's the -- what
12:12:17 I'm asking -- why I'm asking the question.
12:12:21 A. The insurance -- just the SGLI life insurance
12:12:26 package through the Air Force.
12:12:27 Q. Well, but did she --
12:12:28 A. That's all I know of.
12:12:29 Q. Are you aware that she filled out any
12:12:31 applications to get the insurance through the Air Force?
12:12:38 A. Sir, I believe -- if I'm understanding you
12:12:41 correctly, that is a type of application to receive the
12:12:48 insurance.
12:12:48 Q. Yeah -- to get insured?
12:12:53 MR. HADDAD: Right.
12:12:53 THE WITNESS: Yes, sir.
12:12:54 Q. (BY MR. QUANE) You're aware of her having

12:12:56 done that?
12:12:56 A. Yes, sir.
12:12:57 Q. Okay. Do you know if -- and the type of
12:13:04 insurance she is applying for is what you've described?
12:13:07 A. Yes, sir.
12:13:08 Q. Okay. And that's life insurance of some sort?
12:13:10 A. Yes, sir.
12:13:10 Q. Okay. Do you have any memory specifically of
12:13:16 any questions asked on the applications about her health?
12:13:25 A. No, sir.
12:13:28 Q. Do you know if she ever got insured health
12:13:32 insurance-wise --
12:13:34 A. Sir --
12:13:36 Q. -- through the Air Force?
12:13:37 A. I don't understand.
12:13:41 MR. HADDAD: Are you switching from life insurance
12:13:43 to health insurance because you --
12:13:45 Q. (BY MR. QUANE) Any kind of insurance that she
12:13:47 got through the Air Force.
12:13:49 A. Just the life insurance package.
12:13:50 Q. Okay. She got insured, though?
12:13:53 A. Yes, sir.
12:13:54 Q. Okay.
12:13:55 MR. HADDAD: It's automatic, Jerry, just to
12:13:57 let you know.

12:13:58 Q. (BY MR. QUANE) Did she get any health
12:14:00 insurance through the Air Force?
12:14:01 A. Isn't life insurance and health insurance the
12:14:06 same thing?
12:14:07 Q. Well, there's kind of a difference. Some --
12:14:09 "life insurance" means insurance that's on you, but when
12:14:15 you die, benefits are paid.
12:14:17 A. Okay.
12:14:18 Q. And then there's health insurance that pays
12:14:20 for medical bills.
12:14:22 A. No, sir. Through the Air Force you have Tri-Care,
12:14:25 and Tri-Care pays for all medical bills.
12:14:28 Q. Okay. So that's -- she gets that automatically
12:14:30 for being in the Air Force?
12:14:31 A. Yes, sir.
12:14:32 Q. All right. But the Air Force -- but you can
12:14:36 apply for life insurance and get it -- or you don't need
12:14:39 to apply for life insurance, and you don't get it?
12:14:43 A. Correct, sir.
12:14:44 Q. Okay. All right. So the only type of
12:14:48 application for any kind of insurance that your wife
12:14:52 applied for would be life insurance?
12:14:54 A. Yes, sir, that I'm aware of.
12:14:57 Q. Okay. And I believe you named the name of the
12:15:01 insurance company --

12:15:04 A. No, sir.
12:15:04 Q. -- did you?
12:15:05 A. No. It's just called an "SGLI."
12:15:09 Q. Okay. S --
12:15:11 A. "SGLI."
12:15:12 Q. Okay. Do you know what that's -- is that
12:15:16 an acronym -- do you know what an "acronym" is?
12:15:19 A. An "acronym"?
12:15:21 Q. Letters that mean something.
12:15:23 A. Yes, sir. I believe it means "Service Group
12:15:25 Life Insurance" -- I believe.
12:15:27 Q. Okay. Did -- does your -- during the time you
12:15:37 were married, did you and Krystal own any automobiles?
12:15:40 A. "Own" as in paid off --
12:15:46 Q. No --
12:15:47 A. -- or "owned" as in -- we had automobiles with
12:15:50 loans on them, yes.
12:15:51 Q. Were you buying automobiles?
12:15:54 A. Yes, sir.
12:15:55 Q. How many?
12:15:56 A. Okay. During the time that we were married?
12:16:01 Q. Yes.
12:16:02 A. During the time we were married, we purchased
12:16:06 two automobiles.
12:16:06 Q. Okay. Was one of them dedicated to you to

02:31:25 Q. Okay. And you don't know if they're required
02:31:32 to do one when an Airman passes away --
02:31:34 A. No, sir.
02:31:34 Q. -- that's on active duty?
02:31:36 A. No, sir.
02:31:36 Q. Okay. Have you ever talked to anyone at the
02:31:41 Air Force Base about that subject -- without going into
02:31:46 any details?
02:31:47 A. About --
02:31:48 Q. About there being an investigation by the
02:31:50 Air Force into why your wife passed away?
02:31:54 A. No, sir.
02:31:54 Q. Okay. Now, since your wife's death, you have
02:32:14 not remarried; correct?
02:32:16 A. I have not remarried.
02:32:17 Q. Okay. Have you dated a female since your
02:32:24 wife's death?
02:32:24 A. What do you classify as "date"?
02:32:27 Q. The common ordinary meaning of "dating."
02:32:35 A. Like, had a girlfriend?
02:32:37 Q. Yes, sir.
02:32:37 A. No, sir.
02:32:39 Q. Have you had a girlfriend?
02:32:40 A. No, sir.
02:32:40 Q. Have you -- have you gone out with a girl since

EXHIBIT B

Transcript of
Brian Calder Kerr, MD

Date: January 30, 2013

Case: Ballard v. Kerr, et al.

Case No: CV OC 1204792

Reporter: Andrea J. Wecker, CSR#716, RPR, CRR, CBC

Associated Reporting and Video Inc.
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Associated Reporting & Video

Pages: 1 to 260

09:47 be understandable, but it may have --
09:47 And it's not a big deal. We'll get a
09:47 copy of it. But it may have been responsive to
09:47 other requests that we made. But we'll get a copy
09:47 of it, and it's not a big -- big issue.
09:47 Q. (BY MR. HADDAD) Did you ever reach out
09:47 to any of the physicians at Saint Alphonsus who may
09:47 have been colleagues of yours while you were a
09:47 staff member there that you recognize may have
09:47 treated Krystal Ballard to find out their
09:47 perspective on what had happened?
09:47 A. No.
09:47 Q. How about at Elmore Medical Center? Did
09:48 you ever reach out to anybody at Elmore Medical
09:48 Center to try to find out from their perspective
09:48 what had happened?
09:48 A. No.
09:48 Q. Did you ever contact Mr. Ballard after
09:48 hearing of Krystal's death and try to find out what
09:48 had happened?
09:48 A. No.
09:48 Q. Other than making a request -- reviewing
09:48 records from Elmore and Saint Alphonsus and
09:48 requesting the autopsy report, did you do anything
09:48 else to reach out to any person or entity to find

09:48 out what had happened to have caused Krystal
09:48 Ballard to die five days after you had performed
09:48 liposuction surgery on her?
09:48 A. I had a conversation with Krystal
09:48 Ballard's aunt.
09:48 Your question was did I reach out. At
09:48 the time of the -- I didn't know who it was I was
09:48 calling, but I had a conversation with Krystal
09:49 Ballard's aunt.
09:49 Q. And I said "reach out," and that's the
09:49 way I phrased things. And that means did you make
09:49 a call or write to anybody. And just to make sure
09:49 that you didn't misunderstand my colloquialisms and
09:49 misinterpret it --
09:49 A. Yeah.
09:49 Q. -- did you contact anybody by phone,
09:49 letter, or e-mail other than Krystal Ballard's
09:49 aunt?
09:49 A. My recollection --
09:49 Not other than her aunt.
09:49 Q. Okay. Now, going back to that, was that
09:49 a phone call?
09:49 A. She called my cell phone, and then I
09:49 returned the call.
09:49 Q. As best you can recall, when was that in

09:49 proximity to learning of Krystal Ballard's death?
09:49 A. I have -- I wrote a note about that
09:49 conversation. I -- we can provide that, I assume,
09:49 to you.
09:49 Q. Okay.
09:49 A. My recollection, that it was within
09:49 about a week time period.
09:50 Q. Did you call on your -- using your cell
09:50 phone, to your recollection?
09:50 A. To my recollection, I don't remember if
09:50 it was a cell phone. I remember I made the call at
09:50 my office, so it would either be on my cell phone
09:50 or the office phone.
09:50 Q. Okay. Again, we'll get a copy of
09:50 whatever recordation you made concerning that
09:50 conversation with Krystal's aunt.
09:50 Give me your general recollection of
09:50 what that conversation involved.
09:50 A. Right. She explained that Charles had
09:50 asked her to go through messages that had -- that
09:50 were on her cell phone, and I had made several
09:50 calls to her cell phone after the last conversation
09:50 that I had with her and Charles to follow up. That
09:51 would have been on Sunday and, I believe, even
09:51 Monday morning.

09:51 And I had left a message requesting her
09:51 to return a call. And so my understanding is that
09:51 she -- as she retrieved those calls, she saw that
09:51 there were several calls from me. I don't know
09:51 that she knew who I was. I didn't --
09:51 But she called and -- to inform me that
09:51 Krystal had passed away. And I expressed my
09:51 condolences to her and had a -- I believe it was
09:51 about a five- to ten-minute conversation with her.
09:51 My recollection is that she had
09:51 expressed that she had been -- she had actually
09:51 talked with -- or family members had talked with
09:52 Krystal about that time, that Krystal had told them
09:52 that she was having -- that she had fallen down the
09:52 stairs and had hurt her back and had not talked
09:52 about having had a medical procedure.
09:52 We discussed some of the challenges that
09:52 had presented themselves with -- with her
09:52 post-operative compliance, and I think I ended with
09:52 sharing my condolences and --
09:52 But I do have a -- a written narrative
09:52 of that conversation.
09:53 Q. Did anybody ask you or advise you to
09:53 document these calls that were coming in after
09:53 Krystal's death?

09:53 A. No one advised me to.
09:53 Q. Is there any reason, if it involved the
09:53 care and treatment of your patient in close
09:53 proximity to her death, why that would not be
09:53 included in her medical chart?
09:53 A. Because it didn't have anything to do
09:53 with her medical care.
09:53 Q. But there were issues concerning her
09:53 medical care that came up in that conversation,
09:53 weren't there?
09:53 A. I guess -- I mean, that's a judgment
09:53 call. I mean, it didn't have any direct bearing on
09:53 her care. It may have been reflections about it,
09:53 but not part of her care.
09:53 Q. Okay. So as I understand it, Krystal's
09:53 aunt had called your phone because she had seen, to
09:53 your understanding, log entries on Krystal's phone
09:53 where calls had been exchanged?
09:54 A. Correct.
09:54 Q. And she called you --
09:54 A. Voice messages; I'm assuming that she
09:54 heard the voice message requesting that she call,
09:54 recognized that there were several calls from one
09:54 individual, and then returned that call.
09:54 Q. Okay. She called you, and then you

10:43 rephrase it again or restate it again.
10:43 Q. Okay.
10:43 A. I got a little sidetracked with the
10:43 question.
10:43 Q. Fair enough. That happens when
10:43 objections are made. Sometimes people lose track,
10:43 and there's nothing wrong with asking me to
10:43 rephrase or restate the question.
10:43 In reviewing --
10:43 Strike that.
10:43 Is it your opinion that the bacterial
10:44 rods found in the tissue of Krystal Ballard more
10:44 likely than not were introduced into her body after
10:44 she left your facility as opposed to being
10:44 introduced into her body during the procedure
10:44 itself?
10:44 A. Yes, it's my opinion.
10:44 Q. Okay. And why do you hold that opinion?
10:44 Other than saying, "It's my education, training,
10:44 and experience," what specific fact in the medical
10:44 records or your education, training, and experience
10:44 tells you that that bacteria got into her body
10:44 after she left Silk Touch?
10:44 A. Because I've never had another infection
10:44 of that nature.

10:44 **Q. Have you had patients that have had post-operative -- post-procedure infections?**

10:44 **A. At any time?**

10:44 **Q. Well, anytime you've been doing lipolysis.**

10:45 **A. Yes.**

10:45 **Q. Okay. On how many -- what percentage if you've --**

10:45 **Well, first of all, do you track at Silk Touch the number of infections that occur either -- in your patients in the post-operative period?**

10:45 **A. Not formally.**

10:45 **Q. Okay. Do you have a general idea of what percentage of patients undergoing lipolysis at Silk Touch experience an infection that is diagnosed post-procedure?**

10:45 **A. Not an exact number, but a general idea, which would be less than 1 percent.**

10:45 **Q. All right. How many of those patients died?**

10:45 **A. None.**

10:45 **Q. In the other patients other than Krystal Ballard, how was the post-operative infection diagnosed?**

10:49 Q. Okay.
10:49 A. And those are --
10:49 But it's limited to those surgical
10:49 sites.
10:49 Q. Right. I mean, it's -- is there any
10:49 doubt in your mind whether it occurred --
10:49 While you may dispute that it occurred
10:49 intraprocedurally, there's no doubt in your mind,
10:49 is there, Doctor, that bacteria -- gram-negative
10:49 bacteria was in Krystal Ballard at some point?
10:49 A. Correct.
10:49 Q. All right. That being the case, do you
10:49 have an opinion from the time she steps in to have
10:49 the procedure done on July 21 up until the time of
10:49 her death, when during that course that bacteria
10:49 got in her body?
10:49 A. I have an opinion.
10:49 Q. What is your opinion?
10:49 A. One of the aspects of Krystal's
10:49 post-operative care was her pattern of not doing
10:50 the things that we had asked her to do.
10:50 It became apparent that she was
10:50 non-compliant with a number of the things that we
10:50 had both written and orally advised her to do
10:50 because, in fact, she was trying to hide the

10:50 procedure both from her husband, Charles, and, in
10:50 our opinion, from the military, and it's my opinion
10:50 that this compromised her ability to properly take
10:50 care of herself.
10:50 And while I didn't have around-the-clock
10:50 observation of her, my experience with patients is
10:50 that when they are trying to hide the procedure,
10:51 they don't -- they can't change their bandages
10:51 appropriately, they will oftentimes overexert or do
10:51 activities that they shouldn't otherwise because
10:51 they're trying to not draw attention to the fact
10:51 that they've had anything done.
10:51 They may not take their medications as
10:51 prescribed because --
10:51 In particular, in Krystal's case, on
10:51 several occasions, she wanted to know what drugs
10:51 would show up in a drug screen and would indicate
10:51 that she was taking certain medications or imply,
10:51 but when pressed would admit that she was not.
10:51 And so my opinion is is that she may
10:52 have done activities, leave the wound sites open to
10:52 drainage, and that certainly can be a pathway to
10:52 introduce bacteria.
10:52 And my opinion is that at some point,
10:52 bacteria from the outside entered and one of

11:43 Q. Well, that's your memorialization of it.
11:43 What I'm talking about is --
11:43 A. Written.
11:43 Q. Is what I've shown you that we'll mark
11:43 as No. 5 the only time you wrote something and sent
11:43 the written document to either Charles or Krystal's
11:43 family?
11:43 A. Yes, that is the only time.
11:43 Q. All right. If I could have that back so
11:43 we can mark it and make sure it gets attached to
11:43 the deposition.
11:43 A. Uh-huh.
11:43 (Deposition Exhibit No. 5 was marked.)
11:43 Q. (BY MR. HADDAD) The next document that
11:43 Mr. Quane handed me at the break, we'll mark as
11:43 No. 6, which is a three-page document that
11:43 memorializes or appears to memorialize the
11:44 conversation you had with Angela Neil, the aunt of
11:44 Krystal Ballard.
11:44 Is that correct? Let me hand that to
11:44 you so you can identify it.
11:44 A. Yes.
11:44 Q. Okay. Is that all in your handwriting,
11:44 everything that's contained on those three pages?
11:44 A. I don't believe the front handwriting is

11:56 that.
11:56 Q. Okay. Well, let me ask you this: First
11:56 of all, is there any medication that you prescribed
11:57 for Krystal Ballard that you, in fact, know she did
11:57 not take as prescribed?
11:57 A. In my record, she admitted to have not
11:57 taken the Norco that was prescribed.
11:57 Q. And that's a narcotic pain medication?
11:57 A. Correct.
11:57 Q. What narcotic does it have in it?
11:57 A. Hydrocodone.
11:57 Q. Okay. Do you know that when they were
11:57 looking at -- or doing a toxicology screen -- I
11:57 can't remember if it was Elmore or Saint
11:57 Alphonsus -- they actually found hydrocodone in her
11:57 system?
11:57 A. I -- I've seen that toxicology report.
11:57 Q. Would that suggest to you that, in fact,
11:57 in order for the toxicology report to be positive
11:57 for Hydrocodone, it would mean that Krystal
11:57 actually took the Norco that you prescribed?
11:58 A. Not in the time frame that I prescribed
11:58 it. I know that when I had the conversation with
11:58 Charles, I asked him to give her a Norco, which he
11:58 said he did.

11:58 Q. Okay.
11:58 A. Or would.
11:58 Q. Let me ask you this: Norco is a pain
11:58 medication, correct?
11:58 A. Yes.
11:58 Q. It doesn't stop or fight an infection,
11:58 does it?
11:58 A. No.
11:58 Q. Okay. And it's usually written --
11:58 And I don't have the actual
11:58 prescription, but when you write for a narcotic
11:58 pain medication, typically you write it to be taken
11:58 by the patient on an as-needed basis?
11:58 A. Often, yes.
11:58 Q. Okay. I mean, is there --
11:58 Do you have a note that actually tells
11:58 us whether or not, for instance, you told -- or
11:58 wrote a prescription, "Take one tablet every four
11:58 hours as needed for pain," or words similar to that
11:58 to describe a -- a frequency that you were
11:58 prescribing that pain medication for?
11:58 A. You know, it would typically be every
11:59 four to six hours as needed.
11:59 Q. Okay. And the "as-needed" part means
11:59 the patient can elect to take a narcotic pain

11:59 medication or not to, correct?
11:59 A. Yes.
11:59 Q. And there's nothing inappropriate
11:59 whatsoever about a patient deciding to take Motrin
11:59 versus a narcotic, is there?
11:59 A. Well, repeat the question.
11:59 Q. Sure. First of all, did you tell --
11:59 Did you ever write Krystal a
11:59 prescription for Motrin?
11:59 A. I did not write it.
11:59 Q. Were you aware or suggest that Motrin
11:59 would be an appropriate pain -- or
11:59 anti-inflammatory for her to take?
11:59 A. Yes.
11:59 Q. Okay. Motrin can both help relieve pain
11:59 and it can help reduce inflammation, correct?
11:59 A. Correct.
11:59 Q. All right. And there's nothing
11:59 inappropriate at all about a patient deciding to
11:59 take Motrin for pain versus taking a narcotic for
12:00 pain. That's a patient preference issue, isn't it?
12:00 A. Not necessarily.
12:00 Q. Okay. Well, do you think in any way,
12:00 shape, or form not taking Norco, a narcotic, or not
12:00 taking it as you prescribed it led to bacteria

12:00 getting in Krystal's body?
12:00 A. No.
12:00 Well, I'll digress. I'll strike that,
12:00 using your phrase.
12:00 Q. You don't get to strike it, but you can
12:00 add to it.
12:00 A. Okay. If someone --
12:00 Someone's behavior may be altered
12:00 because they are in a lot of pain and not
12:00 controlling their pain symptoms. Pain can -- can
12:00 alter a person's behavior.
12:00 Q. Do you have any basis in fact as you sit
12:00 here today to a reasonable degree of medical
12:01 probability that Krystal Ballard either not taking
12:01 a narcotic for pain or not taking it as prescribed
12:01 actually caused or contributed to bacteria getting
12:01 in her body?
12:01 A. I believe it may have.
12:01 Q. You actually are going to testify in
12:01 court if this goes to trial and say, "She didn't
12:01 take narcotic pain medication, she took Motrin, and
12:01 that may have influenced bacteria getting in her
12:01 body."
12:01 Is that going to be your testimony?
12:01 MR. QUANE: I object to the form, and I'm

12:02 A. 200.
12:02 Q. Let me go back.
12:02 Is it going to be -- is it your
12:02 testimony to a reasonable degree of medical
12:02 probability that Krystal Ballard taking
12:02 prescription Motrin instead of a narcotic pain
12:02 medication actually caused or contributed to her
12:02 having bacteria in her body?
12:02 A. Yes.
12:02 Q. And based on what set of specific facts
12:02 known to you support your opinion that taking
12:03 Motrin instead of a narcotic caused or contributed
12:03 to Krystal Ballard getting bacteria in her body?
12:03 Tell me every fact that supports that opinion.
12:03 A. I don't know if I can tell you every
12:03 fact.
12:03 Q. Tell me any facts that support that
12:03 opinion.
12:03 A. My opinion is that because she did not
12:03 want to --
12:03 She expressed to us that she was
12:03 concerned that narcotics would -- could show up in
12:03 a drug test, a -- a random drug screen by the
12:03 military. It was apparent from what she was
12:03 stating that she had not told her commanding

12:03 officer or anyone in the military and was very
12:03 concerned that they not be able to discover that.
12:03 She asked on several occasions about
12:04 both narcotics and the antibiotics that were
12:04 prescribed.
12:04 She was complaining of pain, and if she
12:04 was not getting adequate pain control, which, in my
12:04 opinion, Norco is a better -- is a stronger pain
12:04 medication, then she could have not followed the
12:04 instructions on how to care for herself, changing
12:04 her bandages, appropriate rest, other
12:04 post-operative care issues because she was dealing
12:04 with pain rather than dealing with her operative
12:04 care.
12:04 Q. Okay. I asked you --
12:04 I don't mean any disrespect. Sometimes
12:04 I ask for what facts support it, and people that
12:04 haven't been in deposition answer a question that
12:05 they believe is responsive to the question.
12:05 Do you know the difference between a
12:05 fact and an opinion?
12:05 A. Will you explain it to me?
12:05 Q. Okay. When you -- your opinion is that
12:05 Krystal Ballard, by not taking a narcotic but
12:05 instead taking Motrin, that that caused or

12:08 Q. Okay. First of all, I kind of jumped the gun.

12:08 Where is the note that talks about her overexerting herself?

12:08 A. Let me take a minute to see --

12:08 Q. Sure.

12:08 A. -- if I can find it.

12:08 Q. You can look at any other documents you need to. You tended to focus on that, but to the extent it's somewhere else, that's fine.

12:09 A. On the right side column, 7/24, it says, "Talked with by phone, complains of buttocks pain, says she has -- she was better this morning, a.m., but may have been too active."

12:09 Q. Okay. Do you equate the word "active" meaning --

12:09 A. And then down lower --

12:09 Q. I'm sorry. Go ahead.

12:09 A. Then down lower, it says, "Ice yesterday but not today."

12:09 Q. Okay. All right.

12:10 Is that -- the fact that it says --

12:10 Is "TW" "talk with"? Is that what it --

12:10 A. "Talk with," yeah.

12:10 Q. Okay. And let me read as I understand

12:11 her abdomen.
12:11 Q. Fair. It doesn't really suggest one way
12:11 or the other, does it?
12:11 A. No.
12:11 Q. Okay. "Patient says she was better this
12:11 a.m. but may have been to," again, it's t-o,
12:11 "active this morning."
12:11 A. Okay.
12:11 Q. What activity was she doing?
12:11 A. I don't know.
12:11 Q. Okay. You said she overexerted.
12:11 Now, obviously, there's a certain level
12:11 of activity that you permit and then certain level
12:11 of activity that you think in the immediate
12:11 post-operative period, a patient should refrain
12:11 from.
12:11 Is that fair?
12:11 A. Yes.
12:11 Q. Okay.
12:11 A. And in our --
12:11 Q. Okay.
12:11 A. In our pre-operative instructions, it
12:12 specifically states to avoid overexertion for two
12:12 weeks.
12:12 Q. Okay.

12:12 A. Now, to shed some light on this --
12:12 Q. Let me ask -- let me ask you something
12:12 first, and then I'll let you shed your light. I
12:12 don't want to cut you off.
12:12 A. Okay.
12:12 Q. Do you know specifically what activities
12:12 she was performing on 7/24 in order for you to
12:12 reach an opinion she overexerted herself and
12:12 exceeded your post-operative instructions?
12:12 A. No, but I can tell you what our fear
12:12 was.
12:12 Q. First I want to know fact; then you can
12:12 give me your opinion.
12:12 A. Okay.
12:12 Q. No facts support an opinion that she
12:12 overexerted and exceeded your instructions.
12:12 Is that fair?
12:12 A. Other than her statement that she said
12:12 she had overexerted.
12:12 Q. Well, she said she was too active. I
12:12 don't know what that means. Do you know what that
12:12 means?
12:12 A. That she was too active.
12:12 Q. Okay. That could mean she got out of
12:12 bed. To a patient, that may be too active given

12:15 A. Correct.
12:15 Q. Okay. And I interpret the 7/23 note
12:15 that appears on STMS 12 as actually her coming into
12:15 your office and you're doing an examination and
12:15 assessment.
12:15 Is that a fair reading?
12:15 A. That's a fair reading.
12:15 Q. Is there anything in that July 23, 2010,
12:16 note where you had a chance to talk with Krystal
12:16 face-to-face, examine her, where there's any
12:16 notation that she did this PT examination the day
12:16 before or the day of your exam?
12:16 A. There's not a notation.
12:16 Q. All right. In fact, while you might
12:16 have had a fear she might have done a -- was
12:16 scheduled for a PT exam, you do not have a basis in
12:16 fact that she ever undertook that PT exam.
12:16 Is that true?
12:16 A. I don't have a basis in fact that she
12:16 did.
12:16 Q. Okay.
12:16 A. I have a suspicion.
12:16 Q. Now, let's look at that --
12:16 Well, we'll come back to that 7/23. I
12:16 want to kind of -- I don't want to digress every

12:19 care to explore, is the issue of taking Motrin or
12:19 not taking the Norco as often as you might have
12:19 liked, okay?
12:19 A. Okay.
12:19 Q. What other non-compliance issues do you
12:19 think are pertinent to Krystal's taking care of
12:19 herself?
12:19 A. Okay. The --
12:19 In our pre-operative visit with her,
12:19 both in the oral discussion and in the written
12:19 instructions, it specifies that she needed to have
12:19 someone to drive her home from the procedure. And
12:19 when she arrived, having received those
12:19 instructions and telling us that she would, she, in
12:19 fact, did not have someone there.
12:19 Another point of discussion was that she
12:20 needed to have someone to take care of her, and she
12:20 acknowledged that she would, and then we had to --
12:20 we discussed --
12:20 At some point she revealed that she had
12:20 not told her husband. We strongly advised that she
12:20 should tell her husband because to do otherwise
12:20 would compromise her care. She agreed to do that.
12:20 When we saw her back on the 23rd, we --
12:20 she revealed to us that she had not told him. We

12:25 sedative to do the procedure, and Krystal was told
12:25 that she could not take the sedation. And if she
12:25 chose to take the sedation during the procedure,
12:25 then she didn't have that option to drive herself
12:25 home.
12:25 Q. Okay. Going back to my question, it's
12:25 because you might get a medication that sedates you
12:25 during a procedure. That's the reason why you
12:25 wanted somebody there to drive her, correct?
12:25 A. That's part of the reason.
12:25 Q. Okay. What is the other reason or the
12:25 other part?
12:25 A. If they had, you know, other conditions
12:26 secondary to the procedure that would preclude them
12:26 from driving home.
12:26 Q. Okay. And you've kind of excluded those
12:26 concerns by, one, not giving her a sedative, and,
12:26 two, observing her for a sufficient period of time
12:26 after the procedure where you felt comfortable she
12:26 could drive herself, correct?
12:26 A. That's correct.
12:26 Q. All right. I think the other issue
12:26 of -- that you raised about compliance was whether
12:26 or not Krystal should tell her husband that she had
12:26 had this procedure, correct?

EXHIBIT C

Krystal Ballard

ate of Lipolysis: 7-21-10

reas treated: Abd, Lat Waist, Flank

ate: 7/23/10 Post op day:	Date: Post op day:	Date: 7/24 Post op day: 1700
t. comments or complaints:	Pt. comments or complaints:	Pt. comments or complaints:
· No problems on travel home, tor c/o tenderness to sitting during the drive. Abd Torso almost no pain Request Nitrina Rx -- called in Wanty to know what drugs would show up on drug test Advised to not using Norco - Shelly Kear not told Nurolaunt.		-Tyler by phone c/o buttocks pain. Says she was better than AM but may have been to active this A.M. Denies Fever Denies Localized pain or erythema Notes Bruising -Notes she is taking Meds: Keflex, ~~Advil~~, Zofran, Norco, Tylenol, Medrol Ice yesterday but not today
in Meds: –	Pain Meds:	Pain Meds:
in: 0...1...2...3...4...5 Abd 1 Butt 3	Pain: 0...1...2...3...4...5	Pain: 0...1...2...3...4...5
usea: 0...1...2...3...4...5	Nausea: 0...1...2...3...4...5	Nausea: 0...1...2...3...4...5
hing: 0...1...2...3...4...5	Itching: 0...1...2...3...4...5	Itching: 0...1...2...3...4...5
9Ls: good...fair...poor	ADLs: good...fair...poor	ADLs: good...fair...poor
lisfaction: good...fair...poor	Satisfaction: good...fair...poor	Satisfaction: good...fair...poor
ompliance:	Compliance:	Compliance:
tibiotic Rx: yes / no Take Keflex	Antibiotic Rx: yes / no	Antibiotic Rx: yes / no
pression Garment: 90 %	Compression Garment: ____%	Compression Garment: ____%
ercise: good...fair...poor	Exercise: good...fair...poor	Exercise: good...fair...poor
trition: good...fair...poor	Nutrition: good...fair...poor	Nutrition: good...fair...poor
kam:	Exam:	Exam:
ound: closed / open	Wound: closed / open	Wound: closed / open
normal / pink / red	normal / pink / red	normal / pink / red
inage. 0...1...2...3...4...5	Drainage: 0...1...2...3...4...5	Drainage: 0...1...2...3...4...5
ema: 0...1...2...3...4...5	Edema: 0...1...2...3...4...5	Edema: 0...1...2...3...4...5
ising: 0...1...2...3...4...5	Bruising: 0...1...2...3...4...5	Bruising: 0...1...2...3...4...5
mness: 0...1...2...3...4...5	Firmness: 0...1...2...3...4...5	Firmness: 0...1...2...3...4...5
onthness: good...fair...poor	Smoothness: good...fair...poor	Smoothness: good...fair...poor
htening: good...fair...poor	Tightening: good...fair...poor	Tightening: good...fair...poor
ier: - buttocks is moderately tender to touch but w/out localized swelling a erythema c/o past FT	Other:	Other:
pression: Krystal main complaint is discomfort to buttocks doubt infection but because distance to travel will start on Keflex 500mg x10d Most likely a sensitivity to procedure itself and possible inflamatory response to fat transfer as it is generalized and not localized c/o Rx Medrol Dose Pack	Impression: She has apparently not told her husband still she is picking up from the airport and states that she will tell him.	Impression: Unusually sensitive p fat transfer but w/out localizing S/S of infection still can not R/O c/ cont Abx
n:	Plan:	Plan: Rest - ↓ activity level Ice area & elevate ½ Norco now - if now relief call back in 1 hour

000950
STMS000012

EXHIBIT D

susie@silktouchmedspa.com

From: Donna Berg [donna@silktouchmedspa.com]
Sent: Wednesday, July 28, 2010 12:23 PM
To: susie@silktouchmedspa.com; Donna@silktouchmedspa.com
Subject: Krystal Ballard
Attachments: _Certification_.txt

July 28, 2010

I am writing this today regarding my involvement and care of Krystal Ballard.
I met her July 13th for a Smart Lipo consultation. Dr. Kerr was involved with the consultation as well.
She had had Lipo suction at another facility on her back two years ago and was unhappy about her abdominal fat. She wanted to get it done as soon as possible, while her husband was gone but did not have someone to drive her.

Dr. Kerr discussed her options of not having oral sedation if she was going to drive herself. He also suggested she consider getting a hotel room for one nite and drive home the following day if need be. Dr. Kerr would not let her leave the Spa if he did not feel she was ok on her own.

July 21st, Krystal had her Smart Lipo procedure. I visited with her several times, she was up beat and jokative.

July 22nd I called Krystal in the morning to see how she was doing. Krystal was alone and was caring for herself. She said she was not sick but in pain. I asked if she was taking her medications and encouraged her to have something to eat so she didn't get sick. Krystal called later that day to ask for a RX for Extra Strength Motrin for her pain. She said she was having a test at work the next day and could not take prescription pain pills. Dr. Kerr called in the RX to Walmart in Mt. Home.

July 23rd. Krystal called in the morning to reschedule her follow up appointment in the late afternoon for earlier. She took the day off work and needed to see Dr. Kerr. I told her to come in as soon as she could and Dr. Kerr would work her into his schedule.
Krystal came in Friday afternoon, Dr. Kerr had met with her and so had Susie Kerr. A RX was called into Walgreen's and Krystal was resting in one of our rooms until the RX was ready. I went in to visit with her, she said she was not sick but in pain. She asked for some juice which I brought her along with a Zofran for nausea. I went to Walgreen's to pick up RX so she could rest.

July 26th. I called Krystal in the morning and left her a message to see how she was doing. At that time, I did not know she had gone to the ER over the weekend. Later, I was told she had been flown to St. Al's in Boise. Dr. Kerr asked me to call to check up on her and at that time was told she had passed away earlier that day.

I can't express the sorrow and complete shock I felt. I know we did everything we could to help Krystal.

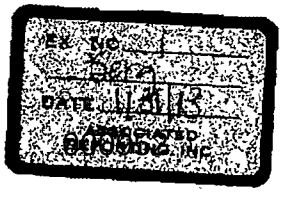

EXHIBIT E

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD; Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	))))Case No. CV OC 1204792))))))))))

DEPOSITION OF GEOFFREY STILLER, M.D.
TAKEN ON BEHALF OF THE PLAINTIFF
AT MOSCOW, IDAHO
JULY 19, 2013, AT 9:09 A.M.

Reported by Nancy K. Towler, CSR, Notary Public

Q. In terms of the machine that you all have used since March of 2012, you don't know who the manufacturer is?

A. I don't remember.

Q. Okay. Do you know what the manufacturer recommends in terms of how to clean and disinfect and sterilize that equipment?

A. The equipment, itself, is just an engine to pull tissue. It doesn't have any contaminants to it.

Q. Okay.

A. So everything going to it is disposable.

Q. What about the hand piece?

A. The hand piece is my liposuction cannulas.

Q. Okay. Okay. The hand piece, as you understand it, that Dr. Kerr used was because he used ultrasound?

A. Correct.

Q. Okay. Have you been provided the manual from the manufacturer of the machine Dr. -- the vaser machine Dr. Kerr used on Krystal Ballard?

A. I have not.

Q. Okay. Now, at some point in time, Doctor, during the -- when you were asked to -- to review this case, I know there was some correspondence from Mr. Jones' office about contacting Dr. O'Neil so that you could talk to him, Dr. O'Neil, about the standard of practice

as it exists in Boise, correct?

A. At the time of this incident, correct.

Q. Okay. Because you had not practiced in Boise or the sounding area, correct?

A. I had practiced in Boise and the surrounding area up until 2005.

Q. As a general surgeon?

A. Correct.

Q. Okay. But they wanted you, as I understand it, to talk to Dr. O'Neil about the standard of practice during the time that Krystal Ballard had her procedure for cosmetic procedures?

A. Correct.

Q. All right. Do you know when you spoke to Dr. O'Neil?

A. End of May, beginning of June.

Q. I mean, do you have any -- first of all, do you have any notes that you've made in your review of any materials?

A. I do not.

Q. Do you have anything that you've kept in any type of electronic format concerning notes about your case review?

A. I have not.

Q. What type of -- what type of practice does

Dr. O'Neil have?

A. A cosmetic physician, I believe.

THE REPORTER: I'm sorry?

THE WITNESS: A cosmetic physician, I believe.

BY MR. HADDAD:

Q. What type of background does he have?

A. I don't know offhand.

Q. Okay. Do you know whether he had any kind of surgical residency?

A. I do not know offhand.

Q. Okay. I mean, when you say you don't know offhand, did you ever -- before you spoke to him, did you ever try to find out what type of background Dr. O'Neil had in terms of his practice?

A. No.

Q. When you were talking to him, did you ask him how he was trained, both in -- through medical school, residency and in cosmetic procedures?

A. No. I asked him about the standard of practice in Boise at that point in time.

Q. Okay. We'll get to that. Did you ask Dr. O'Neil what type of machine he used at his office? For instance, do you know whether he used the vaser?

A. I did not ask him, and I do not know.

Q. Do you know if Dr. O'Neil's practice is such that he has -- strike that. Do you know whether Dr. O'Neil personally performs the cleaning, disinfecting and sterilizing of equipment and supplies that are reusable at his office?

A. I don't know.

Q. Do you know what type of cleaners Dr. O'Neil uses?

A. I do not know.

Q. Do you know what type of disinfectants Dr. O'Neil uses?

A. No.

Q. Do you know if Dr. O'Neil uses an autoclave?

A. No.

Q. Do you know whether Dr. O'Neil takes spore counts?

A. I do not.

Q. Did you ever ask him any of those questions?

A. I did not.

Q. I mean, how long was your conversation with Dr. O'Neil that you utilized to gain an understanding as to the standard of practice for a cosmetic physician at the time Krystal Ballard had her procedure? How long was your call?

A. About 20 to 40 minutes.

Q. (Indicating).
A. Twenty to 40 minutes.
Q. Twenty to 40 minutes. All right. I want you to recount for me everything you discussed with Dr. O'Neil.
A. That will be a very -- a 20-minute to 40-minute conversation to discuss that. Do you want me to go through every aspect of it?
Q. Well, let me break it down. Then I'll ask you kind of a catchall question. And if it takes time, it takes time.
A. Sounds good.
Q. Do you know whether Dr. O'Neil does cosmetic procedures in his own office?
A. Yes.
Q. All right. Do you know whether Dr. O'Neil has specifically dedicated staff who do the cleaning, disinfecting and sterilizing?
A. I don't know.
Q. Do you know whether Dr. O'Neil has written policies and procedures in his office dealing with cleaning, disinfecting and sterilizing equipment?
A. I do not. I did not ask.
Q. All right. What were the general topics, and then we might get into specifics, that you discussed

Q. Okay. How many -- I mean, what was it like practicing in Boise, was that just kind of a general conversation, or what --

A. Absolutely.

Q. Then what was the point of -- I mean --

A. How many physicians there were --

Q. -- it may not have any relevance, but I just want to know, does asking him, gee, what was it like practicing? How many cosmetic physicians in Boise? How did that lead you to have an understanding as to the standard of practice in Boise?

A. As far as the standard of practice in Boise, which physicians, what kind of physicians perform -- were performing and where they were performing their procedures.

Q. Okay. What type of physicians in Boise were performing cosmetic procedures?

A. As -- Dr. Kerr was doing it, as well as Dr. O'Neil was doing it. And I think he said there was an -- not an ophthalmologist, but an ER doc. Again, these were all non-plastics people and who was doing it. And there was five in total. There might have been an OB that was doing it as well, as far as I remember.

Q. Okay. To your recollection, there were only five physicians in Boise doing cosmetic procedures?

A. No. There were five cosmetic physicians doing procedures.

Q. Okay. To your knowledge, all five were nonsurgical trained?

A. I don't know if they were surgical trained.

Q. Now, when you say you discussed the sterilization and the adequacy of the sterilization as described, are you talking about as Dr. Kerr described in his deposition?

A. Yes.

Q. Okay. Tell me specifically what it was you and Dr. O'Neil talked about in terms of the adequacy of the sterilization as described in Dr. Kerr's deposition.

A. Sure. We talked about his cleaning of the instruments. We talked about the sterilization of his instruments.

Q. Okay. Is that it? I mean, can you be any more specific? When you say you talked about the cleaning, what did you all talk about in terms of cleaning the instruments?

A. We discussed what Dr. Kerr had said he did.

Q. Okay. What did Dr. Kerr say he did?

A. Well, he mentioned, at some point in time, that he did both the Hibiclens and the alcohol, as well as he also talked about using a chemical, which he didn't know

the name of.

Q. Okay. Now, how is -- okay. I'm sorry, I interrupted you --

A. No worries.

Q. -- and I shouldn't do that.

A. No worries.

Q. You said alcohol, Hibiclens --

A. Uh-huh.

Q. -- and some unknown chemical Dr. Kerr couldn't remember the name of?

A. Correct.

Q. Okay. Anything else dealing with the cleaning of instruments that you all talked about, other than the types of solutions Dr. Kerr described he used?

A. Not that I can tell you right now, no.

Q. Okay. Do you know in your practice whether you use alcohol to clean instruments?

A. Do we use alcohol to clean instruments? I will use alcohol to clean instruments on the field if I need to, yes.

Q. When you say "on the field," what does that mean?

A. My surgical field.

Q. Okay. But as far as once they go back with Ms. Blake, do you know what she uses?

A. She uses a -- a -- a hospital-grade cleaner, as

well as the -- the disinfectant.

Q. Okay. I mean, saying a hospital-grade cleaner, what's --

A. There's -- well --

Q. -- what's the active ingredient?

A. An acetylene, something, something something. I don't know.

Q. All right. Okay. Let me ask you this. You talked about alcohol, Hibiclens; and, obviously, you couldn't have much discussion about the appropriateness of some unknown cleaner, correct?

A. Correct.

Q. All right.

A. Well, we also talked about his autoclave, the steam autoclave, and the fact that he did use a chemical marker.

Q. All right. That's more the sterilization side.

A. Correct.

Q. I look at it differently, but --

A. Well, the sterilization side is important.

Q. Okay. It is. We were going to get to that, but I was breaking them down. But we can deal with them all together --

A. No worries.

Q. -- if it's easier for you. Do you know whether

whether Hibiclens is an appropriate solution to use?

A. I have not researched it.

Q. What concentration -- I mean, what is the active ingredient --

THE WITNESS: Just a moment.

MR. HADDAD: Sure.

THE WITNESS: Sorry.

MR. HADDAD: We're still good?

THE WITNESS: Yeah.

MR. HADDAD: All right.

BY MR. HADDAD:

Q. What is the active ingredient of Hibiclens?

A. I don't know.

Q. Do you know what -- now, did Dr. O'Neil tell you he uses alcohol?

A. As far as him using alcohol?

Q. To clean medical equipment or supplies.

A. To clean medical equipment, again, it's not the mixture -- it's not alcohol. It's the mixture of alcohol and Hibiclens. And alcohol and Hibiclens is what I use to cleanse patients as far as a cleaner and disinfectant. That being said, again, it's not a disinfectant. It's to sterilize the -- it's used to clean the tissue. So...

Q. Did you ask Dr. O'Neil whether or not he used a

alcohol-Hibiclens solution, mixture, to clean medical equipment and supplies?

A. I asked him whether that was an adequate cleaning at that point in time in Boise with Dr. Kerr. And he agreed that he didn't see any issues with that.

Q. Did he say he did it? He used -- that Dr. O'Neil specifically said, I used alcohol and Hibiclens in a mixture to clean medical equipment and supplies? Did you ask him that?

A. I did -- I don't remember.

Q. Did you ask Dr. O'Neil whether or not he took spore counts?

A. I did not ask him.

Q. Did Dr. O'Neil tell you that other physicians in Boise that do cosmetic procedures did or did not do spore counts? Or did that not come up?

A. It did not come up.

Q. Again --

THE WITNESS: No. Just my wife.

MR. HADDAD: Sometimes that can be more important than any other call you get.

BY MR. HADDAD:

Q. The various places that you practice -- or have practiced -- I'm going to back up so I can kind of get them here. And we'll go in most recent. In March, 2012

Q. Okay. Did you ask Dr. O'Neil whether or not using alcohol to clean your hands before a procedure was or was not something that other Boise nonsurgically trained physicians did?

A. I did not.

Q. Do you do regular maintenance, or have somebody do regular maintenance, on your autoclave?

A. I do.

Q. Okay. How often do they come and check the autoclave to make sure it was working appropriately?

A. I think it's once a year they come by.

Q. The other facilities that you worked in, or were involved with, do you have an understanding that they, likewise, had routine maintenance and upkeep of their autoclaves?

A. I don't know.

MR. JONES: Object to form. Vague.

BY MR. HADDAD:

Q. I mean, do you know if at any other place, when you were at Palouse back in '05 to '08, do you know whether the -- somebody came and checked the autoclave to make sure it was functioning properly?

A. They were the hospital's, so I did not check.

Q. All right. Were you trained at Southeast -- or Southcenter Cosmetic Center and Hair Restoration, did

it out? Have you --

A. They put a sticker on it. That's all I know.

Q. They come and say, I've inspected it?

A. Exactly.

Q. All right. When instruments are taken from the procedure room that you use at Linea, and then you go in and you put them in a basin to soak; is that correct? Do you do that process?

A. I don't do that process.

Q. Okay. Do you know how it's done?

A. I know they're put in a basin to soak.

Q. Do you know what kind of solution is used?

A. Again, it's a cleaning solution.

Q. Okay. When you were talking to Dr. O'Neil, did you ask him whether or not instruments taken from the procedure room are put in -- in a basin to soak?

A. I did not ask him that, no.

Q. Okay. Did you ask him -- we'll leave it at that. In looking at the medical records, is it -- do you have the general opinion that Krystal Ballard died as a result of sepsis?

A. Krystal Ballard died as a result of shock. I don't know if it was sepsis.

Q. Okay. If you were to give a differential diagnosis as to what caused the shock in Krystal

knew.

Q. Okay. Well, if he knew before he actually performed the procedure that she did not have somebody to drive her home, would that be appropriate or inappropriate in Boise to proceed with -- with the liposuction in any way?

A. Depends on the clinical situation.

Q. Well, there's no clinical situation. You're there to have a cosmetic, elective procedure.

A. It is a clinical situation. So yes, it does depend on the clinical situation.

Q. So he could have gone -- he could have said, Krystal, I know that you didn't bring somebody here to drive you home, and I'm going to do it anyway, correct?

A. Correct.

Q. Or he could have said, you don't have somebody to bring you home, take you home, so I'm not going to do the procedure?

A. That -- it's his choice.

Q. Okay. So it's -- it's his choice to either proceed or not proceed?

A. Correct.

Q. Okay. Now, what's the clinical situation that might make him go on -- go forward with the procedure even if he knows she doesn't have somebody to drive her

appropriateness of him performing liposuction on this patient knowing, if he did know beforehand, that she didn't have anybody to drive her home?

MR. JONES: Object to form. Vague.

THE WITNESS: It's a clinical decision. And it's his choice on whether he's going to do it or not.

BY MR. HADDAD:

Q. Well, you make clinical decisions every day.

A. I do.

Q. There are sometimes -- people can make good clinical decisions, and people can make poor clinical decisions, correct?

A. Certainly.

Q. Okay. I'm trying to get into the fact of what clinical situations make him doing this procedure on Krystal Ballard an appropriate clinical decision when he knew she didn't have somebody to drive her home?

A. Is your question whether it was appropriate for him to do this or not? And I agree with his appropriateness to do this procedure on her.

Q. Okay. Then I'm asking, why are you critical of her for not bringing somebody when Dr. Kerr could have said, I'm just not going to do it?

A. You're right, he could have just said that.

Q. Okay.

A. You're right, he could have.
Q. Now --
A. However, what makes me critical of her? Because she didn't listen to him in the first place.
Q. Oh, I see. So he could have stopped it, but the fact that she didn't bring somebody with him (sic), he's off the hook by using his clinical decision?
A. Oh, it's just like --
MR. JONES: Object to form. Argumentative.
THE WITNESS: Thank you. It's like me prescribing an antibiotic to a patient and them not taking it.
BY MR. HADDAD:
Q. Okay.
A. Same difference.
Q. Well, let me ask you this. Is -- do you -- so there's -- even though she didn't bring somebody there to his office on the day of the liposuction when he (sic) should have, when she was instructed to, you thought it was still okay for him to do the procedure, knowing she was going to drive herself home, correct?
A. I find no fault in him doing the procedure and letting her drive herself home.
Q. Okay. Now, that's one issue of noncompliance, I think, Dr. Kerr mentioned. First of all, do you know

Q. Okay. Hydrocodone versus non.
A. Hydrocodone, correct.
Q. Is there patients of yours that opt for using over-the-counter pain and anti-inflammatories in lieu of narcotics?
A. There are. But when they're calling -- coming in complaining of pain, I recommend narcotics.
Q. Okay.
A. And I prescribe the narcotics.
Q. And the day he actually -- she came in complaining of pain on the 23rd, two days postop, he prescribed her Norco, and she took the Norco, right?
MR. JONES: Object to form. Foundation and time.
THE WITNESS: We don't know.
BY MR. HADDAD:
Q. Okay. Well, let me ask you this. You don't know one way or the other. I mean, you know she got a prescription for Norco?
A. Correct.
Q. Okay. That's the day she came in two days postop?
A. She got it actually the day of the operation as well.
Q. True. Well, did she take it?

A. She said she didn't.
Q. Okay. Is there anything wrong if she decides to manage it with non-narcotics?
A. There isn't anything wrong with that, you're correct.
Q. Okay.
A. However, when it's prescribed and she's told to take it and she doesn't, again, and comes -- if she's complaining of pain, it comes down to non-compliance.
Q. Okay. Did that cause -- did Norco cause -- can not taking a narcotic cause a patient to have -- to get an infection?
A. Again, we don't know if she has an infection.
Q. I'm asking you generally, as a medical doctor, if somebody is prescribed narcotics following a liposuction and they don't take the narcotics because they choose to treat it with Motrin, is that going to cause an infection?
A. No, not necessarily.
Q. Well, you said "not necessarily." I want to know the circumstances by which taking or not taking a narcotic --
A. It's a --
Q. -- can --
A. -- theoretical question. I'm not going to answer

Q. Okay. I understand. I'm just wondering -- well, noncompliant means you've not followed the directions of a physician.

A. Correct.

Q. All right. I don't know what it is, other than just not following military protocol and not telling them exactly why you might be having a procedure done.

A. It shows a pattern of noncompliance, does it not?

Q. I want to know -- no, I disagree, and that's why we're here. I want to know what the effect of not telling the military -- if she didn't tell the military or her commanding officer about the procedure, how did that cause or contribute to her death?

A. It shows -- it points a direction of noncompliance.

Q. How did it --

A. It does not show any cause of death.

Q. Okay. That's all I want to know. Why is that -- why is that so hard?

A. Well (inaudible) the question.

MR. JONES: Let's -- let's -- Counsel, let's not be argumentative.

BY MR. HADDAD:

Q. My question's not very hard. I want to know what the causal effect of not telling the military has on her

EXHIBIT F

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, MD; Silk Touch Laser, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, DBA SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA and LASER CENTER, and/or SILK TOUCH MED SPA, LASER and LIPO of BOISE, Defendants.	)	NO. CV OC 1204792

VIDEOTAPED DEPOSITION OF JOHN P. LUNDEBY, MD

Deposition upon oral examination of John P. Lundeby, MD, taken at the request of the Plaintiff, before Danelle Bungen, CSR, and Notary Public, at the law offices of Ramsden & Lyons, 700 Northwest Boulevard, Coeur d'Alene, Idaho, commencing at 8:30 a.m. on July 26, 2013, pursuant to the Idaho Rules of Civil Procedure.

that cause, meaning "Sepsis with probable toxic shock syndrome"?

A. I reviewed this case and looked at it and -- well, I -- I guess that's a very broad question and I'm trying to figure out the best way to answer it for you.

I think the clinical picture that she presented would be consistent with sepsis. The toxic shock syndrome, from my medical recollection and training, is probably not used accurately here in that my understanding of toxic shock syndrome is not a gram negative sepsis, which seems to be the question in the medical record. But when I looked at this entire record, I was very -- it was difficult to figure out exactly why this patient died.

Q. Okay.

A. Like I say, the clinical picture would be most consistent with sepsis. I can see why the coroner's office and the medical examiner put that.

Q. You just haven't -- Let me see if I can rephrase what you said, and if I mess it up, you let me know. At this point in time, you don't know whether or not you have enough information to form an opinion as to the cause of this patient's death; is that fair?

MR. JONES: Object to form.

not Ms. Ballard was taking hydrocodone to alleviate pain prior to the time she presented to Elmore Medical Center?

A. Can I look at the record?

Q. Sure. And the reason I'm saying is there's a list of medications that the patient's on that reflect that one of them is hydrocodone.

A. That was my recollection, but I wanted to look at that.

MR. JONES: So you're asking him if there's evidence in the medical record that suggests or supports the conclusion that the patient had been taking hydrocodone at the time she arrived at Elmore Medical Center.

MR. HADDAD: On or before the time she arrived, yes.

THE WITNESS: Yeah, hydrocodone is on her current medications.

Q. (BY MR. HADDAD) Is that the -- I mean Dr. Kerr prescribed a drug called Norco, N-O-R-C-O. That is a hydrocodone, right?

A. Yes.

Q. All right. What was the schedule that was ordered, or at least reflected in the records from Elmore as far as the schedule that the patient was to take it?

A. The Elmore record says, "Hydrocodone PO 4 hours prn," and it's "10/325," so 10 milligrams/325 milligrams.
Q. And in layperson speak, that means you're to take a pill by mouth every 4 hours as you may need it for pain.
A. Yes.
Q. So a large measure of it is whether a patient takes a narcotic is based upon how much pain the patient's in and whether they can tolerate that level of pain without taking a narcotic; correct?
A. Yes.
Q. She was taking Motrin for pain; do you have an understanding of that?
A. It's listed on there as well, I think.
Q. Did Dr. Kerr reference the fact she wanted Motrin, as opposed to a narcotic, when she saw him in follow-up to the liposuction procedure?
A. Yes.
Q. Is there anything wrong, in terms of a compliance of a patient, who choses to take Motrin versus a narcotic to manage their pain?

MR. JONES: Object to the form.

THE WITNESS: No.

Q. (BY MR. HADDAD) I mean do you have a -- have you formed an opinion as to whether or not there was some

EXHIBIT G

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE; Defendants.	Case No. CV OC 1204792

VIDEOTAPED DEPOSITION OF THOMAS J. COFFMAN, M.D.

August 20, 2013

VOLUME 1
Pages 1-108

Reported by
Patricia J. Terry
Certified Shorthand Reporter No. 653
Registered Diplomate Reporter
Certified Realtime Reporter

but do you know any of the solutions that were used by Dr. Kerr as part of his cleaning and disinfecting the materials?

A. No.

Q. You have listed private practice infectious disease. I take it the bulk of your practice is probably being called in on a consult in a hospital setting?

A. Correct.

Q. Okay. Your private practice, does that simply involve follow-up to patients that you might have consulted with in the hospital that need outpatient assessment and treatment?

A. Yeah. We do -- we see patients, you know, outpatient consults in the office, too, for different kinds of things, fevers or swollen glands, things like that. And we have a pretty big HIV practice that we take care of.

Q. Now, Doctor, among the materials that you brought with you, Mr. Quane kind of explained it to me off the record, but I want to explain it, make sure I have an understanding on the record. There appears to be as part of the packet of materials that you brought with you comprising your file is various sheets that contain the first

name of patients, dates of treatment, and then the procedures performed at Silk Touch. Is that your understanding?

A. That is.

Q. Do you have an understanding as to how these sheets were created?

A. I believe that the people at Silk Touch pulled up the names of -- and procedures of people they worked on the last several years and compiled them.

Q. Is there anything else other than getting this list that had the patient name, the date of treatment, and procedure, is there anything else you were given or shown regarding patient outcomes in any of these patients?

A. No.

Q. There is -- Mr. Quane has it for you. He indicated that it might contain certain tabs to it, which is the defendants' answers to the third set of discovery requests. And you understand part of this incorporates anticipated opinions that you may hold in this case. Do you understand that?

A. Yes.

Q. Okay. Had you been sent by e-mail or

whatever he uses there in the office looks like.

Q. Okay. Now, there's a notation under the 7-23 chronology part of your notes, "Hasn't used Norco." And there looks like there's an exclamation in your notes. Is that the way it was written in Dr. Kerr's record or is that exclamation something you felt was important enough that she hasn't used Norco that you wanted to highlight?

A. I think I highlighted it.

Q. What significance does that have?

A. Well, Norco is a pain medication. You're not using it. So it's -- you know, usually if people are having a lot of pain, they'll use Norco.

Q. Okay. Is the only significance from an infectious disease or physician standpoint, an expert reviewer of this case with respect to Norco is if she's not using Norco, her degree of pain must not be that significant?

A. That would be my interpretation.

Q. And you hold that without the knowledge of how Dr. Kerr and Ms. Kerr described how Krystal Ballard was walking on 7-23 when she came to the office?

EXHIBIT H

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO DEFENDANTS BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, AN IDAHO LIMITED LIABILITY PARTNERSHIP; AND SILK TOUCH LASER, LLP, AN IDAHO LIMITED LIABILITY PARTNERSHIP, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, AND LIPO OF BOISE

PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION TO DEFENDANTS BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, AND SILK TOUCH LASER, LLP d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, AND LIPO OF BOISE

DEFINITIONS

A. "Document" means originals or any exact copies of written, recorded, transcribed, punched, filmed, taped, or graphic matter, however and by whomever prepared, produced, reproduced, disseminated or made, including but not limited to, any memoranda, intraoffice or interoffice communications, letters, studies, reports, summaries, articles, releases, notes, records of conversation, minutes, statements, comments, speeches, testimony, notebooks, drafts, data sheets, work sheets, records, statistics, charts, contracts, diaries, bills, accounts, graphics or oral records, presentations of any kind (including, without limitations, photographs, plats, charts, graphs, microfiche, microfilm, videotape recording and motion pictures), tapes, data processing sheets or cards, computer or word processing disks, or other written, printed, typed, aural, or recorded material in the possession, custody or control of you or your counsel. The term "document" also means all copies or reproductions of all the foregoing items upon which notation in writing, print, or otherwise has been made that do not appear as originals. To the extent the data processing cards, magnetic tapes, or other computer-related materials are produced, produce all programs, instructions, and other similarly related information necessary to read, comprehend and otherwise utilize said data processing cards, magnetic tapes, or other computer-related materials.

B. "Individual" or "person" means any natural person, including, without limitations, an officer, director, employee, agent, representative, distributor, supplier, independent contractor, license or franchise, and it includes any corporation, sole proprietorship, partnership, joint venture,

group, government agency and agent, firm or other business enterprise or legal entity, which is not a natural person, and means both singular and plural.

C. "Oral," when used in conjunction with a term connecting information refers to any spoken expression, exchange, or transmission of thoughts, messages, information, or the like, at any time or place, and under any circumstances whatsoever.

D. "Define," when used with the reference to a phrase or term, means (a) state the meaning of the phrase or term; and (b) identify each person known by you to have personal knowledge regarding the meaning of such phrase or term upon whose testimony you presently intend to rely at trial.

E. "Describe" means to explain fully by reference to underlying facts rather than conclusion of fact or law.

F. "Identify," when used with reference to a natural person, means to state his or her (a) full name; (b) present business and/or residence address and telephone numbers; (c) present business affiliation, address, title or position; (d) if different from (c), the group, origination or business the person was representing at any time relevant to the answer to a specific interrogatory; and (e) home address. If this information is not known, furnish such information as was last known.

G. "Identify," when used with reference to a business entity, means to state its (a) full name; (b) form of organization (e.g., corporation, partnership); (c) place of incorporation; and (d) address of its principle place of business. If this information is not known, furnish such information as was last known.

H. "Identify," when used with reference to an act, action, activity, omission or event, means to state (a) the identity of each person who participated in such act, action, activity,

omission, or event; (b) the date and place of such act, action, activity, omission, or event in detail; and (c) the identity of each person having knowledge or the act, action, activity, omission, or event.

I. "Identify," when used in reference to a document, means to state (a) the type of document or some other means of identifying it (e.g., letter, memorandum, report, etc.); (b) its subject matter; (c) the identity of its author; (d) the identity of each addressee or recipient; (e) the identity of each person to whom copies were sent and each person by whom copies were received; (f) its title and date; and (g) its present location and the identity of its custodian (if any such document was, but is no longer in the possession of or subject to the control of you or your counsel, state what and when disposition was made of it.

J. "Identify," when used with reference to a conversation, oral communication, discussion, oral statement or interview, means; (a) state the date upon which it took place; (b) identify each person who participated in it, witnessed it and/or overheard it; (c) state what was said by each person, including the issues and matters discusses; and (d) identify each document which describes or relates to it.

K. "Communications(s)" and/or "communicate" shall mean all occasions on which information was conveyed from one person or entity to another, either: (a) through a document; or (b) verbally, either in person or by telephone (including phone messages or alerts); or (c) by means of any other mechanical or electronic device.

L. "Complaint" refers to any communication from anyone expressing negative views or suggestions for improvements, irrespective of whether the concern raised in the communication was investigated or verified (by you) or at your direction.

M. "RELEVANT TIME PERIOD" means July 13, 2010 to present.

N. In construing or interpreting these interrogatories, all words in the plural may be read in the singular, and vice versa whichever reading which results in the provision of the larger amount of information or documents being the correct reading.

O. In construing or interpreting these interrogatories, all words of a conjunctive meaning (e.g., "and") may be read in the disjunctive meaning (e.g. "or"), and vice versa, or both, whichever reading which results in the provision of the larger amount of information or documents being the correct reading.

P. "Documents and Things to be Produced", means original documents and things if they exist and all non-identical copies. If such originals do not exist or are not in the possession or control of the Defendant, it means any additional copy of said originals and all non-identical copies thereof.

Q. "You" and/or "yours" means Dr. Brian Calder Kerr, M.D., Silk Touch Laser, LLP, and Silk Touch Laser, LLP d/b/a Silk Touch Med Spa, and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser, and Lipo of Boise.

GENERAL PROVISIONS

Pursuant to Rule 33 of the Idaho Rules of Civil Procedure, the interrogatories set forth below are to be answered within thirty (30) days of service, fully and separately in writing, under oath, and in accordance with the above cited rule. Answers to these interrogatories must include not only information in your personal knowledge and possession, but also any and all information available to you, including information in the possession of any of your agents, attorneys or employees. If a claim of privilege is made as to any such information, you must specify the basis for the claim of privilege and describe the information claimed to be privileged.

If any document identified in an answer to an Interrogatory was, but is no longer in your possession, custody or control, or was known to you but is no longer in existence, describe what disposition was made of it or what became of it. Your answer must be based not only on documents in your personal possession, but also on any documents available to you, including documents in the possession of your agents, attorneys, accountants or employees. No document requested to be identified or produced herein can be destroyed or disposed of by virtue of a record retention program or for any other reason.

These interrogatories are continuing and your responses to them must be supplemented to the maximum extent authorized by law and the applicable rules.

INTERROGATORIES

INTERROGATORY NO. 1: Please identify the person(s) responding to these interrogatories and requests, their date(s) of birth, and addresses for the past five years.

Answer:

INTERROGATORY NO. 2: Please provide the employment history for the last ten years of Dr. Brian Calder Kerr and any agent, servant, or employee who had any interaction or communication with Krystal Ballard. Please include with this answer the employer name, the job title and duties; the dates of such employment; the reason for leaving employment; and the salary or wages for each employment.

Answer:

INTERROGATORY NO. 3: State the name and addresses of each person whom you intend to call as an expert witness at trial, the subject matter on which each expert is expected

to testify, the substance of the facts and opinions of each expert, a summary of the grounds for each opinion of each expert, and a summary of each expert's qualifications.

Answer:

INTERROGATORY NO. 4: Please state in detail the legal and factual basis for any claim or defense by you that someone other than you are liable for the death of Krystal Ballard and the Plaintiff's damages stemming from the same.

Answer:

INTERROGATORY NO. 5: Please identify the manufacturer, model, and serial number of all equipment or machinery used in Krystal Ballard's procedure.

Answer:

INTERROGATORY NO. 6: Please state with specificity the education, training and experience which qualified Dr. Brian Calder Kerr to perform the cosmetic procedure at issue and produce a copy of all training material, certificates or licenses documenting his experience performing cosmetic procedures such as the one performed on Krystal Ballard.

Answer:

INTERROGATORY NO. 7: Please identify all hospitals or Joint Commission accredited facilities at which Dr. Brian Calder Kerr has privileges to perform the cosmetic procedures performed on Krystal Ballard.

Answer:

INTERROGATORY NO. 8: Please identify any individual employed by or acting on behalf of you who currently has authority and/or access to perform any type of cosmetic procedure using the Cynosure Smartlipo Machine; any individual who had this authority/access from January 1, 2005 through July 21, 2010 to perform such procedures and produce all documents to support this answer.

Answer:

INTERROGATORY NO. 9: Does Silk Touch Laser, LLP have any policies procedures, bylaws or standards to assess and credential agents, servants or employees to perform computer cosmetic procedures. If yes, please describe each one and produce all documents regarding the same.

Answer:

INTERROGATORY NO. 10: Please state the date of the first cosmetic procedure performed by Dr. Brian Calder Kerr, and specifically the first Smart Lipo procedure and first fat transfer procedure; the location each procedure was performed and all education and training Dr. Brian Calder Kerr had received to perform the procedures.

Answer:

INTERROGATORY NO. 11: For the equipment identified in response to Interrogatory No. 5, did the manufacturer of the equipment provide any training, seminars, workshops, in services, etc. (collectively, "training") which Dr. Brian Calder Kerr or agents,

servants or employees of Silk Touch Laser, LLP attended. For each training, please list the date of each training, the individuals who attended each training, the person and/or entity which provided the training, and a description of the matters discussed during the training.

Answer:

INTERROGATORY NO. 12: Please identify all facilities at which you currently hold privileges to practice medicine.

Answer:

INTERROGATORY NO. 13: Please provide the name and address(s) of any third party entity or organization that performs any kind of inspection, evaluation, or screening of Silk Touch Laser, LLP.

Answer:

INTERROGATORY NO. 14: Please provide the name and address(es) of any third party entity or organization that inspects the sterilization practices and procedures at Silk Touch Laser, LLP, including, but not limited to the equipment and instruments used in the procedures performed on Krystal Ballard.

Answer:

INTERROGATORY NO. 15: Please identify the manufacturer, model number and serial number of all equipment used to sterilize the equipment used in Krystal Ballard's procedure,

including but not limited to the hand piece, cannulas and the fiber, and produce the sterilization logs, as well as a copy of any services or repairs on the equipment.

Answer:

INTERROGATORY NO. 16: Please identify any and all communication between Dr. Brian Calder Kerr and Krystal and/or Charles Ballard which occurred after the procedures were performed on Krystal Ballard. For each communication, please identify the type or nature of the communication (e.g., phone call, email, text message), provide the phone number and/or email address of the phone and/or email account that was used to make the communication, provide the substance of each communication as verbatim as you can, identify each recording, message or memorialization of each communication, and produce all recordings, messages, and memorialization's of each communication.

Answer:

INTERROGATORY NO. 17: Please list all persons in the room with Dr. Brian Calder Kerr and Krystal Ballard while procedures were being performed on Krystal Ballard and each individual who made contact with and/or inserted any instrument or equipment into Krystal Ballard during the procedures.

Answer:

INTERROGATORY NO. 18: Please state whether Dr. Brian C. Kerr or Silk Touch Laser, LLP, has ever been cited, sanctioned or fined by any governmental, regulatory, or licensing agency.

Answer:

INTERROGATORY NO. 19: List any and all inspections and/or investigations conducted by a federal, state of local agency, or any other independent organization in which Dr. Brian C. Kerr, Silk Touch Laser, LLP, and/or any employee, agent or independent contractor was found to be in violation of any federal, state or local statute or regulation from 2005 to present. If the inspection or the investigation was conducted by an independent organization, state the organizational standard that was alleged to violated, from 2005 to present. For each, state the name of the agency conducting the inspection and /or investigation; the date of the inspection and /or investigation; the findings of the inspections and/or investigations; all actions taken by you to rectify any alleged deficiencies and the ultimate disposition of the matter.

Answer:

INTERROGATORY NO. 20: Identify each witness known to you to have information and relevant materials to the claims presented in this action or to any defense asserted thereto, and for each person please give a brief summary of each such witness's expected trial testimony.

Answer:

INTERROGATORY NO. 21: State the liability coverage, policy number, insurance company, maximum amount of liability coverage for each policy including the amount per person, the amount of all persons and the content of any insurance agreement you have available to satisfy

part or all of any judgment which may be entered in this action, or to indemnify or reimburse for payments made to satisfy a judgment.

Answer:

INTERROGATORY NO. 22: Please identify and describe each procedure, policy, and/or protocol for sterilization of each individual and/or piece of equipment which participated in or was used during the procedure on Krystal Ballard.

Answer:

INTERROGATORY NO. 23: Please describe any training, seminars, workshops, in services, etc. (collectively, "training") which Dr. Brian Calder Kerr or agents, servants or employees of Silk Touch Laser, LLP attended for each procedure, policy, and/or protocol for sterilization identified and described in Interrogatory No. 22. For each training, please list the date of each training, the individuals who attended each training, the person and/or entity which provided the training, and a description of the matters discussed during the training.

Answer:

REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Idaho Rules of Civil Procedure, the Requests for Admissions set forth below are to be answered within thirty (30) days of service, fully and separately in writing, under oath, and in accordance with the above cited rule.

1. Admit that you performed a liposuction procedure on Krystal Ballard with a Cynosure Smartlipo Machine.

RESPONSE:

2. Admit that Krystal Ballard's procedure was performed by Dr. Brian Calder Kerr.

RESPONSE:

3. Admit that Krystal Ballard's death resulted from bacteria which entered into her body during the procedure performed by Dr. Brian Calder Kerr.

RESPONSE:

4. Admit that Krystal Ballard's death was caused by the negligence of Dr. Brian Calder Kerr and /or other agents, servants, and employees of Silk Touch Laser, LLP.

RESPONSE:

5. Admit that Dr. Brian Calder Kerr has no professional training and/or certification qualifying him to perform the procedures performed on Krystal Ballard.

RESPONSE:

6. Admit that prior to the purchase of the Cynosure Smartlipo Machine that Dr. Brian Calder Kerr, had no previous experience with performing liposuction procedures.

RESPONSE:

7. Admit that each document produced pursuant to these discovery requests,is authentic under Idaho Rule of Evidence.

RESPONSE:

REQUESTS FOR PRODUCTION

Pursuant to Rule 34 and other applicable provisions of the Idaho Rules of Civil Procedure, you are requested to produce and serve upon counsel for the Plaintiff, Charles Ballard, within thirty (30) days of service of this request the following:

REQUEST NO. 1: All documents identified or referred to in answering any of the foregoing interrogatories.

Response:

REQUEST NO. 2: Each document about which Dr. Brian Calder Kerr has in his possession, custody, and control pertaining to the equipment used during Krystal Ballard's procedures.

Response:

REQUEST NO. 3: The curriculum vitae or resume of each expert you intend to call as an expert witness at trial.

Response:

REQUEST NO. 4: All reports provided to you by any witness (expert or lay) that you have received in relation to this case.

Response:

REQUEST NO. 5: All warnings or other disclosure information given to any patients considering a liposuction or fat transfer.

Response:

REQUEST NO. 6: All photographs or videotapes taken of Krystal Ballard before, during and after the Smartlipo procedure on July 21, 2010.

Response:

REQUEST NO. 7: All invoices, purchase orders, and receipts regarding any and all repairs and manufacturing of the equipment used during Krystal Ballard's procedure.

Response:

REQUEST NO. 8: Produce each and every document or tangible thing which you intend to utilize as an exhibit and/or demonstrative aid at the trial of this matter.

Response:

REQUEST NO. 9: Any and all medical and billing records of Krystal Ballard.

Response:

REQUEST NO. 10: Produce a copy of any and all citations issued to or against you or any of your employees or agents, by any governmental or regulatory agency.

Response:

REQUEST NO. 11: Produce all maintenance, ownership, operation and other records in your possession relating to, in any way, the equipment used during Krystal Ballard's procedure.

Response:

REQUEST NO. 12: All manuals, including clinical and service manuals, regarding the equipment used on Krystal Ballard's surgery.

Response:

REQUEST NO. 13: Any and all written agreements made between you and Krystal Ballard.

Response:

REQUEST NO. 14: A copy of Dr. Brian Calder Kerr's curriculum vitae.

Response:

REQUEST NO. 15: A complete copy of every liability, excess and/or umbrella insurance policy that could provide coverage for the claims asserted in the Complaint.

Response:

REQUEST NO. 16: All proposals, memoranda, communications or any other documents concerning any review or inspection of Silk Touch Laser, LLP, conducted by federal, state or local agency, or any quasi-governmental organization, non-for-profit organization during the past ten years.

Response:

REQUEST NO. 17: All documents including, but not limited to, any written material, film, video, recording, book, or policy and procedure that was provided to any employee for purposes of training, demonstrating, describing or instructing employees on the proper use, maintenance, functionality, and sterilization of the equipment used during Krystal Ballard's procedure.

Response:

DATED this 6th day of June, 2012.

NEVIN, BENJAMIN, MCKAY & BARTLETT, LLP

By _____
David Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2012, I served a true and correct copy of the foregoing ***Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Defendants, Brian Calder Kerr, M.D; Silk Touch Laser, LLP an Idaho limited liability partnership; and Silk Touch Laser, LLP, an Idaho limited liability partnership, d/b/a Silk Touch Med Spa, and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser, and Lipo of Boise*** by delivering the same to the following via:

Jeremiah A. Quane
CAREY PERKINS, LLP
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701-0519

☐ U.S. Mail (postage prepaid)
X Hand Delivery
☐ Facsimile
☐ Overnight Mail

NEVIN, BENJAMIN, McKAY & BARTLETT, LLP

By _____
Scott McKay

EXHIBIT I

Last Name	First Name	Date of Tx	procedures
	Susan	12.2007	abdomen, love handles, flank
	Tiffany	12.2007	upper arms, abdomen
	Erica	12.2008	abdomen, love handles, flank
	Mike	12.2007	abdomen, love handles & flank

Last Name	First Name	Date of Tx	procedures	
	Vicki	01.29.08	neck	
	Julie	02.01.08	full ab, love handles, bra fat	
	ruth	02.02.08	lower ab, under bum, outer hips	
	Jane	02.08.08	inner/outer thigh, knees	
	Matthew	02.08.08	abdomen, flanks	
	Nancy	02.11.08	neck, full abdomen & luvs	
	Matthew	02.21.08	abdomen, chest	
	Ruth	02.25.08	luvs, inner thigh	
	Jennifer	02.28.08	banana roll, inner & outer thigh	
	Char	02.29.08	abdomen	
	Patty	03.03.08	abdomen	
	Patty	03.03.08	abdomen	
	Cheryl	03.04.08	abd, flank & loves	
	Timothy	03.11.08	abdomen, flanks	
	Joni	03.13.08	abdomen, neck	
	Kristyn	04.03.08	abdomen, flank, inner thigh, tootsie roll, upper arm	
	Simone	04.07.08	abdomen & flank	
	Dee	04.09.08	abdomen, flanks	
	Cindy	04.11.08	abdomen	
	Tauni	04.17.08	inner & outer thigh, tootsie roll	
	Tonya	04.18.08	abdomen, hips, inner thigh	
	Dennis	04.19.08	abdomen, flanks, neck	
	Myrna	05.08.08	flanks,abdomen	
	Cindy	05.13.08	abdomen	
	Molly	05.13.08	abdomen	
	Sheila	05.15.08	abdomen, outer leg, flanks, Fat transfer to face	
	LeAnn	05.19.08	full ab	
	Vicki	05.19.08	flank & bra area	
	Patricia	05.20.08	inner and outer thigh	
	Melinda	05.21.08	inner & outer thighs	
	Jennifer	05.21.08	inner & outer thighs	
	Debbie	05.22.08	abdomen, flank	
	JoAnn	05.22.08	abdomen, chin	
	Kimber	05.29.09	abdmen & flank	
	Kim	06.06.08	abdomen & love handles	
	Diane	06.26.08	abdomen	
	Teresa	07.03.08	abdomen, flanks	
	Teresa	07.03.08	abdomen, flanks	
	Randae	07.10.08	abdomen, flank, neck	
	Patty	07.11.08	abdomen touch up	
	Patty	07.11.08	lower abdomen	

	Kathy	07.12.08	upper & lower abdomen	
	Lisa	07.16.08	abdomen, flank	
	Krissie	07.17.08	abdomen	
	Jenny	07.24.08	abdomen, bra & back fat,	
	Pam	07.25.08	abdomen, lateral waist	
	Steve	07.30.08	abdomen, love handles & chest	
	Mary Ann	07.30.08	neck	
	Nancy	07.31.08	hips	
	Lyubov	08.09.08	abdomen	
	Jeanette	08.15.08	abdomen, thorax, waist, lat bra fat area	
	Nancy	08.19.08	luv handles	
	Kendall	09.03.08	arms	
	Denis	09.04.08	Breast	
	Beverly	09.05.08	abs & flank	
	Debbie	09.08.08	abdomen	
	Eleanor	09.16.08	abdomen, lat waist, flank and lateral bra area	
	Jennifer	09.16.08	outer & inner thigh, buttocks	
	Marion	09.17.08	waist, flank, bra, neck, bra fat	
	Jenny	09.19.08	arm, lat waist, flank	
	Michelle	09.23.08	abdomen, lateral waist & thigh	
	Jennifer	09.25.08	inner/outer thigh, knees	
	Ernie	09.26.08	luvs, hest	
	Kimber	10.02.08	abdomen, luv handles and flanks	
	Lisa	10.07.08	outer & inner thigh, abdomen	
	Patty	10.30.08	abdomen, flank, waist and bra area, arms, butt	
	Kim	11.04.08	abdomen, waist, fat transfer to face	
	Katie	11.12.08	inner & outer thighs	
	Becky	11.17.08	arms	
	linda	12.08.08	fulll ab, hips, luv, bra	
	Erica	12.27.08	abdomen, luv handles and flanks	
	MANDI	12.28.08	abdomen, chin, inner thighs, arms	

Last Name	First Name	Date of Tx	procedures
	Terri	01.07.09	abdomen & neck, fat transfer to face
	Phyllis	01.15.09	abd, luv, bra fat
	Kayce	01.16.09	abdomen, luv handles, flank
	Leah	01.19.09	ankles
	Barbara	01.20.09	ful abd, chest from hip to armpit
	Polly	01.21.09	abd, luvs & flank
	Jennifer	01.22.09	abd
	Cheryl	01.22.09	abd
	Cathi	01.23.09	full ab, luv, bra fat
	Jenny	01.23.09	abdomen, outer thighs
	Barbara	01.26.09	inner & outer thigh,
	Kerry	01.28.09	ankle, thigh, knee
	Ruth	01.30.09	outer thigh
	Carole	02.10.09	ab, luv, flank, bra fat
	Beverly	02.11.09	abdomen, luv handles
	Julie	02.13.09	inner & outer thigh
	Christina	02.16.09	abd, waist, outer thigh
	Linda	02.17.09	upper arm & lower arms, neck
	Helena	02.18.09	abdomen
	Jacque	02.18.09	full abdomen
	Phyllis	02.19.09	outer, inner thigh, knees
	LeAnn	02.20.09	outer & inner thigh, knee
	Liz	02.23.09	abdomen, full waist and flank
	Judie	02.26.09	full abdomen
	Bonnie	03.04.09	abdomen, lat waist & flank, & bra fat
	Vicki	03.05.09	neck & lower jowels
	Jennifer	03.06.09	lat thigh touch up, fat transfer to outer thight
	Joyce	03.10.09	Inner & outer thigh, f/t labia, face
	Kristi	03.11.09	outer & inner thigh, flanks, fat transfer to face
	Gentry	03.19.09	ab, luv handles
	Sherrie	03.20.09	abd, outer thighs
	Kristin	03.21.09	chin, neck, arm
	Sherri	03.26.08	abdomen and flanks
	Barbara	03.30.09	upper arms, fat transfer to breast
	Connie	03.30.09	arms, fat transfer to face
	Chris	04.20.09	abdomen, lateral waist
	Carole	04.01.09	arm & bra fat
	Sherri	04.07.08	Fat transfer to face
	Leslie	04.09.09	outer & inner thigh

	Jackie	04.10.09	outer & inner thigh & knees	
	Patricia	04.13.09	abd, lat waist & thorax	
	Nola	04.21.09	full abd, luv & flank	
	Patty	04.21.09	abd touch up, bra fat	
	Judy	04.22.09	neck	
	Bruce	04.28.09	abdomen & luv handles	
	Jackie	04.29.09	ankles, arms	
	Cheri	04.30.09	neck	
	MaryAnn	05.01.09	Upper & lower arms, fat transfer to face	
	Kim	05.06.09	arm, fat transfer to breasts	
	Kelly	05.07.09	knees, f/t to breast	
	Debra	05.14.09	inner thigh, ft to face and breast	
	Tina	05.19.09	full ab, flank, bra fat	
	Alisa	05.20.09	abd, luv, bra fat, flank	
	Kendra	05.29.09	full ab, armpit	
	Ed	05.30.09	abd, lateral waist & flank	
	Marion	06.01.09	leg, thigh, arm, chest wall, f/t to breast	
	Tina	06.02.09	outer thighs, f/t to buttocks scar	
	Letty	06.02.09	ab, luv, flank, f/t to butt	
	Lisa	06.03.09	abdomen, waist,bra fat, knees and right upper leg	
	Shanna	06.13.08	abdomen, lateral waist, inner & outer thigh, upper lat buttocks, fat transfer to face	
	Tara	06.15.09	neck	
	Cheryl	06.22.09	full ab, waist & flank	
	Cheryl	06.24.09	inner thigh,bra fat, fat transfer to breast?	
	Anthony	07.06.09	abdomen, lateral waist	
	Michelle	07.07.09	ab & fat transfer to face	
	Aaron	07.08.09	breast, neck	
	Jackie	07.30.09	full ab, love handles	
	Terri	07.31.09	abd, waist, neck f/t to breast	
	Stacy	08.19.09	full ab, waist ft to face/hands/breast	
	Keil	08.27.08	breast, full ab	
	Carrie	08.27.09	full ab, flank, inner/outer thigh	
	Glenn	09.03.09	abd, lateral waist & flank	
	Teresa	09.04.09	abdomen & waist	
	Teresa	09.04.09	abdomen and lateral waist	
	Chris	09.08.09	breast	
	Phyllis	09.17.09	abd anterior, lower inner thigh	
	Ann	09.21.09	full abd, lat waist & flank	
	Maureen	09.22.09	full abd, inner thigh	
	Carol	09.23.09	full abdomen	

Jennifer	09.25.08	outer thighs	
linda	09.25.09.	arms	
LaDoena	09.30.09.	abd, flank	
LaDoena	09.30.09.	abd, flank, bra fat	
gladys	10.01.09.	ab,bra fat, fat transfer to breast	
Tarena	10.02.09	abdomen, flank, love handles	
Lorl	10.14.09	Lower ab, neck,	
Katie	10.21.09.	outer & inner thigh f/t to breast	
Minni	10.22.09.	abdomen, flank	
Lisa	11.13.09.	love handle, flank, outer thigh	
Brandy	11.16.09	abdomen, flanks	
Helena	11.18.09	ab, love handles, neck	
Jackie	11.19.09.	upper knee, arms	
Marion	11.20.09	ankle, calfs, inner thigh, axilla, flank,	
ruth	11.23.09	knees, lateral waist	
Julia	11.24.09	outer & inner thigh, ft to breast	
Theresa	11.25.09	abd, lat waist, neck f/t to breast	
Ashley	12.04.09.	abdome, lateral waist & flank	
Jim	12.11.09	abd, waist, chest	
Travis	12.14.09	neck	
Alyson	12.15.09	abdomen, lat waist & flank	
Becky	12.17.09	ab, luv, inner thigh	
LeaAnn	12.18.09	abd, waist, butt f/t	
Adrienne	12.18.09	outer thigh	
Caiyun	12.21.09	ab, luv, bra fat,	
Janina	12.23.09	abd, waist, neck f/t to breast	
John	12.24.09.	chest	
Theresa	12.24.09	outer & inner thigh f/t to breast	

Last Name	First Name	Date of Tx	procedures	
	Tawnja	1.5.10	ab, flank bra	
	Christine	1.8.10	thighs, waist	
	Brandy	1.14.10	abd, flank, thigh	
	nancy	1.25.10	3 area FAT transfer	
	Julie	1.29.10	ab revision , FAT	
	olivia	2.4.10	abd FAT to lip	
	Christine	2.5.10	abd, arms, inner thigh	
	Susan	2.10.10	ab touch up	
	Jennifer	2.10.10	lat outer thigh	
	Linda	2.11.10	flank, FAT	
	Stephen	2.17.10	neck	
	HHaleena	2.18.10	ab	
	Pamela	2.19.10	ab, flank, FAT face	
	Linda	2.23.10	abd, flank	
	Deborah	2.24.10	abd, flank	
	Tina	3.1.10	Ab, flank	
	Karrie	3.1.10	outer thighs	
	Janet	3.3.10	thighs, FAT breast,face, hands	
	Letty	3.4.10	abd, arm, FAT bust, butt	
	Chris	3.5.10	chest touch up	
	Jennifer	3.5.10	knees, abdomen, outer thigh	
	Kelly	03.08.10	abd, lat waist	
	Angie	3.11.10	inner, outer thigh, FAT breast	
	Lisa	3.10.10	outer thigh, FAT breast	
	Linda	3.10.10	REVision thighs	
	Erin	3.12.10	flank, FAT breast	
	Janet	3.16.10	neck, FAT to face	
	Patricia	3.18.10	abd, arms, FAT to butt	
	Jessica	3.19.10	abd, waist	
	Michelle	3.22.10	abd, lat waist	
	Dwayne	3.23.10	ab, flank	
	Geo	3.24.10	abdm flank	
	Elsie	3.25.10	abd, flank, FAT face	
	Kim	3.25.10	abd	
	Ruth	4.5.10	lat thigh touch up	
	Julia	4.6.10	thighs	
	Nancie	4.8.10	abd, flank, FAT	
	Emily	4.9.10	outer thigh, inner FAT to breast	
	Pauline	4.12.10, 4.19.10	abd, arms, inner outer	
	Sandy	4.13.10	abdomen FAT	
	Elizabeth	4.14.10	abd, flank, inner thigh	

	Sara	4.16.10	arms, FAT breast	
	Joanna	4.16.10	abd, waist	
	Phyllis	4.19.10	touch up	
	Jackie	4.21.10	3 areas, touch up, FAT	
	Denise	4.30.10	abd, FAT to face	
	Sandy	4.13.10	abdomen FAT	
	Patty	4.13.10	abd TU, bra, Fat transfer	
	Rebecca	4.22.10	abd	
	Kathleen	4.30.10	thighs	
	Deborah	5.2.10	arms	
	Jeanie	5.4.10	ab, flank, FAT to breast	
	Marianne	5.6.10	3 areas FAT to butt	
	Trina	5.7.10	abd, waist thigh, FAT BUTT	
	Dianne	5.14.2010	abd, FAT to face	
	Loretta	5.17.10	abd, flank, bra, FAT	
	Rhonda	5.18.2010	Thighs, FAT breast & butt	
	Bette	5.18.10	flanks, arms	
	Melissa	5.20.10	ab, flank	
	Gwen	5.25.10	fat transfer	
	Debbie	5.26.10	inner, outer thigh, FAT breast	
	Jackie	5.28.10	revision thighs, FAT thighs	
	Paula	5.28.10	abd	
	Barbara	6.2.10	ab, waist, bra fat	
	Mary	6.3.10	abd, thighs	
	Lucy	6.4.10	3 areas FAT to hands	
	Megan	6.8.10	abd, flank FAT	
	Sheri	6.8.10	neck, jowels	
	Valerie	6.9.10	ab, flank	
	Sally	6.16.10	outer thigh, flank, FAT	
	Brianna	6.17.10	knees, thighs, flank	
	Melinda	6.18.10	abdm, flank waist	
	Deborah	6.20.10	abd, flank, bra	
	Sara	6.21.10	ab, waist, bra fat,	
	Pamela	6.22.10	neck, jaw, abd, FAT to face	
	Tracy	6.24.10	abdomen, flank	
	Brenda	6.25.10	breast, thigh	
	Deborah	6.30.10	arms	
	Carolyn	7.1.10	abdm flank, FAT to face	
	Linda	7.7.10	abd	
	Kaye	7.6.10	abd, flank, arms, FAT to breast	
	Shawn	7.13.10	neck	

Ballard	Krystal	07.21.10	full abdomen, luv handles, flank & fat transfer to butt	
	Roxann	07.22.10	abd, lat waist	
	BECKY	07.23.10	Abd, flanks, fat transfer breast	
	Melinda	7.24.10	arms, FAT to breast	
	Christopher	7.26.10	abd, flank, neck	
	Barbie	7.27.10	jaw, neck	
	Becky	7.28.10	ab, luvs, fat transfer breast	
	Jessica	7.29.10	abd, lat, waist, flank, breast	
	Melinda	7.30.10	thighs	
	Beverly	8.3.10	neck	
	WAFAA	8.4.10	Abd, lat waist, flank	
	Mike	8.5.10	abd, flank	
	Kristen	8.6.10	abd, flank	
	Mary	8.13.10	abd, flank	
	Becky	8.19.10	thighs	
	Dennis	8.19.10	neck	
	Bonnie	08.19.10	neck	
	Josie	8.25.10	abd, fat transfer breast	
	Vicki	08.30.10	upper & lower ab	
	Rita	9.01.10	abd, fat transfer	
	Orie	09.02.10	ab, flank, fat transfer	
	Molly	09.03.10	ab, flanks,	
	Christine	09.15.10	elbo, inner knee , thight	
	Jackie	09.15.10	abd, upper ab, lat waist & back	
	Lee	09.16.10	abd, chest	
	Melinda	09.16.10	upper, lower abdomen large	
	Melissa	9.20.10	arms	
	Ginger	9.21.10	abs, flanks, luvs	
	Scott	9.22.10	abd, flank	
	Amy	9.23.10	arms, bra	
	Cindy	9.24.10	abd, butt banana roll	
	Melissa	9.27.10	abd, flank	
	Ashley	9.28.10	abd, lat waist, flank	
	Molly	09.30.10	inner outer thigh	
	Leta	9.30.10	lat waist, flank, chest, fat transfer to face	
	Scott	10.01.10	chest, axilla	
	Trent	10.02.10	chest	
	Elizabeth	10.04.10	abd, lat waist flank.	
	Joanna	10.5.10	abd, flank, chest, fat transfer to butt, breastt	
	Linda	10.14.10	lat waist touch up	
	Bette	10.15.10	ant ab touch up	

	Larraine	10.15.10	abd, flank	
	Jini	10.15.10	arm, breast fat transfer	
	Elizabeth	10.19.10	thighs, fat transfer breast	
	Patricia	10.20.10	inner, outer thighs	
	Janet	10.21.10	abs,flanks	
	Jennifer	10.22.10	abd.touch up	
	Kim	10.22.10	abd, flank, inner, outer, fat to breasts	
	Misty	10.25.10	abd, breasts, neck	
	Christine	10.26.10	abd, flank, breast	
	Mimi	10.28.10	lat waist, luv, flank touch up	
	Vicky	10.28.10	arms	
	Theresa	10.29.10	ankle, inner thigh	
	Misty	11.2.10	flanks, butt fat	
	Debra	11.3.10	flanks, fat transfer to hands	
	Kelly	11.15.10	touch up ab	
	Melissa	11.15.10	outer, inner thigh	
	Holly	11.17.10	abd, flank, ftransfer breast	
	Kathie	11.18.10	ab, waist, fat transfer	
	Tracy	11.23.10	ab, breast fat transfer	
	Nancy	11.29.10	chin, ab	
	Sara	11.29.10	flanks, fat transfer to butt	
	Cindy	11.30.10	flanks	
	Amy	12.1.10	abd, flank	
	Erica	12.2.10	abd, bra fat	
	Todd	12.3.10	abd, flank	
	Melody	12.08.10	abd, flank, fat transfer breast	
	Tony	12.09.10	abd, flank	
	Kristin	12.10.10	waist, breast fat trans	
	Amy	12.20.10	inner outer thigh	
	Heather	12.20.10	abd, flanks	
	Theresa	12.22.10	upper ab, thighs	
	Gene	12.23.10	abd, flanks	
DR. KERR DID APPROX 4 LIPOS A WEEK . 44 WEEKS (8 WEEKS OF VACATION)				

EXHIBIT J

Deposition of
Gregory N. Laurence, MD

Date: October 2, 2013

Case: Ballard v. Kerr, Silk Touch

Case No: CV OC 1204792

Reporter: Andrea J. Wecker, CSR#716, RMR, CRR, CBC

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Internet: www.associatedreportinginc.com

Pages: 1 to 172

vibration or energy or heat to the tissue to help process the fat or help with the contouring before you actually do the removal of the fat.

I've used just about everything that's out there.

Q. Okay. In terms of a cosmetic practice, have you spoken to any physicians that practiced in Boise, Idaho, in 2010 which is the time period that Krystal Ballard had a procedure about the standard of practice in Boise in 2010?

A. Yes, I did.

Q. Who did you speak with?

A. Dr. Kelly O'Neil who practiced in this area around that time.

Q. And I think within the materials that are either part of Exhibit 1 or Exhibit 2, whichever is the stack of your file --

A. Yeah, it's 2.

Q. -- there's reference to Dr. O'Neil.

And you remember speaking with him?

A. That's correct.

Q. All right. Is your discussions with Dr. O'Neil --

Well, first of all, did you rely upon Dr. O'Neil exclusively in order to understand what

the standard of practice was in Boise, Idaho, in 2010 in performing similar procedures and services to patients in --

MR. JONES: Object to form; vague.

THE WITNESS: There were no other physicians that I spoke to who practiced in Boise, Idaho, around that time to whom I spoke or communicated in any way.

Q. (BY MR. HADDAD) Okay. And Dr. O'Neil is a physician that you were referred to by Mr. Quane to contact in order to avail yourself of what the standard of practice was in Boise in in 2010, correct?

A. Yeah, correct. I did not know him before.

Q. Okay. Basically, counsel for Dr. Kerr told you, "You need to learn what the standard of practice was in 2010, and here's the guy that can tell you what the standard of practice is," and they named Dr. O'Neil, correct?

MR. JONES: Object to form.

THE WITNESS: So, yes, I spoke to him after they referred me to him as someone who was reliable.

Q. (BY MR. HADDAD) Okay. Did you know

Dr. O'Neil from any other circumstance other than the fact that counsel for Dr. Kerr told you to contact him about understanding the standard of practice?

A. I'd never run into him at a meeting or anything like that, correct.

MR. JONES: Counsel, we don't have the benefit of coffee or water or anything in this room like you do, so I'd like to take a break when you get to a point --

MR. HADDAD: Okay. It will be just --

Well, let's do it now. Let's go off the record.

(Break taken from 10:11 a.m. to 10:21 a.m.)

Q. (BY MR. HADDAD) Doctor, in terms of your conversations --

First of all, have you had more than one conversation with --

A. I'm sorry. The video skipped.

Q. I'm sorry. I was looking down, so that probably had something to do with it.

Dr. Kelly O'Neil, have you spoken to him on more than one occasion?

A. Two occasions.

Q. All right. What I see, Doctor, within

Ballard's medical records?

A. Again, I don't know whether he had reviewed them or not, and I -- and I don't recall if there was anything in particular that he said that would have, by inference, made me be able to say that he had or had not.

Q. Okay. Is it fair to say that it was -- the longer telephone call is the one that you used as the basis by which you came to learn what the standard of practice was in Idaho in 2010?

MR. JONES: Object to form.

THE WITNESS: I think that a combination of the review of all the records and in combination with the conversation with him was what I relied upon to be able to say that Dr. Kerr was within the standard of practice for the area.

Q. (BY MR. HADDAD) Okay. Well, we'll get to that.

I understand you reviewed the medical records, but in terms of familiarizing yourself with the standard of practice in Idaho, is it fair to say that familiarizing yourself with what the standard of practice was in Boise, Idaho, in 2010 was really based upon the longer call with Dr. O'Neil?

Q. (BY MR. HADDAD) I mean, I think you presumed it, but you didn't specifically ask him, "During the calendar year 2010, did you do liposuction?"

A. I did not ask the number of cases he had done in any particular month or year, correct.

Q. Okay. In terms of fat transfer, did you talk to Dr. O'Neil at all about fat transfer?

A. I did.

Q. Did Dr. O'Neil tell you that he performed fat transfers in 2010?

A. We talked about fat transfer specifically.

Fat transfers are an area of liposuction where some doctors really, really are excited about it, and some do very little fat transfer. And I don't recall whether I asked him if fat transfer was something that he did routinely with every one of his liposuctions or with 10 percent. But he certainly was familiar with that aspect.

We talked very specifically about the -- the different options that the physician had with regard to the addition of PRP, the addition of -- whether the fat was spun down or just gravity was used to separate out.

And so he -- he was clearly knowledgeable about fat transfer, but I don't know how much he did it.

Q. Based upon your discussions with Dr. O'Neil, was it your understanding that during the calendar year 2010, he had done any fat transfer procedures?

A. Would you ask that question again?

Q. Yes.

A. It sounded -- I'm sorry. It sounds like something that you had already asked, but maybe it's a little bit different.

Q. Maybe a little bit different.

Do you know one way or the other whether or not, during the calendar year 2010, Dr. O'Neil had performed any fat transfer procedures based upon your discussions with him?

A. Okay. So you're asking the same question about fat transfer that you were about liposuction. I understand.

The same answer. I'm not -- I did not ask him specifically what his caseload looked like.

Q. Okay. When Dr. O'Neil was talking about other physicians in Boise, did he tell you -- did you have a discussion about what other physicians

did in their office practice as it relates to the fat transfer procedure?

A. Yes, we did.

Q. Did Dr. O'Neil tell you how he came to learn how other physicians in Boise might either do liposuction or fat transfer?

A. You know, no, he did not tell me how he knew other physicians did one thing or another.

Q. Okay. In your discussions with Dr. O'Neil, did he tell you that his facility was an accredited facility in 2010?

A. You're talking about Dr. O'Neil --

Q. Yes.

A. -- and whether his facility was or was not accredited?

We certainly did talk about the accreditation issue, and he related to me that -- that there were a variety of practice situations in Boise where these type of procedures were performed in both accredited and facilities that were not accredited. He did not --

He could have told me whether his facility currently or in Boise was or was not, but I don't recall.

Q. Did Dr. O'Neil tell you how he came to

Q. Okay. Did he tell you how he came to learn the whole process that you described to him you did -- cleaning, disinfecting, and sterilizing -- how he learned what other physicians did in their practices?

A. You know, I know that in my office, the only way I have to know exactly what my peers do is that sometimes we share staff and employees. So a lot of my staff that has come in are people that worked somewhere else.

So I can say from my standpoint, I generally know that the way I approach sterilization is similar to other physicians.

I assumed that, likely, he had enough connections with staff or through other people that gave him a sense that other physicians in Boise had a similar approach.

Q. But you don't know that specifically, do you?

A. That's -- I cannot tell you how he knew that, correct.

Q. Now, you talked about a medical equipment specialist.

What is a medical equipment specialist in terms of what you just referred to a moment ago?

facility or not in 2010?

A. We mentioned that earlier. I had mentioned that he did not tell me whether he operated out of a -- an office or an accredited facility.

Q. In terms of materials, I understand that you've seen the disclosure that purports to have the opinions that you are going to express, correct?

A. I think I understood your --

What did you say again?

Q. Well, there's a -- we were provided, as part of the discovery, your name and several pages that followed your name that says, "Here's the areas he may testify on."

Have you seen that?

A. Yes, I have.

Q. Okay. When did you first see that?

A. I saw that --

I believe it was sent to me earlier, but I reviewed it yesterday for the first time. I think I probably lost it in my stack of paperwork, and I feel like I'd seen it before. It sounded like me talking.

But it was prepared by my attorneys

Sound Surgical Technologies --

First of all, do you know if Sound Surgical Technologies was a manufacturer of the liposuction machine?

A. It was the -- the manufacturer of not the liposuction machine but the Vaser.

Q. Okay. The Vaser?

A. Right.

So, yes.

Q. Do you --

A. Yes, Sound Surgical is the manufacturer of that.

Q. Did you review their operator's manual with respect to what recommendations they make as to how to clean, disinfect, and sterilize the equipment that is used as part of the Vaser procedure?

A. I did not; I did not.

Q. Doctor, you've given --

This is part of the packet of file materials that's part of your file that was produced. I think that's No. 2, I think.

A. Correct.

Q. Give me a second here. I'll look through my sticky notes here.

A. I have not. I have looked at this sheet, but I haven't looked at the corresponding charts.

Q. Okay. But in any event, you were given this chart on August 27th of this year?

A. That's correct.

Q. Is it your opinion, Doctor, that --

Well, you had mentioned Ms. Ballard, in your opinion, experienced a urosepsis.

Is that correct?

A. That's correct.

Q. And you believe that's what caused the sepsis and shock that she experienced?

A. The -- to -- to my best evaluation, that's what I would say.

Q. Okay. And obviously, we have certain standards in the law for opinion testimony.

Are you able to say one way or the other to a reasonable degree of probability that Ms. Ballard had a urosepsis?

A. I would just say more likely than not.

Q. Okay. Do you have an opinion, more likely than not, that the urosepsis caused her to die?

A. Yes, I believe she died of sepsis.

EXHIBIT K

SEP 17 2013

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Attorneys at Law

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September 16, 2013

Clerk of the District Court
c/o Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

Re: ***Ballard v. Kerr, et al.***
Ada County Case No. CV OC 1204792
Our File No. 1107/25-938

Dear Clerk:

Enclosed for filing with the Court regarding the above-referenced matter, please find an original and one (1) copy of a **NOTICE OF SERVICE OF DISCOVERY** (Defendants' Supplemental Answer to Plaintiff's Interrogatory No. 20).

Please file the original, returning the conformed copy in the self-addressed stamped envelope provided. Please contact my office if you have any questions. Thank you for your assistance.

Very truly yours,

/s/

Jeremiah A. Quane

JAQ/ms
Enclosure
cc/encls: David Z. Nevin/Scott McKay
P. Gregory Haddad
James B. Perrine

SEP 17 2013

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF SERVICE OF DISCOVERY

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 16th day of September, 2013, I served DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NO.

20, together with a copy of this Notice, upon counsel in the above-entitled matter by the method indicated below:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657

JAQ

Jeremiah A. Quane

SEP 17 2013

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NO. 20

Defendants hereby provide supplemental answer to Plaintiff's Interrogatory No. 20 as follows:

INTERROGATORY NO. 20: Identify each witness known to you to have information and relevant materials to the claims presented in this action or to any defense asserted thereto, and for each person please give a brief summary of each such witness's expected trial testimony.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 20: In addition to the individuals named in the Defendants' Answer to Plaintiff's Interrogatory No. 20 dated September 24, 2012, the following:

1. Dr. Howard Schaff – Expected trial testimony relates to the CT examination of Krystal Ballard on July 25, 2010 at Saint Alphonsus Regional Medical Center.

2. Cody Murphy – Expected trial testimony relates to the events, issues and matters described in the records of Elmore Ambulance Service for July 25, 2010.

3. Wendy Vanderburgh – Expected trial testimony relates to the events, issues and matters described in the records of Elmore Ambulance Service for July 25, 2010.

4. Dr. Billy Morgan – Expected trial testimony relates to his evaluation of Krystal Ballard on July 25, 2010 at Saint Alphonsus Regional Medical Center and the matters described in his Consultation Report.

5. Melisa Fellows – Expected trial testimony unknown since defense counsel has not spoken with her, although attempted. Charles Ballard mentioned her in his second deposition and said he spoke with her about her involvement with Krystal Ballard.

6. Susie Kerr – In addition to the matters and testimony in her deposition, her expected testimony will relate to records of Silk Touch, records and data she compiled of Silk Touch for infections, patients, drawings of Krystal Ballard, photos of Krystal Ballard and experience in training and cosmetic procedures.

7. Briana Kerr – Expected trial testimony is the testimony in her deposition and the events of the procedure performed by Dr. Kerr on Krystal Ballard.

8. Donna Berg – Expected trial testimony is the testimony in her deposition and her interactions with and observations of Krystal Ballard.

DATED this 16th day of September, 2013.

QUANE JONES McCOLL, PLLC

By /s/
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2013, I served a true and correct copy of the foregoing DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NO. 20 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

16|

Jeremiah A. Quane

EXHIBIT L

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508
ghaddad@baileyglasser.com

Via Facsimile Only 208-780-3930

September 20, 2013

Jeremiah A. Quane, Esq.
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
PO Box 1576
Boise, Idaho 83701

Re: *Ballard v. Kerr, et al.*

Dear Mr. Quane,

I am in receipt of "Defendants' Supplemental Answer to Plaintiff's Interrogatory No. 20", served on September 16, 2013. In your supplemental answer to Interrogatory No. 20, you identify Susie Kerr as being expected to testify to "Silk Touch, records and data she compiled of Silk Touch for infections, patients," etc. I do not know exactly what she compiled at this point given the vague response, but take issue with Ms. Kerr apparently compiling information at the 11th hour; over 15 months after the service of the original requests; after a motion to compel requiring you to respond to the interrogatories; after Ms. Kerr's deposition as a fact witness and 30(b)(6) representative; and after a significant number of expert depositions. We will certainly raise this issue with the Court due to the untimeliness of this supplementation, but not having the benefit of how the Court will address this issue, and without waiving any objection, we need you to provide the following:

1.) Records, data or documents she compiled as referenced in the supplemental answer to Interrogatory No. 20. This would also be required as part of your duty to supplement request for production No. 1, which asks for "all documents identified or referred to in answering any of the foregoing interrogatories." We do NOT want a mere summary of the information, but all documents she actually used and relied upon in compiling the information. Without the actual documents, our ability to fully cross-examine Ms. Kerr would be impeded.

2.) A date on which Ms. Kerr can be re-deposed to address the possible testimony referenced by this late supplementation.

Given our current trial date and the need to obtain this information immediately, I would like the documents faxed to my office within the next 3 business days. This should not be difficult since apparently it has already been compiled by Ms. Kerr.

Thank you for your attention to this matter.

Sincerely,

P. Gregory Haddad, Esq.

PGH/das
cc: Scott McKay, Esq. (via facsimile only)
J.B. Perrine, Esq. (via facsimile only)

EXHIBIT M

Quane Jones McColl, PLLC
Attorneys at Law

Jeremiah A. Quane jaq@quonelaw.com

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September 26, 2013

VIA FACSIMILE (304) 594-9709
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

The records and data compiled by Susie Kerr regarding infections and patients which you erroneously claim was untimely supplemented in my Answer to your Interrogatory Number 20 was produced for you at your deposition of Dr. Coffman on August 20, 2013. You have had this data for one month before you ever brought up the subject of deposing Susie Kerr. If anything, you are the one who is untimely and you seem to always cast blame on me for your dilatory conduct. The records and data under discussion was prepared shortly before August 20, 2013 for the purpose of being a trial exhibit and it did not exist before and therefor it was not available for production or reference in supplementation to answers to written discovery. In fact, since it will be used only as a trial exhibit, the court Order governing further proceedings does not require its identification and disclosure until either 14 days or 7 days before trial. The Order also provides that the last day to take discovery depositions shall be no later than sixty (60) days prior to trial. Your request to depose Susie Kerr (September 20, 2013) was not made within the time frame of the Court Order.

I must have you provide me with legal authority and support for your claimed right to depose Susie Kerr. I did you a favor by producing the data at the deposition of Dr. Coffman on August 20, 2013.

You also contend that Dr. Garrison untimely disclosed his opinion on fat emboli at his deposition for the first time. I agree that his opinion was first disclosed at his deposition but I do not agree it was untimely. It was formed by Dr. Garrison a few days before his deposition and therefor it was not subject to disclosure in his two prior expert disclosures or at any time before it was formulated by him. He did not tell me about his opinion until the day before the deposition. I am always amazed when lawyers take depositions of opposing experts and ask about opinions of the expert not previously disclosed. It makes no sense or logic why lawyers want to know of opinions of experts that have not been previously disclosed when such undisclosed opinions are not admissible in evidence. Why ask? You are the one who caused the new opinion of Dr. Garrison on fat embolism to be brought out and as a result, you must now live with the opinion. But for you, it would not even exist. The deposition of an opposing expert taken after the expert has given a disclosure of opinions constitutes a valid disclosure of opinions elicited at the deposition, even if new. You did the same thing at the deposition of Dr. Coffman and I objected but you persisted and got an opinion of sorts on an issue not previously described in the disclosure of Dr. Coffman. You also went into details about fat embolism and the basis for the opinions of Dr. Garrison at the deposition. This included references to the chest x-ray at Elmore Medical Center and the report of Dr. Morgan, both of which made reference to fat embolism. You now claim that you could not adequately prepare for his deposition because you did not have notice of his opinion in advance. This is an absurd position because you would not be prepared when you brought up the matter of fat embolism which you should not have done, but you did. You must live with your contention that you were not prepared and I know of no legal authority that gives you the right to take another deposition of Dr. Garrison. You have put yourself in an awkward position and if you will provide me legal authority and support for taking another deposition of Dr. Garrison I will consider your request.

Very truly yours,

Jeremiah A. Quane

JAQ/cf

EXHIBIT N

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September 27, 2013

Clerk of the District Court
c/o Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

Re: *Ballard v. Kerr, et al.*
Case No. CV OC 1204792

Dear Clerk:

Enclosed please find for filing with the Court the NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR in regard to the above-referenced matter. Copies have been mailed to counsel of record. Thank you for your attention to this matter.

Sincerely,

/s/ P. Gregory Haddad

P. Gregory Haddad, Esq.

PGH/flc

Enclosure

cc: Jeremiah Quane/Terrence Jones (via facsimile)
Scott McKay, Esq. (via facsimile)
J. B. Perrine, Esq. (via facsimile)

David Nevin (ISB #2280) dnevin@nbmlaw.com
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Birmingham, Alabama 35244
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR**

To: Susan Kerr
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video conference deposition duces tecum of Susan Kerr, on **Wednesday, October 2, 2013, at 12:00 p.m.,** mountain time, at Regus, 950 West Bannock Street, #1100, Boise, Idaho 83702, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. A copy of all documents and data that comprise or relate to the "records of Silk touch, records and data she compiled of Silk Touch for infections, patients, drawings of Krystal Ballard, photos of Krystal Ballard and experience in training and cosmetic procedures" as referenced in Defendants' Supplemental Answer to Plaintiff's Interrogatory No. 20 dated September 16, 2013 concerning Susie Kerr.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 27th day of September, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

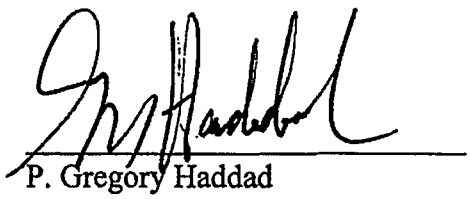
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR** by Facsimile upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701



P. Gregory Haddad

EXHIBIT O

ORIGINAL

Jeremiah A. Quane, ISB No. 977
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' FIRST SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendants hereby submit their First Supplemental Answer to Plaintiff's First Set of Interrogatories as follows:

INTERROGATORY NO. 3: State the name and addresses of each person

whom you intend to call as an expert witness at trial, the subject matter on which each expert is expected to testify, the substance of the facts and opinions of each expert, a summary of the grounds for each opinion of each expert, and a summary of each expert's qualifications.

SUPPLMENTAL ANSWER TO INTERROGATORY NO. 3:

1) Brian C. Kerr, M.D.
C/o Quane Jones McColl PLLC
101 S. Capitol Blvd. Suite 1601
Boise, Idaho 83701
(208) 780-3939

Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Kerr is a physician licensed by the state of Idaho to practice medicine and surgery. Dr. Kerr has engaged in the medical specialty of anesthesiology and cosmetic surgery at all times relevant herein. Dr. Kerr will testify as a non-retained expert witness at the trial as to his compliance with the applicable standard of health care practice with respect to all of the medical services rendered to the patient/decedent Krystal Ballard. Dr. Kerr will testify that he has actual knowledge of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that he met such standard taking into account his background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient.

Part of the basis for Dr. Kerr's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician in Boise, Idaho, his prior involvement in the peer review process while working

as an anesthesiologist, his involvement as an anesthesiologist on thousands of surgeries, his prior medical staff privileges, his knowledge of how cosmetic procedures like liposuction are performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers in Boise, Idaho and elsewhere, and his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion. Dr. Kerr will explain his training and experience at the Mayo Clinic during his residency in anesthesiology 1989-1992 as it relates to sterile operating conditions for the anesthetic procedures he performed, was taught and observed. He will explain the same matters for his experience as a staff anesthesiologist at Saint Alphonsus Regional Medical Center in Boise from 1992 to 2008.

Dr. Kerr will discuss the standard of health care practice employed at Saint Alphonsus Regional Medical Center for achieving sterile operating conditions and the disinfection of instruments and equipment and that the similar matters undertaken for the procedure on Krystal Ballard were used and exceeded.

Dr. Kerr will testify that the infection rates at Saint Alphonsus Regional Medical Center were and are for in excess of any infections he has encountered which

are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences.

By way of these and other professional experiences in Boise, Idaho, Dr. Kerr will testify that he has actual knowledge of community standards of health care practice applicable to him. During his professional career in Boise, Idaho, he has been acquainted with physicians who perform cosmetic procedures who are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. Dr. Kerr has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and the procedures utilized by them in this specialty in Boise, Idaho in 2010, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic procedures including the procedures at issue in this case. Dr. Kerr will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice for him or physicians who practice in the same medical specialty he does.

Dr. Kerr will describe and offer testimony on the training he received for the procedures he performed on Krystal Ballard and refer to the publications, data and documents that have been produced in discovery on this subject that are incorporated herein by this reference and explain the numerous similar procedures he performed before his treatment of Krystal Ballard, consisting of 199 liposuctions through July 20, 2010 and 33 fat transfers through July 20, 2010.

Dr. Kerr will explain that there was no requirement, per the standard of health care practice or otherwise, for his facility to be certified, inspected or approved by

any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedure he performed on Krystal Ballard.

During Dr. Kerr's professional career in Boise, Idaho, he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. He will testify regarding the significant experience he has in performing these types of procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that he had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. As reflected in his deposition testimony and discovery responses which are hereby incorporated as if set forth in full, Dr. Kerr had performed these procedures on numerous other patients before and since the procedure at issue in this case. Dr. Kerr will testify that he possesses the professional knowledge and experience that allows him to express the opinions and testimony described in this document.

Dr. Kerr will testify that he has never had a patient experience a post-operative complication like the one alleged in this case nor has he ever had a patient experience a post-operative infection of this nature, nor a patient death. Based in part on his review of this case and in consultation with experienced and trained medical professionals in several other areas of medicine including infectious disease and pathology, he will testify that the patient's death was not due to any error or omission on

his part or the part of anyone associated with his practice. He will testify that he employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies. Dr. Kerr will explain the procedures he performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will explain the same matters in regard to the multitude of procedures her performed before the procedure he performed on Krystal Ballard. He will render the opinion that his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Kerr actually holds the opinions expressed in this document and that his opinions will be stated on a more probable than not basis or reasonable medical certainty.

Dr. Kerr will testify that nothing he elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient. Dr. Kerr will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice by him. He will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. Dr. Kerr's testimony at trial will necessarily contain a mixed component of both factual and expert testimony. He

will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010.

As part of his testimony, Dr. Kerr will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with his deposition testimony, prior discovery responses and the contents of this disclosure which are hereby incorporated. He will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. The standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and no perfect outcome was ever warranted or represented to the patient. The standard of practice applicable includes as a major element aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. Dr. Kerr will be prepared to testify about his experiences in this regard at trial and why his care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Kerr will explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections may occur. Dr. Kerr will explain the advice and information given to Krystal Ballard in regard to the risk, benefits and options he provided to Krystal Ballard on two occasions before his procedure on July 21, 2010 which is documented in his medical records. Dr. Kerr will

explain the standard of health care practice that is applicable to him and that everything undertaken by him in his care and treatment of Krystal Ballard is illustrative of the standard of health care practice, based on the class of health care provider to which he belonged and in which capacity he was functioning. Dr. Kerr will explain that the standard of health care practice provides that he is to be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization.

As part of his testimony and consistent with his specialty of anesthesiology and cosmetic surgery, Dr. Kerr is expected to testify concerning the totality of medical services provided to Krystal Ballard. As part of his testimony, Dr. Kerr will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery. He will discuss his care and treatment of the patient as outlined in the patient's medical records as well as his conversations and interactions with the patient and her husband as discussed in the documents produced in discovery and/or attached as exhibits to Dr. Kerr's deposition. To the extent it is relevant to his opinions, he will also discuss his continuing education courses since transitioning from anesthesia to cosmetic procedures including his further knowledge of cosmetic surgery which includes both the Vaser procedure and fat injection procedures and how they are performed in different locations in this body.

With respect to the fat injection, he will discuss how a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site

being treated. Before the procedure, the areas from where the fat is being removed are injected with a fluid to minimize bruising and discomfort. The fat is removed from the body by a cannula through a small incision. He will discuss how the fat is prepared to be reinjected back into the patient's body and then placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by injecting more than is needed at the time to achieve the desired end result. Over a few weeks, the amount of transferred fat will decrease. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Kerr will discuss the entries in his records including his first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the patient's health history form, the fact that she had previously had a liposuction procedure and desired further treatment of this type, the general state of the patient's health, the operative report and a detailed explanation of how he did the procedure on July 21, 2010, he will discuss the patient's vital signs and her clinical condition before during and after the surgery as well as at the post-operative visit with the patient, his pre-operative, intra operative and post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt, he will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates

to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, he will explain the artistic nature of the procedure and the laborious aspect of moving the cannula back and forth to feather the tissue and achieve the desired aesthetic result.

As part of his testimony, Dr. Kerr will explain the manner and method by which the adipose tissue harvested is then drained and prepared for reinjection, how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss those pieces of equipment and/or attachments and medical goods which are new versus sterilized for reuse between patients and/or procedures, he will discuss the pre and post-operative antibiotics he administered to the patient and the reasons why they were appropriate, he will discuss how the patient never appeared infected or septic to him or even to be suffering from any signs or symptoms of any infection beyond general localized pain in her buttocks which would be expected initially from this type of procedure. He will discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, there was no swelling or signs of a rash or change in condition of the skin surrounding the area. Dr. Kerr will explain how he looked for and documented the absence of these signs and symptoms during his postoperative visit on July 23 and in his subsequent discussions with the patient and her husband prior to her death. He will testify that at no point did the patient present to him as having an infection nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done. He will discuss his knowledge of gram negative rods

and the fact that they do not exist on the skin nor would they be found on his instruments, but rather they are a class of bacteria which resides in the bladder, bowels and urinary tract of a patient.

Dr. Kerr will discuss why the Vaser procedure is an appropriate method of removing unwanted adipose tissue in a patient like Krystal Ballard. He will testify that he had adequate training and experience to perform the surgical procedures on the patient in question and that he performed these procedures in conformity with the local standard of practice to which Dr. Kerr is held. He will explain how the field of laser lipolysis with the use of tumescent anesthesia has expended in recent years. He will discuss how when considering different types of the body for lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or reinject into each location. He will explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

As part of his testimony, he will explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove.

Small-diameter probes are then inserted into the body through small incisions. He will explain how by resonating at a high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Kerr may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. He will discuss his operative report and how he creates his medical record documentation, how and why he selected the antibiotics in question including the decision on July 23 to place the patient on 500 mg of Keflex and that this was an appropriate broad spectrum antibiotic to provide the patient given her location in Mountain Home, he will explain how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how he specifically evaluated, questioned the patient and documented regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that he took the appropriate amount of time to address this patient during her procedure on July 21, 2010. He will discuss his knowledge of the various cosmetic organizations to which he belongs and/or has knowledge of, what they offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field. Dr. Kerr will explain the matter he undertook on July 23, 2010 for evaluating Krystal Ballard and

assessing whether there was any clinical evidence of infection of the surgical sites, including abnormal odor, and thus there was no evidence or suggestion of infection of the sites.

He will discuss how on July 26, 2010 he learned around 1 p.m. that Krystal Ballard had died. After the patient's death he sent a document setting forth his list of concerns to the coroner who he asked for a copy of the autopsy record. He will discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine and that this is consistent with an infectious process in the patient's bladder. This is also an area wherein gram negative rod bacteria are known to populate and exist. He will discuss how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery. He will comment upon the fact that the autopsy failed to address the patient's bladder or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. Dr. Kerr is expected to offer testimony on the autopsy report of Dr. Glen Groben and the matters he described in his deposition in regard to the report, including the fact that Dr. Groben did not perform a microscopic evaluation of the bladder and urinary tract with the exception of the kidneys.

Dr. Kerr is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly. He will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of

acute inflammatory cells within tissue from the surgical sites, it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. Dr. Kerr will render the opinion, more likely than not, that the gram negative bacterial rods, if they existed, were introduced into the patient's surgical site sometime after the procedure rather than being introduced during the procedure. He has never had a patient experience such an infection in all his years. Dr. Kerr will testify that few of his patients who have undergone a lipolysis procedure have ever experienced any kind of post-operative infection and none of those patients died and all of them were diagnosed based on clinical observation. These were limited cellulitis based on clinical suspicion and not based on a culture result. Dr. Kerr will explain that if the opinions of Dr. Dean Sorensen are valid, there should have been other infections of patients before and after the procedure on Krystal Ballard, and there were not.

Dr. Kerr will testify that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss how the patient repeatedly concealed this procedure from her husband and the military and that she was noncompliant with what she had been told both in writing and verbally about how to care for herself. He will discuss how the patient erroneously reported that she had fallen and injured her back and claimed this was the source of her pain rather than admit she had cosmetic surgery performed. He will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will also discuss how the patient admitted to engaging in activities she was told to refrain from

in order to allow her body time to heal. He will discuss his concern that the patient was not properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Kerr will testify that he and his employees followed the appropriate sterile technique in regards to the procedure he performed on Krystal Ballard. He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control. He will explain how the patient was not following the instructions on how to care for herself, change her bandages, and get appropriate rest. He will discuss the patient's disclosure that she had a PT exam in the military scheduled for a day or two after the procedure and was told that she should not engage in that activity. He will discuss how the patient agreed to tell her husband that she had the cosmetic procedure done so he could help care for her, but then she failed to do so on multiple occasions. He will explain that when the patient showed up on July 21 to have the procedure she did not have someone present to drive her home as she was instructed to do. Dr. Kerr will discuss how he did not use a sedating drug with the patient and then observed her for a period of time after the procedure before allowing her to drive home and even offered to have a taxi take the patient home.

The patient was placed on 500 mg of Keflex per day for 10 days as of the July 23 visit. He would have removed the bandages in order to personally observe the area of the wound to check for signs and symptoms of infection. He will testify that the amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require him to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. He will discuss his training in performing liposuction he received from both John Lundeby and at the Keller Medical Institute. He will discuss his experiences with and the differences between Smart Lipo, Ultrasonic liposuction and traditional liposuction. He will discuss his background, training and experience in the use and regular implementation of the sterile technique. He will discuss how this is an office based procedure which is not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such a procedure. He was not required, nor does the standard of practice require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF.

He will discuss how his procedure room is prepared for surgery, how the patient, himself, his assistant and the patient are all prepared for surgery and the sterile technique utilized. He will discuss the autoclave he uses, how it operates and how it helps him maintain a sterile field for his procedures. He will testify that he was not required to test for spores or mold and that these issues have nothing to do with the case. He will discuss the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. He will discuss the operation

and use of the Vaser ultrasonic lipolysis machine utilized for the procedure in this case. He will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how he harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes despite the fact the patient was in the procedure room for around four hours. He will discuss the different cannulas used to aspirate the fat and the artistic technique required to accomplish the desired aesthetic outcome.

He will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss his informed consent discussion with the patient including the contents of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications. He will discuss and interpret the entries in his medical records.

Dr. Kerr will render his opinions consistent with the requirements of Idaho Code §6-1012 and 6-1013. In this regard, he will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of

consent, he will testify that he discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects consistent with the requirements of Idaho Code §39-4506. As part of his testimony, he may also discuss his preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that he improperly performed the lipolysis procedure, the fat injection procedure, that he improperly sterilized his equipment or that he did anything to cause the patient's death. Depending on the testimony of Dr. Dean Sorensen at trial, Dr. Kerr may offer testimony on and descriptive of the fact that Dr. Sorensen is a competitor of his and advertises his belief that non-plastic surgeons should not do liposuction, such as his website that states "unfortunately, there are a number of procedures being performed by physicians who are not trained in plastic surgery. These non-plastic surgeons often utilize technologies that have catchy names and are expensive but in clinical trials have not shown any significant improvement over the standard tumescent liposuction techniques. Patients are advised to select a procedure that is safe and effective based on scientific results performed by a Board Certified plastic surgeon and to ignore the marketing hype so common today." Depending on the proof submitted at trial and the testimony of Dr. Sorensen and/or the tenor or implication of his testimony and opinions, Dr. Kerr may describe the lawsuit against Dr. Sorensen in Boise that resulted in the jury rendering a verdict of malpractice against him and assessing damages of a substantial amount against him. Dr. Kerr may testify that Dr. Sorensen has

never observed or seen the operating procedures of his, including his sterile techniques, use of instruments, disinfectant matters and the way he performed the procedures on Krystal Ballard.

As part of his testimony, Dr. Kerr will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Kerr will testify that he had the best interests of the patient in mind and that he was committed to the rendition of his services in full compliance with the applicable local standard of health care practice and his experience and capability. He will testify that even in hindsight the patient did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. At the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard and Dr. Kerr will opine that Krystal Ballard was not suffering from a urinary tract infection on July 21, 2010.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Kerr has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of anesthesia and cosmetic surgery in Boise, Idaho in 2010 in treating, diagnosing, managing and caring for patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge that it is within his specialty and capability to perform the procedures in question as part of his practice of medicine,

his interactions with cosmetic providers, and his membership and participation in various medical associations, including those in the state of Idaho. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery within Boise, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine in Boise.

Dr. Kerr will discuss the ability, competence and proficiency of Brianna Kerr as a surgical assistant and the manner in which she maintains sterile conditions for surgeries, and the fact that she did nothing in the surgery of Krystal Ballard that would create or contribute to an infection.

His opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, affidavits, discovery responses and depositions taken. Dr. Kerr's professional background and qualifications were discussed in his deposition and are incorporated herein. As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including his own, his employees, and the Plaintiff's. He has also reviewed and considered his medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records

are produced, they will also be considered. Dr. Kerr will explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight.

At Elmore Medical Center, July 25, 2010, the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at St. Alphonsus on July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overlaid. Dr. Kerr will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Kerr will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of a developing urinary tract infection or abnormalities that developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they came from the urinary tract of Krystal Ballard or her intestinal tract and were not introduced during his surgical procedure. Bacteria was found in the urinalysis at Elmore.

It is expected that Dr. Kerr will explain pertinent anatomy, infectious processes, pathophysiology of infections, nidus for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding what drugs would show up on drug test by the Air Force. He will also explain the post-surgery matters he undertook and his efforts to assist Krystal Ballard, including the importance of the

post-treatment instructions given to Krystal Ballard as denoted in his medical records and the evidence that is consistent with non-compliance by Krystal Ballard.

Dr. Kerr reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Kerr reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond. Dr. Kerr has not testified in any matter in the last four years. He is not a retained expert. His curriculum vitae was previously produced and is incorporated by this reference.

2) Gregory Laurence, M.D.
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Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Laurence is a physician licensed in the state of Tennessee to practice medicine and surgery. Dr. Laurence is board certified in both family practice and laser surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Laurence will testify as a retained expert witness at the trial. Dr. Laurence will testify that he has actual knowledge

of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient.

Dr. Laurence will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Laurence's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges at Baptist Memorial Hospital and St. Francis Hospital in Memphis, Tennessee, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers were performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers like Dr. Kerr in Boise, Idaho and elsewhere, his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion. As part of his testimony, Dr. Laurence may also explain his training and

experience at the University of Tennessee during his residency in family practice in 1992-95 as it relates to sterile operating conditions for the procedures he performed, was taught and observed. He will explain the same matters for his experience in his own aesthetics surgical center which he operates in Germantown, Tennessee from 2003 to the present.

Dr. Laurence will discuss the standard of health care practice employed at his own surgical facility in Tennessee for achieving sterile operating conditions and the disinfection of instruments and equipment and maintaining a sterile operative field and that the similar actions and efforts undertaken by Dr. Kerr as have been described for the procedure on Krystal Ballard in this case were used and exceeded in his opinion. Dr. Laurence will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were appropriate and working properly at the time of the surgery at issue in this case.

Dr. Laurence will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons. Dr. Laurence has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and

the procedures utilized by them in this specialty, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic procedures including the procedures at issue in this case. Dr. Laurence will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice in the same medical specialty as his and Dr. Kerr.

Dr. Laurence will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. As part of his testimony, he is expected to refer to the publications, data and documents that have been produced in discovery on this subject and explain the numbers of similar procedures he has performed. Dr. Laurence will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard. He will testify that he was not required to test for spores or mold and that these issues have nothing to do with the case.

During Dr. Laurence's professional career he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. Dr. Laurence will testify regarding the significant experience he has in performing these types of

procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Laurence will testify that he possesses the professional knowledge and experience that allows him to express the opinion and testimony described in this document.

Dr. Laurence will testify that the fact this patient experienced a post-operative complication like the one alleged in this case which resulted in a patient death does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections are not proof of a violation. He will render the opinion that the patient's death was not due to any error or omission on Dr. Kerr's part or the part of anyone associated with his practice. He will discuss his own sterilization techniques, training and experience in this area which will help support his opinion that Dr. Kerr employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies.

Dr. Laurence will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient,

but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Laurence will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

As part of his testimony, Dr. Laurence will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Laurence actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty.

Dr. Laurence will testify regarding the specific issues set forth in this disclosure, but he will also testify globally that nothing Dr. Kerr elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient. Dr. Laurence will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice.

Dr. Laurence will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Laurence will testify regarding his various publications, honors and university

appointments as set forth in his curriculum vitae which is hereby incorporated as if set forth in full. He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American Institute of Ultrasound Medicine, the Association of American Physicians and Surgeons, the American Society of Cosmetic Breast Surgeons, and the National Society of Cosmetic Physicians.

Dr. Laurence will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Laurence will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Laurence holds the opinion and will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient.

Dr. Laurence will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and

properly followed the patient and communicated with her and her family. Dr. Laurence will be prepared to testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Laurence will explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur.

Dr. Laurence will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records. Dr. Laurence will explain that everything undertaken by Dr. Kerr in his care and treatment of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Laurence will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon which Plaintiff is unfairly trying to do in this case.

As part of his testimony, Dr. Laurence will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's

medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband.

With respect to the fat injection procedure at issue, Dr. Laurence will discuss and explain to the jury the medical basis upon which a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient. He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin.

Dr. Laurence will discuss and describe how the adipose tissue is then prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Laurence will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact that she had previously had a liposuction procedure and desired further treatment of this type. To the extent it is relevant to his opinions, Dr. Laurence will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient. He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Laurence will explain that Krystal Ballard appeared to be in good health and without a urinary tract infection before the procedure on July 21, 2010 and there is no evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice.

Dr. Laurence will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue. From his unique perspective as a cosmetic surgeon, Dr. Laurence will explain the artistic nature of the liposuction

procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient.

In the process of providing his opinions that the care by Dr. Kerr was appropriate, Dr. Laurence will also explain the manner and method by which the adipose tissue harvested was then drained and prepared for reinjection. He will also discuss how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss these pieces of equipment as well as their various attachments as well as describing the medical equipment which is new versus that which must be re-sterilized for reuse between patients and/or procedures. Dr. Laurence will discuss the pre and post-operative antibiotics administered by Dr. Kerr to the patient and explain why they were appropriate medications to give to the patient as a prophylaxis against infection.

Dr. Laurence will discuss how the patient never appeared infected or septic per the medical records and deposition testimony. He will discuss the expected localized pain patients can expect to experience following a fat transfer procedure. To the extent it becomes relevant to aid in expressing his favorable opinions, Dr. Laurence may also discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor.

Dr. Laurence will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and

her family prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done.

Consistent with his background and experience in medicine and surgery, Dr. Laurence will discuss his knowledge of gram negative rods and the fact that such organisms do not exist on or in the skin, nor would they be found on surgical instruments. Instead, they represent a class of bacteria which reside in the urinary tract and bowels of a patient. He will testify that Dr. Kerr had adequate training and experience to perform the surgeries in question, that Dr. Kerr's medical records contain an adequate description of the care rendered and the discussions with the patient, that Dr. Kerr implemented appropriate sterility techniques and conditions for surgery and that he used correct solutions for cleaning and disinfecting instruments and assuring that operative conditions were adequately sterile to guard against the risk of infection. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

To the extent the surgical selection is questioned or needs further explanation at trial, Dr. Laurence will be prepared to discuss why the Vaser procedure is an appropriate method of removing unwanted adipose tissue in a patient like Krystal Ballard. As part of his testimony and in order to expand upon his background and experience in cosmetic surgery, Dr. Laurence may offer testimony explaining how the field of laser lipolysis with the use of tumescent anesthesia has developed in recent years.

This may include testimony addressing that when considering different types of the body for lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or re-inject into each location. As part of his testimony, Dr. Laurence will be prepared to explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

As part of his testimony, he will explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions. He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin

retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Laurence may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how Dr. Kerr's records and deposition evidence that he specifically and appropriately evaluated and questioned the patient and then documented in his records regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on July 21, 2010.

As outlined above, Dr. Laurence will discuss his knowledge of the various cosmetic organizations to which he belongs and/or has knowledge of, what they offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field. Dr. Laurence will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites.

He will discuss his review and comments of the autopsy record and the patient's subsequent treatment records. By way of example, Dr. Laurence is expected to

discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine. Based on his experience in family practice, he will render the opinion that this laboratory finding is consistent with, and provides strong evidence of, an infectious process located within the patient's bladder. He will explain how the bladder is also an area wherein gram negative rod bacteria are known to populate and exist in the face of an infection.

Dr. Laurence will also comment upon the significance from his perspective regarding how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly.

Dr. Laurence will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. Dr. Laurence will render the opinion, more likely than not, that the gram negative bacterial rods were introduced into

the patient's surgical site sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient elected to place herself and her health care provider in by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery performed.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Laurence will testify that Dr. Kerr and his employees followed the appropriate sterile technique in regards to the procedure he performed on Krystal Ballard.

He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control.

Dr. Laurence will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require Dr. Kerr to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. He will discuss his background, training and experience in the use and regular implementation of the sterile technique in his practice in order to lay a foundation for his opinions as to the adequacy of Dr. Kerr's sterile technique. Dr. Laurence will discuss how liposuction and fat transfers are office based procedures which are not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Laurence will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Laurence will render the opinion that Dr. Kerr's procedure room was properly prepared for surgery and to protect and preserve an appropriate sterile field. He will discuss the autoclave at issue, how it operates and how

it helps Dr. Kerr maintain a sterile field for his procedures. He will discuss the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. He will discuss the operation and use of the Vaser ultrasonic lipolysis machine utilized for the procedure in this case. He will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure.

As it relates to rebutting the testimony of the Plaintiff's experts, Dr. Laurence will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications.

Dr. Laurence will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr. Kerr's preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr improperly sterilized his equipment or that Dr. Kerr did anything to cause the patient's death.

As part of his testimony, Dr. Laurence may also address and explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight. He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at St. Alphonsus on July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Laurence

will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Laurence will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection the developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they came from the urinary tract of Krystal Ballard or her intestinal tract and were not introduced during his surgical procedure. As part of his testimony, it is expected that Dr. Laurence will explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

As part of his testimony, Dr. Laurence will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Laurence will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Laurence has relied upon his own unique training and

experience as a licensed physician engaged in the medical specialty of cosmetic surgery in Tennessee in treating, diagnosing, managing and caring for patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine, and his membership and participation in various medical associations and organizations as set forth herein. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine.

Dr. Laurence's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Laurence's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including Dr. Kerr's, employees of Silk Touch, and the Plaintiff's. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance

Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered.

Dr. Laurence reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Laurence reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

3) Charles Garrison, M.D.
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208.891.8505

Subject Matter: Facts of case, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Garrison is a physician licensed by the state of Idaho to practice medicine and surgery. Dr. Garrison has engaged in the medical specialty of forensic pathology at all times relevant herein which he practices in Pocatello and Boise, Idaho. Dr. Garrison will testify as a retained expert witness at the trial and his testimony will address the issue of the cause of the patient's death. Part of the basis for Dr. Garrison's opinions include: his background, training, research, practice and experience in performing forensic pathology and in determining disease processes

as well as the cause of death of patients like Krystal Ballard as part of his regular practice of medicine.

Dr. Garrison will render opinions which refute and rebut the opinions, conclusions and methodology advanced by Plaintiff's experts including the opinions of George Nichols, M.D. and Keith Armitage, M.D. who claim that the bacterial infection which the patient died from was a direct result of bacteria introduced during the July 21, 2010 procedure and who further claim that the presence of gram negative rods are proof of a breach in sterility by the Defendants. The Plaintiffs' experts contend that the toxic shock and multisystem organ failure which the patient suffered from occurred as a result of contaminated equipment of the Defendants. Dr. Garrison, who has viewed and analyzed the medical and autopsy records as well as the tissue pathology slides from the post mortem examination, will refute these opinions at trial.

Dr. Garrison will render his opinions to a reasonable degree of medical certainty. Dr. Garrison's medical specialty, training, experience and knowledge enable him to render the opinions expressed in this document, which includes the subjects of bacteria, bacterial infections, virus, gram negative rods, types of bacteria that embrace gram negative rods, the presence and location of gram negative rods, sepsis, toxic shock, cause of death of patients from sepsis and toxic shock and bacteria that inhabit the skin, urinary tract and bowel. He will testify that the presence of gram negative bacteria in the wounds of Krystal Ballard, are by no means proof to a reasonable medical certainty, that a breach in sterility occurred in the surgical procedure. He will explain that although the patient's death involved gram negative sepsis, to contend as Plaintiffs' experts do, that the etiology of her sepsis was a primary infection of the wound which occurred as a result

of a breach in sterility, is to ignore the medical facts of the case, and wound infections in general.

He will testify that for Plaintiffs' experts to state that there are no other reasons for Krystal Ballard's death other than as a direct result of bacteria introduced intraoperatively during the procedure as a result of contaminated equipment, is to ignore the process of postoperative wound infections, their etiology, the facts of this case, the patient's presenting symptoms and treatment course, how wounds are evaluated to determine the presence or absence of an infection and the routes by which they occur. In this regard, Dr. Garrison will explain post-operative wound infections and compare them to other infectious processes, including those associated with the patient's urinary track bacteria and abnormal urinalysis.

He will testify regarding how infections become septic. He will render the opinion that the sepsis which led to the septic shock and multi-system organ failure was caused by the patient's primary infection which was the urinary track, not any wound infection as alleged by Plaintiffs in this case. In this regard, he may also discuss the fluid retention and weight gain of the patient in the days prior to her death associated with her organ failure, but yet there was never any overt signs of the patient having any wound infection at the locations of the fat transfer or liposuction. The presence of gram negative bacteria in the surgical wound(s) of Krystal Ballard is simply proof of their presence, but by no means is it proof that they arrived there by or through the surgical procedure of Dr. Kerr.

As part of his testimony, Dr. Garrison will explain the difference between a primary versus a secondary infection and how it relates to the onset of sepsis in a patient

like Krystal Ballard. He will render the opinion that the patient's sepsis and subsequent septic shock and death were not proximately caused by any bacteria introduced into the operative field during Dr. Kerr's July 21, 2010 liposuction and fat transfer procedure. He will testify that Dr. Nichols conclusions are not only medically flawed and inaccurate, but they fail to take into consideration any other diagnostic evaluation that might have been done to further define the etiology of the infection, and reach such a conclusion with proper and appropriate medical investigation.

He will testify that the most that can be said about the presence of gram negative bacteria allegedly found in the wounds of Krystal Ballard at autopsy is simply that it is proof of their presence at that location – which location cannot be determined for certainty since the tissue samples were not labeled as to precise location. He will testify that such a bacterial finding at autopsy is by no means definitive proof to a reasonable degree of medical certainty that the gram negative organism, whatever it was, arrived there by or through the surgical procedure performed by Dr. Kerr, nor does such a finding at autopsy establish that the patient's death was due to any breach in sterility or cleaning protocol of any of the equipment, instruments or facility within the Silk Touch Med Spa facility.

Dr. Garrison will testify that he would expect to see gram positive organisms populate the site of the operative wound if in fact the sepsis was due to a skin infection caused by a breach in sterility as alleged. He will explain how in this case the presence of the gram negative organisms represented a secondary process to the patient's ongoing urinary tract infection. In this regard, he will explain the process by which a urinary tract infection can lead to sepsis in a patient like Krystal Ballard. He will testify

that he has not seen a circumstance wherein a gram negative rod resulted in sepsis, septic shock followed by the death of the patient.

He will testify that the autopsy conducted in this case did not identify any specific organism. He will discuss how in most cases of a postoperative surgical wound infection, that he generally observes signs and symptoms of infection due to a breach in sterility within two to three days of surgery which did not occur in this case. He will discuss how the evidence in this case demonstrates that both Dr. Groben, Dr. Kerr, the patient's husband and the patient prior to her death all describe a patient and an operative site which is not grossly infected at any time, even at autopsy. He will testify that the absence of evidence of any gross infection at the surgical site is wholly inconsistent with it having caused the patient's death as Plaintiffs' experts contend. In this regard, Dr. Garrison will discuss the cardinal signs of infection and how the patient presented without evidence of any fever and without evidence of any warmth, redness or drainage to the wound site. He will discuss and explain the significance of such a finding.

He will testify that there is nothing from the autopsy, the depositions, the medical records or the death of the patient which establish to any reasonable degree of medical certainty that there was any breach of sterility in this case. He will discuss the autopsy report including the fact that the tissue samples do not identify with any degree of specificity where they were taken from which further compounds the relevance of the finding of gram negative rods. He will testify that Plaintiffs' experts cannot state to any degree of medical certainty that the mere presence of gram negative organisms was in any way caused by, evidence of, or the result of a breach in sterility or cleaning protocol by any of the Defendants or their employees. In the opinion of Dr. Garrison, it is most

probable, which means to a reasonable degree of medical certainty, that the gram negative bacteria came from the bowel or urinary tract of Krystal Ballard where they reside and that their presence was not due to their being introduced during the procedure by Dr. Kerr.

As further support for his opinions, he will discuss the significance of the fact that there were not any other postoperative infections reported or experienced by any patient who was seen at the Silk Touch Med Spa before or since this patient's procedure and how this is further evidence that the sterilization procedures at the facility were adequate to maintain a proper sterile field. As part of his testimony, he will discuss how the process of sterilization works and how bacteria are eliminated by various cleaning processes and how there is not just one approved way to maintain a sterile field. As part of his testimony, he may also discuss how different types of bacteria are susceptible to different cleaning techniques, temperature and/or antibiotics.

As part of his testimony, Dr. Garrison will discuss different types of bacteria, how bacteria multiply, how they react to different parts of the human body, where they normally live in the human body, how they are identified in various standard tests, how the body fights off and/or responds to and/or relies upon different types of bacteria, where various types of bacteria normally reside within and on the human body, how different kinds of gram negative bacteria organisms are known to reside within the human urinary tract and bowels as well as within fecal matter.

For purposes of explaining his testimony he is expected to discuss general anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. He may

discuss how antibiotics are able to travel throughout the body, how infection within certain types of tissue can be harder to treat depending on the vascularity of the area of the infection (such as treating localized infections in fatty tissue versus in muscle) and whether or not an infection is localized versus systemic. It is expected that Dr. Garrison will use during his testimony demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the bacteria.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Garrison has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of forensic pathology, in evaluating laboratory results, tissue samples, autopsy records, consultations with other physicians and otherwise managing and identification of bacterial disease processes in patients like Krystal Ballard, his observations of the habits, customs and practice experiences of other forensic pathologists who address medical situations like those presented in this case, and his membership and participation in various medical associations, including those in the state of Idaho.

The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing forensic pathology, his review of the care and treatment of the patient by Dr. Kerr and others, and his review and consideration of the depositions and discovery responses taken and/or disclosed to date in this case. His opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory and infectious disease studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and

interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Garrison's professional background and qualifications are set forth in his attached curriculum vitae, which is hereby incorporated by reference.

As part of his review, he has had available to review and consider the medical records of Silk Touch Med Spa, Dr. Brian Kerr, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and portions of the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be made available to this witness for consideration.

Dr. Garrison reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Garrison reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with the law. The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

4) Thomas Coffman, M.D.
125 East Idaho, Suite 203
Boise, Idaho 83712

Subject Matter: Facts of case, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Coffman is a physician licensed by the state of Idaho to practice medicine and surgery. Dr. Coffman is engaged in the medical specialty of infectious disease at all times relevant herein which he practices in Boise, Idaho. Dr. Coffman will testify as a retained expert witness at the trial and his testimony will address the issue of the cause of the patient's death and the fact that death did not result from the events of the procedure of Dr. Kerr. Part of the basis for Dr. Coffman's opinions include: his background, training, research, practice and experience in infectious diseases and in determining disease and infectious processes as well as the cause of death of patients like Krystal Ballard as part of his regular practice of medicine.

Dr. Coffman will render opinions which refute and rebut the opinions, conclusions and methodology advanced by Plaintiff's experts including the opinions of George Nichols, M.D. and Keith Armitage, M.D. who claim that the bacterial infection which the patient died from was a direct result of bacteria introduced during the July 21, 2010 procedure and who further claim that the presence of gram negative rods are proof of a breach in sterility by the Defendants. The Plaintiffs' experts contend that the toxic shock and multisystem organ failure which the patient suffered from occurred as a result of contaminated equipment of the Defendants. Dr. Coffman, who has viewed and analyzed the medical and autopsy records as well as the tissue pathology slides from the post mortem examination, will refute these opinions at trial.

Counsel for the Defendants have requested access to blood samples, tissue samples and gram stained samples from the autopsy which are to be evaluated by Dr. Coffman and other defense experts, however, as of the writing of this disclosure, only the tissue sample slides have been produced by the Coroner's office. Arrangements are

still being made and the defense is still waiting to receive both the gram stained slides and the blood samples for further evaluation and testing. As a result, Dr. Coffman is unable to complete his work on this matter thus far. The opinions of Dr. Coffman which are known thus far are set forth herein and it is expected that additional opinions will be supplemented once the missing materials identified above have been made available for review.

Dr. Coffman will render his opinions on a more probable than not basis which is to a reasonable degree of medical certainty. Dr. Coffman's medical specialty, training, experience and knowledge enable him to render the opinions expressed in this document, which includes the subjects of bacteria, bacterial infections, virus, tissue types, gram negative versus gram positive rods, types of bacteria that embrace gram negative and gram positive rods, the presence and location of gram negative versus gram positive rods and the methodologies for reviewing each, sepsis, toxic shock, cause of death of patients from sepsis and toxic shock and identification and type of bacteria that reside and inhabit the skin, urinary tract and bowel.

He will testify that Dr. Kerr was not required to test for spores or mold and that these issues have nothing to do with the case. Dr. Coffman will discuss other disease processes which are known to cause a rapid patient death such as occurred in this case. He will discuss how infections lead to sepsis and toxic shock. He will testify that based on his view of the tissue slides that he sees evidence of white blood cells which can be evidence of the reparative process following surgery. He will testify as to why he believes the blood cultures were negative as well as what the various components of a complete blood count mean to him as an expert in infectious disease.

As part of his testimony, Dr. Coffman will discuss where gram negative versus gram positive bacteria are known to reside in the body. He will testify that gram negative bacteria do not reside on or in the skin, but instead reside within the urinary tract and bowel. He will testify that even if gram negative bacteria were observed in any of the tissue samples that this does not rule out that the patient may well have had an ongoing infection in another area of her body such as her urinary tract.

As part of his testimony, Dr. Coffman will testify that he has substantial experience in identifying bacteria and other cellular structures and organisms in tissue samples obtained from the human body. He will testify that he is regularly called upon in his specialty in infectious disease to make such determinations and that he is capable of identifying the differences between a gram negative versus a gram positive bacteria on properly prepared slides as well as being able to further classify and define specific species of bacteria and other organisms and cellular structures within the human body.

Dr. Coffman will render the opinion that based on his review of the materials to date that any sepsis, toxic shock or other infectious process suffered by the patient was not caused by or in any way due to a lack of sterility or failure to properly clean and maintain the equipment and/or sterile field by Dr. Kerr and/or his office staff.

He will rebut the Plaintiffs' experts wherein they opine that there are no other reasons for Krystal Ballard's death other than as a direct result of bacteria introduced intraoperatively during the procedure as a result of contaminated equipment. In this regard, he will discuss the process of postoperative wound infections, their etiology, the facts of this case, the patient's presenting symptoms and treatment course, how wounds are evaluated to determine the presence or absence of an infection and the

routes by which they occur. In this regard, Dr. Coffman will explain post-operative wound infections and compare them to other infectious processes to the extent not otherwise discussed by other defense experts.

He will testify regarding how various infections can lead to the condition known as sepsis. He will render the opinion that the sepsis which allegedly led to the septic shock and multi-system organ failure was caused by the patient's primary infection which was not a wound infection as alleged by Plaintiffs in this case. As part of his testimony, Dr. Coffman will explain the difference between a primary versus a secondary infection and how it relates to the onset of sepsis in a patient like Krystal Ballard. He will render the opinion that the patient's sepsis and subsequent septic shock and death cannot be blamed on Dr. Kerr's July 21, 2010 liposuction and fat transfer procedure.

He will testify that Dr. Nichols conclusions are not only medically flawed and inaccurate, but they fail to take into consideration any other diagnostic evaluation that might have been done to further define the etiology of the infection, and reach such a conclusion with proper and appropriate medical investigation. Even assuming arguendo as to the findings by Dr. Groben, Dr. Coffman will testify that the most that can be said about the presence of gram negative bacteria allegedly found in the wounds of Krystal Ballard at autopsy is simply that it is proof of their presence at that location – which location cannot be determined for certainty since the tissue samples were not labeled as to precise location.

Dr. Coffman will testify that such a bacterial finding at autopsy, is by no means definitive proof to a reasonable degree of medical certainty that the gram negative organism arrived there by or through the surgical procedure performed by Dr. Kerr, nor

does such a finding at autopsy establish that the patient's death was due to any breach in sterility or cleaning protocol of any of the equipment, instruments or facility within the Silk Touch Med Spa facility.

Dr. Coffman will testify that he would expect to see gram positive organisms populate the site of the operative wound if in fact the patient's sepsis was due to a skin infection caused by a breach in sterility as alleged. Dr. Coffman will discuss and explain the process by which a urinary tract infection can lead to sepsis in a patient like Krystal Ballard. He will testify that he has not seen a circumstance wherein a gram negative rod resulted in sepsis, septic shock followed by the death of the patient. It is the opinion of Dr. Coffman that the infectious process of Krystal Ballard, as stated in the autopsy report, came from bacteria from her urinary tract or bowel that developed after the procedure of Dr. Kerr.

He will testify that the autopsy conducted in this case failed to identify any specific organism. He will discuss how the evidence in this case demonstrates that both Dr. Groben, Dr. Kerr, the patient's husband and the patient prior to her death all describe a patient and an operative site which was not grossly infected at any time. He will testify that the absence of evidence of any gross infection at the surgical site is inconsistent with such an alleged infection as having caused the patient's death as Plaintiffs' experts contend. In this regard, Dr. Coffman will discuss the cardinal signs of infection and how the patient presented without evidence of any fever and without evidence of any warmth, redness or drainage to the wound site. He will discuss and explain the significance of such a finding.

He will testify that there is nothing from the autopsy, the depositions, the medical records or the death of the patient which establish to any reasonable degree of medical certainty that there was any breach of sterility in this case and that the conclusions stated by the Plaintiff's experts on this topic are without a factual basis in the record. He will discuss the autopsy report, the photos, blood tests, tissue samples and gram staining. He will testify that Plaintiffs' experts cannot state to any degree of medical certainty that the mere presence of gram negative organisms were in any way the result of a breach in sterility or cleaning protocol by any of the Defendants or their employees. As further support for his opinions, he will discuss the significance of the fact that there were not any other postoperative infections reported or experienced by any patient who was seen at the Silk Touch Med Spa before or since this patient's procedure and how this is further evidence that the sterilization procedures at the facility were adequate to maintain a proper sterile field. He will render the opinion that for the patient to have suffered from an infection due to a breach in sterility caused by any failure in the cleaning and sanitizing protocol of the defendants, that one would expect to see substantial evidence of other contaminated equipment related postoperative infections which there are none of in this case.

From his unique perspective as an expert in infectious disease, as part of his testimony Dr. Coffman may also discuss the process of medical equipment sterilization and how bacteria are eliminated by various cleaning processes and how there is not just one approved way to maintain a sterile operative field. As part of his testimony, he may also discuss how different types of bacteria are susceptible to different cleaning techniques, temperature and/or antibiotics.

As part of his testimony, Dr. Coffman will be prepared to discuss different types of bacteria, how bacteria multiply, how they react to and survive in different parts of the human body, where they normally reside within the human body, how they are identified in various standard tests, how the body fights off, responds to and/or relies upon different types of bacteria, how different kinds of gram negative bacteria organisms are known to reside within the human urinary tract and bowels.

For purposes of explaining his testimony he is expected to discuss general anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. He may discuss how antibiotics are able to travel throughout the body, how infection within certain types of tissue can be harder to treat depending on the vascularity of the area of the infection (such as treating localized infections confined to fatty tissue versus infections which are able to make their way into muscle and the blood stream) and whether or not an infection is localized versus systemic. It is expected that Dr. Coffman will use during his testimony demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the bacteria.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Coffman has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of infectious disease in evaluating laboratory results, tissue samples, blood tests, gram staining, operating laboratory equipment, autopsy records and otherwise managing and identification of bacterial disease processes in patients like Krystal Ballard, his observations of the habits, customs and practice experiences of other infectious disease specialists who address

medical situations like those presented in this case, and his membership and participation in various medical associations, including those in the state of Idaho.

The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing medicine in the area of infectious disease, his review of the care and treatment of the patient by Dr. Kerr and others, and his review and consideration of the depositions and discovery responses taken and/or disclosed to date in this case. His opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory and infectious disease studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Coffman's professional background and qualifications are set forth in his attached curriculum vitae, which is hereby incorporated by reference.

As part of his review, he has had available to review and consider the medical records of Silk Touch Med Spa, Dr. Brian Kerr, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and portions of the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be made available to this witness for consideration.

Dr. Coffman reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Coffman reserves the right not to offer all or any of the opinions set forth

in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with the law. The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

5) Alan W. Frankle, Ph.D.
1491 Lewis Lane
Boise, Idaho 83712

Subject Matter: Damages and economic analysis.

Substance of Opinions and Expected Testimony: Dr. Frankle is an economist and retired professor from Boise State University. He has been an economist in Boise, Idaho, continuously from 1984 to the present. Dr. Frankle will respond to and rebut the opinions of the patient's economic expert, Cornelius Hofman. It is expected that Dr. Frankle will render opinions regarding discount rates and present value calculations regarding the patient's special damages claims. He may also testify regarding inflationary rates for annuities.

The economic report of Plaintiff's expert, Cornelius Hofman, was not produced until May 14 by means of the Plaintiff's second supplemental answers to the written interrogatories of the Defendants. By court order dated May 16, 2012, the Defendant's disclosure of experts shall be disclosed 60 days after the Plaintiff's disclosure of experts. It is impossible for Dr. Frankle to respond to and submit his opinions on the report of Mr. Hofman at this time and should the court allow Mr. Hofman to

render testimony and opinions at trial over the objection of the defendants, the expert opinions of Dr. Frankle should not have to be disclosed until 60 days after May 14, 2013.

As a result, Defendants reserve the right to supplement the opinions of Dr. Frankle. As part of his opinions, however, he is expected to address the issue of consumption rates and how the Plaintiff has improperly calculated the decedent's rate of consumption in order to inflate claims for future lost wages. In this regard, he will address the permissible categories of damages eligible to the Plaintiff in this case, namely, the damages for wrongful death are measured by the support the Plaintiff as the surviving spouse would have received had the decedent lived. He will discuss the absence of any children in this case and that no support would have been provided by the decedent to support any children.

Dr. Frankle will also discuss the improper assumptions in earnings and the failure to consider other income and expense offsets which exist by virtue of both the Plaintiff and the decedent being members of the military. By law in Idaho, Plaintiff is not entitled to recover any amounts for loss of inheritance, loss of income or loss of accumulation which are deemed speculative, particularly here where in the decedent was only 27 years of age, had been married for less than four years and had been in the military for such a short period of time. Dr. Frankle will discuss the speculative nature of said damages and how these categories relate to the improper opinions advanced by Mr. Hofman.

Dr. Frankle is still in need of additional tax records for Charles Ballard and we currently have no tax records for Krystal Ballard despite the outstanding requests for these records. Dr. Frankle has further opinions he may render once being provided with

these missing tax records as well as being able to comment on the fact that Mr. Hofman did not request or utilize such records when generating his report purporting to forecast the current and future losses of the Plaintiff.

Dr. Frankle will dispute the consumption rates relied upon by Mr. Hofman in the range of 24%. He will further testify Plaintiff has not produced a credible projection of earnings or anticipated promotions/advancements for either the Plaintiff or the decedent. For purposes of responding to the report of Mr. Hofman, Dr. Frankle has assumed a similar projection of earnings for both Charles and Krystal Ballard. He will discuss the absence of data and reports from the Air Force as to what track, if any, the decedent and Charles Ballard are/were on as respects aspirations for advancement, further promotions, raises in income, etc. Dr. Frankle will also comment upon the fact that Mr. Hofman has not produced item No. 39 relied upon as a basis for some of his opinions in his report.

Regarding the issue of loss of household services, Dr. Frankle will comment upon the lack of any documentation regarding what household services, if any, that the decedent provided in order to arrive at his conclusion.

There are additional issues which have not been addressed by Mr. Hofman including the fact that often the decedent and the Plaintiff were not living together and if they were it was often only half time. Mr. Hofman's report fails to factor this key component of household services.

Based on the limited information available, for the household services, one assumes each spouse spends 38% of the time on indivisible tasks, 31% on tasks for themselves and 31% on tasks for the other. Charles Ballard therefore only lost the 38%

for services that were concerned with indivisible tasks. The 31% of tasks that the decedent did for the Plaintiff are therefore cancelled out because he is no longer having to do the 31% for the decedent. Thus his only potential household services loss is for those indivisible tasks she performed which they shared equally.

Underlying Facts and Data: Dr. Frankle will rely on his education, training and experience as an economist; the use and recognition of standard and accepted economic data, government reports, publications and authorities; his experience teaching economics and finance at Boise State University; his review of the economic loss report of the patient's experts and his assumptions and calculations for determining the annual costs for household services and lost wages associated with an individual like Krystal Ballard.

Dr. Frankle reserves the right to rely as further support for his opinions on recognized economic literature related to any of the subjects set forth in this disclosure. Additional materials which Dr. Frankle may ultimately review and consider for forming his opinions is unknown and reserved based on the foregoing. The Defendants have not received the income tax returns or documents that reflect the earnings of the decedent over the past several years even though they were requested of the Plaintiff to be produced several months ago. As a consequence, Dr. Frankle does not have this material showing the decedent's actual earnings which Dr. Frankle will utilize to further criticize the invalidity of Mr. Hofman's opinions. In the event Dr. Frankle is deposed his deposition testimony is hereby incorporated into this disclosure as if set forth in full.

Dr. Frankle reserves the right not to offer any of the opinions set forth herein as this disclosure is prepared with the assistance of counsel and is worded broadly in

order to comply with the requirements of Rule 26(b)(4). The ultimate testimony to be offered at trial will depend entirely on what testimony is deemed necessary to refute the testimony of Plaintiffs and their experts. Plaintiff has the burden of proof and only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

Dr. Frankle's Curriculum Vitae setting forth his qualifications and prior publications is attached hereto and incorporated herein as if set forth in full.

6) John Lundeby, M.D., FACS, FAACS
Shape Cosmetic Surgery and Med Spa, PLLC
524 W. 6th Ave
Spokane, Washington 99204

Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Lundeby is a physician licensed in the state of Idaho and Washington to practice medicine and surgery. Dr. Lundeby is board certified by the American Board of Surgery and the American Board of Cosmetic Surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Lundeby will testify as a retained expert witness at the trial. Dr. Lundeby will testify that he has actual knowledge of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to the medical treatment rendered to the patient.

Dr. Lundeby will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types

of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Lundeby's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges at Kootenai Medical Center and Northwest Specialty Hospital, both in Idaho, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers were performed in Boise in 2010.

Dr. Lundeby will discuss his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers like Dr. Kerr in Boise, Idaho and elsewhere, and his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case. As part of his testimony, Dr. Lundeby may also explain his training and experience at the University of Washington and the San Joaquin General Hospital in 1991-96.

Dr. Lundeby will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were adequate and working properly at the time of the surgery at issue in this case.

Dr. Lundeby will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons. Dr. Lundeby has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and the procedures utilized by them in this specialty. Dr. Lundeby will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice in the same medical specialty as his and Dr. Kerr.

Dr. Lundeby will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. He will testify that Dr. Kerr did not need any residency in general or other surgical field in order to competently perform the liposuction and fat grafting procedures at issue in this case. As part of his testimony, he is expected to discuss the fact that he provided training to Dr. Kerr at his office in Spokane and that Dr. Lundeby has trained many physicians in performing a variety of cosmetic procedures.

He will testify that he has performed cosmetic surgery with Dr. Kerr and has witnessed his habits and customs in this regard in a surgical setting. Dr. Lundeby is expected to refer to the publications, data and documents referred to in his attached curriculum vitae. He is expected to discuss the numbers of similar procedures he has performed. Dr. Lundeby will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or

approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard.

During Dr. Lundeby's professional career he has received and provided specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. Dr. Lundeby will testify regarding the significant experience he has in performing these types of procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Lundeby will testify that he possesses the professional knowledge and experience that allows him to express the opinion and testimony described in this document.

Dr. Lundeby will testify that the fact this patient died does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections, if that is what occurred in this case, are not proof of a violation in operative technique, patient selection or breach in sterility. He will render the opinion that based on the record in this case that to a reasonable degree of medical certainty the patient's death was not due to any error or omission on the part of Dr. Kerr or his practice.

Dr. Lundeby will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient, but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Lundeby will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

As part of his testimony, Dr. Lundeby will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures would not have caused or resulted in the introduction of any bacteria to the patient. Dr. Lundeby actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty. Dr. Lundeby will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed or proven to be the result of violations of the standard of health care practice.

Dr. Lundeby will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center,

publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Lundeby will testify regarding his various publications, honors, committee and university appointments as set forth in his curriculum vitae which is hereby incorporated as if set forth in full. He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American Society for Laser Medicine and Surgery, the American Academy of Cosmetic Surgery, the National Society of Cosmetic Physicians, the American College of Surgeons and both the Idaho and American Medical Associations.

Dr. Lundeby will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Lundeby will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Lundeby holds the opinion and will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient.

Dr. Lundeby will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and properly followed the patient and communicated with her and her family. Dr. Lundeby will be prepared to testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Lundeby will explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur.

To the extent he is asked to address the issue of informed consent, Dr. Lundeby will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records. Dr. Lundeby will explain that the surgical care by Dr. Kerr of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Lundeby will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon which Plaintiff is unfairly trying to do in this case.

As part of his testimony, Dr. Lundeby will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband. He will discuss the training classes he provides to physicians, like Dr. Kerr, regarding introduction to and advanced applications for liposuction procedures.

With respect to the fat injection procedure at issue, Dr. Lundeby will discuss and explain to the jury the medical basis upon which a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient. He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin.

Dr. Lundeby will render the opinion that Dr. Kerr's facility did not need to be certified in order to operate in Idaho. He will testify that there is no evidence that Dr. Kerr went too deep and entered the abdominal cavity or otherwise impacted the bowel in any way so as to contaminate the operative field during the liposuction procedure. He will discuss the pain response a patient would be expected to give if the fascia were to have

been impacted, particularly where the patient did not have any sedatives on board for the procedure.

Dr. Lundeby will discuss and describe how the adipose tissue is prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will discuss how the fat is deposited above the muscle and in some instances within portions of the muscle. He will discuss the skill in making injections with accompanies performing fat transfer procedures and that it takes a degree of artistic talent, but that it is not otherwise generally a technically challenging or physically taxing activity for a cosmetic surgeon to engage in.

He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Lundeby will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact

that she had previously had a liposuction procedure and desired further treatment of this type.

Dr. Lundeby will testify that the preoperative preparation of the patient utilizing Hibiclens and alcohol. He will discuss how physicians and hospitals use Hibiclens to cleanse patients as well as their own hands and exposed parts of their bodies before surgery to prevent the spread of bacteria, infection, or disease to patients. It is also used to cleanse wounds to prevent the spread of bacteria and infection. Dr. Lundeby will render the opinion that the skin preparation and surgical sterile technique for the surgery in using Hibiclens and alcohol were appropriate and good agents to use for that purpose.

To the extent it is relevant to his opinions, Dr. Lundeby will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient. He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Lundeby will explain that Krystal Ballard was in good health before the procedure on July 21, 2010 and there is no clinical evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice.

He may discuss the fact that sometimes patients will elect not to disclose health conditions to the physician which may impact the timing of an elective procedure. The reason for this nondisclosure is generally because they are concerned that the physician will cancel or postpone the procedure which may be inconvenient to a patient due to the fact that the patient desires to achieve a recovery by a specific date.

Dr. Lundeby will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue. From his unique perspective as a cosmetic surgeon, Dr. Lundeby will explain the artistic nature of the liposuction procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient.

Dr. Lundeby will discuss how the patient never appeared infected or septic per the medical records and deposition testimony while she was seen by Dr. Kerr. He will discuss the expected localized pain patients can expect to experience following a fat transfer procedure. To the extent it becomes relevant to aid in expressing his favorable opinions, Dr. Lundeby may also discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor. Dr. Lundeby will discuss his experience in caring for postoperative wounds and infections based on his long history of performing all manner of both cosmetic and general surgery. Dr. Lundeby will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and her

family prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done. He will testify that Dr. Kerr was not required to obtain any diagnostic tests before electing to perform surgery on July 21.

Consistent with his background and experience in medicine and surgery, Dr. Lundeby will discuss his knowledge of gram negative rods and the fact that such organisms do not exist on the skin, nor would they be found on surgical instruments following an appropriate cleansing through an autoclave. Instead, he will discuss how they represent a class of bacteria which reside in the urinary tract and bowels of a patient. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

As part of his testimony, Dr. Lundeby will be prepared to explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

In connection with describing his opinions and the basis therefore, Dr. Lundeby may be called upon to explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions. He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Lundeby may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how Dr. Kerr's records and deposition evidence that he specifically and appropriately evaluated and questioned the patient and then documented in his records regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on

July 21, 2010. He will testify that the records and deposition testimony document that Dr. Kerr is a caring, hands on physician who goes to great lengths to monitor and be available for his patients.

Dr. Lundeby will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites. He will render the opinion that in order for Dr. Kerr to have infected the patient in some manner at the time the surgery was performed on July 21, that there would have to have been evidence of infection at the location of the surgery by the time of the autopsy or at Elmore Medical Center. He will testify that the absence of any evidence of infection at the injection or liposuction sites is proof to Dr. Lundeby that the patient was not infected during the surgery and that her death is due to some other cause.

He will discuss his review of the autopsy record and the patient's subsequent treatment records. By way of example, Dr. Lundeby is expected to discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine. Based on his experience in general surgery, he will render the opinion that this laboratory finding is consistent with, and provides strong evidence of, an infectious process located within the patient's bladder or urinary tract. He will explain how the bladder is also an area wherein gram negative rod bacteria are known to populate and exist in the face of an infection. He will discuss the concept of how infections, like a urinary tract infection, can be spread hematogenously or via the blood stream.

Dr. Lundeby will also comment upon the significance from his perspective regarding how the patient did not present to Elmore Medical Center with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly.

Dr. Lundeby will discuss how the patient presented to Elmore Medical Center with a blood gas pH of 6.99 and how this is dangerously low and provides strong evidence that the patient was extremely ill by that point and that she needlessly delayed seeking medical attention despite the urging and instruction of Dr. Kerr and his staff. He will testify that the patient's decision to delay returning for further care to either Dr. Kerr or the ER after July 23 is the reason she died and that if she had returned sooner that she more likely than not would have been saved. He will discuss how the cost of vanity and the patient's apparent unrelenting desire for secrecy resulted in her own tragic demise. He will discuss with the jury that it is not the physicians fault when the patient fails to do as they are instructed and return when their condition worsened as it clearly did long before this patient ultimately elected to seek medical help and was transported critically ill to Elmore Medical Center.

Dr. Lundeby will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. In this regard, Dr. Lundeby will discuss how there are commonly a variety of bacteria located near the surface normally of wound sites which is not evidence of an infection, but that the more important inquiry which would be more indicative of an infection is whether the gram negative rods were located within the deeper issues under the wound sites which cannot be determined from the autopsy documents in this case.

He will discuss the normal wound biology is to see evidence of bacteria on the surface. Dr. Lundeby will render the opinion, more likely than not, that the gram negative bacterial rods were introduced into the patient's surgical site sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure. Dr. Lundeby will render the opinion that based on his experience that gram negative rods do not result in the sudden and unexpected patient death such as occurred in this case. He will discuss the fact that the autopsy records eliminate embolism as a cause of death for this patient. Despite this finding at autopsy, he will testify that it would be extremely uncommon (outside of necrotizing fasciitis which attacks the soft tissue and the fascia or tissue covering the muscle and can cause rapid death) for an alleged soft tissue infection to spread, become septic and kill a patient within the limited time frame at issue in this case. In this regard, he will discuss how sepsis is a presumptive clinical diagnosis which is compounded in this case due to the absence of any positive blood cultures. Dr.

Lundeby is expected to offer testimony on several aspects of the autopsy report of Dr. Groben, starting with sepsis with probable toxic shock syndrome of unknown etiology and manner of death natural. His inspection of the incisions through the surgical sites reveal reparative changes, but no gross evidence of an infectious process. No pockets of pus or discolored fluid are seen. No evidence of erythema around the incisions sites. Subcutaneous fat and muscle of the abdominal wall, lower back and buttocks show no areas of necrosis or discoloration associated with reparative changes and no pockets of discolored fluid or pus. These autopsy findings are consistent with and support his opinion that bacteria were just introduced during the procedure of Dr. Kerr.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient elected to place herself and her health care provider in by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery performed.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is

essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Lundeby will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control.

Dr. Lundeby will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require Dr. Kerr to obtain a urinalysis or complete blood count on the patient on July 23. Dr. Lundeby will discuss how liposuction and fat transfers are office based procedures which are not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Lundeby will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Lundeby will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure.

As it relates to rebutting the testimony of the Plaintiff's experts, Dr. Lundeby will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications.

Dr. Lundeby will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally

attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr. Kerr's preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr did anything to cause the patient's death.

As part of his testimony, Dr. Lundeby may also address and explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight. He will discuss the concept of third spacing of fluid or leaking of fluid out of cellular structures due to the body's global inflammatory response. He will discuss this in connection with efforts which were made to maintain fluid volume for the patient once she presented at the hospital. He will testify that a weight gain of 50 pounds due to efforts to maintain fluid volume in the face of the patient's condition would not be unexpected.

He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at St. Alphonsus on

July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Lundeby will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Lundeby will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection that developed after the procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they were more likely to come from the urinary tract of Krystal Ballard or her intestinal tract and that they were not introduced during his surgical procedure. As part of his testimony, it is expected that Dr. Lundeby will explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth in this case, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

As part of his testimony, Dr. Lundeby will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Lundeby will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Lundeby has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of cosmetic and general surgery in Spokane, Washington in treating, diagnosing, managing and caring for elective procedure patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers and the way they perform the procedures at issue in this case, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine, and his membership and participation in various medical associations and organizations as set forth herein. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine.

Dr. Lundeby's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Lundeby's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions of Dr. Kerr. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered.

Dr. Lundeby reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Lundeby reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts.

7) Geoffrey Stiller, M.D.
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Subject Matter: Facts of case, standards of health care practice, causation, and the care and treatment of Krystal Ballard.

Substance of facts known and opinions held: Dr. Stiller is a physician licensed in the state of Idaho to practice medicine and surgery. Dr. Stiller is board certified in both general and cosmetic surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Stiller will testify as a retained expert witness at the trial. Dr. Stiller will testify that he has actual knowledge of the standard of

health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion, and based on his own unique background, that Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient. Dr. Stiller actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty.

Dr. Stiller will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Stiller's opinions include: his background, training, research, practice and experience in performing general and cosmetic surgical procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges in Idaho, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers are performed, including how they were performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures.

Dr. Stiller will explain his knowledge of how the Vaser ultrasonic liposuction procedure is performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic surgery providers like Dr. Kerr in Boise, Idaho and elsewhere, his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner

and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion.

As part of his testimony, Dr. Stiller may also explain his training and experience at the Graduate Hospital in Philadelphia, Pennsylvania during his residency in general surgery 1997-2001 as it relates to sterile operating conditions for the procedures he performed, was taught and observed, including his role as chief resident. He will explain the same matters for his experience in his own surgical facility which he currently operates at Palouse Surgeons in both Pullman, Washington and Moscow, Idaho.

Dr. Stiller will discuss the standard of health care practice employed at his own facility in Moscow, Idaho for achieving and maintaining sterile operating conditions and the disinfection of instruments and equipment and maintaining a sterile operative field and that the similar actions and efforts undertaken by Dr. Kerr as have been described for the procedure on Krystal Ballard in this case were used and exceeded in his opinion. Dr. Stiller will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially nil.

He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were appropriate and working properly at the time of the surgery at issue in this case. Dr. Stiller will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons.

He may also discuss his various publications and presentations on cosmetic surgery including liposuction and fat transfers as set forth in his attached curriculum vitae. Dr. Stiller will discuss how he has become acquainted with the nature and scope of practice he and other cosmetic surgical procedure providers utilize as well as the procedures utilized by them in this specialty, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic surgical procedures including the procedures at issue in this case. He will testify that there is more than one way to achieve proper sterilization.

Dr. Stiller will explain that the standard of health care practice for a plastic surgeon is not the same standard of health care practice for someone in the same medical specialty as his and Dr. Kerr. Dr. Stiller will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. As part of his testimony, he is expected to refer to the publications, data and documents that have been produced in discovery on this subject and explain the numbers of similar procedures he has performed.

Dr. Stiller will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard. During Dr. Stiller's professional career he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will

testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue.

He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Stiller will testify that he possesses the professional knowledge and experience that allows him to express the opinion and testimony described in this document.

Dr. Stiller will testify that the fact this patient experienced a post-operative complication like the one alleged in this case which resulted in a patient death does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections are not proof of a violation. He will render the opinion that the patient's death was not due to any error or omission on Dr. Kerr's part or the part of anyone associated with his practice. He will discuss his own sterilization techniques, training and experience in this area which will help support his opinion that Dr. Kerr employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies.

Dr. Stiller will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss

how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient, but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Stiller will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

Dr. Stiller will render the opinion that gram negative bacteria do not cause sepsis or toxic shock as alleged in this case. As part of his testimony, he will discuss the urinalysis obtained at Elmore Medical Center which revealed plus 3 bacteria, white and red blood cells, elevated white blood cell count with a left differential shift and ketones. As part of his testimony, Dr. Stiller will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Stiller will testify regarding the specific issues set forth in this disclosure, but he will also testify globally that nothing Dr. Kerr elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient.

Dr. Stiller will be rendering his testimony based on his own unique perspective as a general and cosmetic surgeon and the training and practice experience he has received. Dr. Stiller will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice. Dr. Stiller will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is

established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Stiller will testify regarding his various publications, honors and university appointments at the National Society of Cosmetic Physicians and the University of Washington School of Medicine WWAMI program as set forth in his curriculum vitae which is hereby incorporated as if set forth in full.

He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American College of Surgeons, American Academy of Cosmetic Surgery and the Idaho Medical Association. He will discuss what these organizations offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field.

Dr. Stiller will opine that the standard of health care practice is the care typically provided under similar circumstances by physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Stiller will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Stiller holds the opinion that compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results.

He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient. Dr. Stiller will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and properly followed the patient and communicated with her and her family. Dr. Stiller will testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice to which he is held.

As with all operative procedures, the risk of infection is always a possibility and Dr. Stiller will discuss that post-operative infections, if they should develop, are an accepted and recognized risk factor that are usually not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur even under the best of care conditions. Dr. Stiller will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records.

Dr. Stiller will explain that everything undertaken by Dr. Kerr with regard to his care and treatment of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice typically provided, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Stiller

will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon.

In order to support his opinions, Dr. Stiller is expected to discuss the training he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband.

With respect to the fat injection procedure at issue, Dr. Stiller will discuss and explain to the jury the medical basis upon which a person's own fat may be used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will discuss his research and publications on this topic. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient.

He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin. Dr. Stiller will discuss and describe how the adipose tissue is then prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. With use of

demonstrative exhibits and various medical instruments, he will explain both the lipo and fat injection process to the jury. He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects.

Dr. Stiller will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Stiller will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact that she had previously had a liposuction procedure and desired further treatment of this type. To the extent it is relevant to his opinions, Dr. Stiller will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient.

He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Stiller will explain that Krystal Ballard was in

good health before the procedure on July 21, 2010 and there is no clinical evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice. He will render the opinion that the patient developed an infectious process in her urinary tract after the procedures by Dr. Kerr which had nothing to do with the surgery or the sterilization procedures used by the Defendants in this case. In order to further illustrate his testimony to the jury, Dr. Stiller will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue.

From his unique perspective as both a general and cosmetic surgeon, Dr. Stiller will explain the artistic nature of the liposuction procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient. In the process of providing his opinions that the care by Dr. Kerr was appropriate, Dr. Stiller will address the method by which the adipose tissue harvested was drained and prepared for re-injection. He will also discuss how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss these pieces of equipment as well as their various attachments and describe that medical equipment which is new versus that which must be re-sterilized for reuse between patients and/or procedures.

Dr. Stiller will discuss the appropriate nature of the pre and post-operative antibiotics administered by Dr. Kerr to the patient and explain why they were given not for an infection, but rather as a prophylaxis against infection. Dr. Stiller will render the opinion that the evidence in this case establishes that the patient never appeared infected or septic while being treated by Dr. Kerr. He will discuss the localized pain patients can expect to experience following a fat transfer procedure into the buttocks region.

Dr. Stiller will discuss the cardinal signs of infection and how the patient did not demonstrate having any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor when she was seen by Dr. Kerr and when she was seen at Elmore Medical Center the day before her death.

Dr. Stiller will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and her husband prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, toxic shock or sepsis, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done. Consistent with his background and experience in medicine and surgery, Dr. Stiller will discuss his knowledge of various bacteria including gram negative rods and the fact that such organisms do not exist on or in the skin, nor would they be found on surgical

instruments in the event of a breach in sterility. Instead, he will discuss how they represent a class of bacteria which reside in the urinary tract and bowels of a patient.

He will testify that Dr. Kerr had adequate training and experience to perform the surgeries in question, that Dr. Kerr's medical records contain an adequate description of the care rendered and the discussions with the patient, that Dr. Kerr implemented appropriate sterility techniques and conditions for surgery and that he used correct solutions for cleaning and disinfecting instruments and assuring that operative conditions were adequately sterile to guard against the risk of infection. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

As part of his testimony and in order to expand upon his background and experience in cosmetic surgery, Dr. Stiller will discuss how the field of laser lipolysis with the use of tumescent anesthesia has developed in recent years. This may include testimony addressing that when considering different types of the body to undergo lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or re-inject into each location. As part of his testimony, Dr. Stiller will be prepared to explain the positioning of the patient, incision sites for various injections and instruments, patient selection, choice of instrument sizes and positioning, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period.

He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date. As part of his explanation of how the Vaser Lipo process works, he will describe it as a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions.

He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction which requires far greater traction and trauma to the surrounding anatomical structures.

Dr. Stiller may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area and the instructions given to the patient. He will render the opinion that Dr. Kerr's records and deposition testimony evidence that he appropriately evaluated and questioned the

patient and then documented in his records these issues on each encounter he had with the patient.

He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on July 21, 2010. Dr. Stiller will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites. He will discuss his review and comments of the autopsy record and the patient's subsequent treatment records. He will discuss the hospital records from Elmore Medical Center and St. Alphonsus Regional Medical Center.

He will render the opinion that the laboratory data at Elmore Medical Center is consistent with, and provides strong evidence of, an infectious process located within the patient's bladder which occurred postoperatively and not located within the operative area of Dr. Kerr. He will explain how gram negative rod bacteria are known to populate and exist in the urinary tract. Dr. Stiller will also comment upon the significance from his perspective regarding how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010.

He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly. Dr. Stiller will address the confusing aspect of the autopsy report wherein the pathologist referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where actually harvested from the patient. Dr. Stiller will render the opinion that the gram negative rods were introduced into the patient's surgical site(s) sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure and that their introduction had nothing to do with the cleanliness and/or sterility of Dr. Kerr's facility and equipment.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient placed herself in despite the advice and instruction of her health care provider by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery and needed help monitoring her care and condition.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Stiller will testify that Dr. Kerr and his employees followed the appropriate sterile technique in regards to the procedure performed on Krystal Ballard. He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. Dr. Stiller will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively.

He will testify that the standard of practice did not require Dr. Kerr to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. Dr. Stiller will discuss his background, training and experience in the use and regular implementation of the sterile technique in his practice as further support for his opinions as to the adequacy of Dr. Kerr's sterile technique. Dr. Stiller will discuss how liposuction and fat transfers are office based procedures which are not

required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Stiller will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Stiller will render the opinion that Dr. Kerr's procedure room was properly prepared for surgery and to protect and preserve an appropriate sterile field and that he did not require additional rooms or locations to store and clean equipment. He will discuss the autoclave at issue, how it operates and how it helps Dr. Kerr maintain a sterile field for his procedures. He will discuss how an autoclave operates, how it is loaded, what is done to maintain an autoclave, how it is tested and that Dr. Kerr was not required to do more with his autoclave that he has described in this case.

Dr. Stiller will describe the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. With respect to the lipo procedure in this case, he will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will testify that these were not excessive amounts and may comment upon the findings set forth at autopsy and in the autopsy photos demonstrating the areas of adipose tissue within the patient.

Dr. Stiller will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure. As it relates to rebutting the testimony of the Plaintiff's experts, he will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was a proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. Dr. Stiller will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. As part of his testimony, and to the extent it is an issue at trial, Dr. Stiller will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications. He may also discuss his experiences in discussing risks and benefits with patients and the fact that certain patients fail to follow the advice and instructions and end up with an unexpected and/or dissatisfactory result.

Dr. Stiller will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, to the extent not covered by other witnesses, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr. Kerr's preoperative clinical

examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits.

He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr improperly sterilized his equipment or that Dr. Kerr did anything to cause the patient's death. Based on his own unique surgical perspective, Dr. Stiller may also address and explain the significant documented weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will discuss the medical reasons and significance of these changes in weight as it relates to the issues of fluid overload and organ failure.

He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. He may also comment upon the findings at autopsy which documented no frank evidence of an infection as aptly depicted in the autopsy photos. He may further address and explain to the jury how at Elmore Medical Center the patient's cardiac ejection fraction was noted to be only 17% which is poor. In addition, later at St. Alphonsus on July 25, 2010, the patient's central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Stiller will explain these factors and their relative significance in terms of

the causes for the death of Krystal Ballard all of which have nothing to do with the care and treatment rendered by Dr. Kerr.

Dr. Stiller will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection the developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they more likely than not came from the urinary tract of Krystal Ballard or her intestinal tract and were not introduced during Dr. Kerr's surgical procedure. As part of his testimony, it is expected that Dr. Stiller will discuss and explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

It should be noted that in response to the Plaintiff's counsel's concern about the defense experts, Dr. Stiller will testify such that he avoids the presentation of needless cumulative testimony by tailoring his responses such as to avoid excessive duplication of other defense experts. As part of his testimony, Dr. Stiller may be called upon to discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself.

Dr. Stiller will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her

undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Stiller has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of general and cosmetic surgery in Moscow, Idaho in consenting, diagnosing, treating, operating, managing, caring for and following up with patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine (regardless of the fact that Dr. Kerr also happens to be board certified in anesthesia), and his membership and participation in various medical associations and organizations as set forth herein.

The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine. Dr. Stiller's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr.

Stiller's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including Dr. Kerr's, employees of Silk Touch, and the Plaintiff's. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, St. Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered.

Dr. Stiller reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. He reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

DATED this 31st day of May, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2013, I served a true and correct copy of the foregoing DEFENDANTS' FIRST SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES by delivering the same to each of the following, by the method indicated below, addressed as follows:

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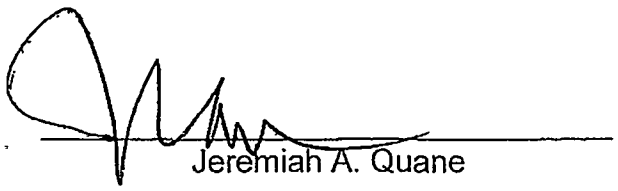

Jeremiah A. Quane

CURRICULUM VITAE

PERSONAL DATA

Name: Brian C Kerr
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Office Phone: (208) 939-8442
Foreign Language: Fluent in Spanish

EDUCATION:

College:

Brigham Young University, Provo, UT
Degree: B.S. Zoology 1984

Medical School:

University of Utah, Salt Lake City, UT
Degree: Doctor of Medicine 1988

POSTGRADUATE TRAINING

Internship: Transitional Residency 1988-89
Deaconess Medical Center, Spokane, WA

Residency: Anesthesia 1989-1992
Mayo Clinic, Rochester, MN

PRACTICE EXPERIENCE

Emergency Medicine:

St. Gabriel Hospital, New Prague, MN 1989-90
Lake City Hospital, Lake City, MN 1990-91

Anesthesia: Staff Anesthesiologist
St. Alphonsus Regional Medical Center 1992-2008

Aesthetics:

Medical Director Silk Touch MedSpa 1999-present

Lipolysis Surgeon 2007- present

CERTIFICATION AND LICENSURE

Basic Life Support
Advanced Cardiac Life Support
American Board of Anesthesia 1995
State of Idaho Medical License 1992- present

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Gregory N. Laurence, M.D.

Professional Experience

Medical Director, Complete Medical Care Germantown & Germantown Aesthetics Surgery Center
Hospital Laparotomy privileges
Qualified in laparoscopic procedures
Obstetrical Family-centered care
Capable abdominal and vascular ultrasound
Training, experience, and proven ability in office cosmetic surgery, facial and body

Board Certification	American Academy of Family Physicians 8880 Ward Parkway Kansas City, Missouri 64114-2797 September 1995–present	Diplomat 1995-2000 Fellow 2000-present
	American Board of Laser Surgery Diplomat	2009 - present
Medical Licensure	Tennessee #25017–Issued 10/26/93 State of Tennessee Division of Health Related Boards. Expires 6/30/2013	
	Idaho, pending licensure Utah, pending licensure	
Medical Education	May 2008	Fellow American Society of Cosmetic Breast Surgery
	July 1995–June 1996	The University of Tennessee, Memphis Fellowship in Advanced Women's Health Director, Charles E. Couch, M.D., FACOG
	July 1992–June 1995	The University of Tennessee, Memphis UT/Saint Francis Family Practice Residency Program, Memphis, TN
	August 1988–June 1992	University of Texas at Houston Medical School, Houston, Texas–M.D. Degree June 1992
Previous Education	January 1987–May 1987	University of Houston, Houston, Texas Graduate Studies

	September 1981–May 1986	Baylor University Waco, Texas B.S. Degree in Biology
Society Memberships	American Institute of Ultrasound in Medicine (AIUM) 1994–present Association of American Physicians and Surgery 1999-present American Academy of Family Physicians (AAFP) 1992–present American Society of Cosmetic Breast Surgeons 2003-present National Society of Cosmetic Physicians 2011-present American.Congress of Phlebology 2009-present	
Hospital Appointments	Baptist Memorial Hospital – East, Department of Family Medicine Chairman October 1999 – 2000 Baptist Memorial Hospital – East, Medical Executive Committee, 2000 Tenet/St. Francis Hospital, Maternal/Fetal Well-Being Committee 1998 – 2000 Methodist Hospital, FP/OB Joint Practice Committee 1998 - 2000	
University Appointments	The University of Tennessee, Memphis Department of Family Medicine **Clinical Instructor** July 1, 1995–June 30, 1996 **Associate Clinical Professor** July 1, 1996–present	
Hospital Appointments	Active Staff Saint Francis Hospital 5959 Park Avenue Memphis, TN 38119 August 7, 1995–present	Courtesy Staff Methodist Hospital 1265 Union Avenue Memphis, TN 38104 December 1, 1996–2003
	Active Staff Baptist Memorial Hospital 899 Madison Avenue Memphis, TN 38146 October 1996–present	Courtesy Staff Delta Medical Center 3000 Getwell Road Memphis, TN 38118 September 12, 1996–present (901) 369-8517; fax 369-8503

Professional Experience	Private Practice (August 1996–1999) Peabody Healthcare 6005 Park Avenue Suite 424B Memphis, TN 38119 Private Practice (August 1999–2002) Laurence Family Practice & Obstetrics 2195 West Street Germantown, TN 38138 Private Practice (August 2002–2008) Germantown Family Practice & Obstetrics 2195 West Street Germantown, TN 38138 Private Practice (2003–present) Germantown Aesthetics, LP 7485 Poplar Pike Germantown, TN 38138 Private Practice (August 2008–present) Complete Medical Care Germantown 7485 Poplar Pike Germantown, TN 38138 Private Practice (August 2009–present) The Vein Institute 7485 Poplar Pike Germantown, TN 38138	
Publications	Laurence, Gregory; Orientale, Eugene, Jr., "Colorectal Cancer: Screening Diagnosis and Management," Manual of Family Practice; ed.: Robert B. Taylor, publisher: Little Brown. 1996. Laurence, Gregory, "Obstetrical Privileging in Memphis," Tennessee Family Physician; ed.: J. Lou Manning, pg 8-9, winter 1999. Laurence, Gregory, "MemoryGel TM Breast Implant Post-Approval Study," IRB Company, Inc; ed.: Clinical Study. 5271 Mentor PAS	
Preceptorships	June 30 – July 3, 2001 July10 – July 12, 2002	Subfascial Breast Augmentation Internal Mastopexy J. Dan Metcalf, MD (Oklahoma City, OK)
	June 2003	Transumbilical Breast Augmentaion

	June 2004	Robert Shumway, MD (LaJolla, CA)
	June 2003 June 2004	Biplanar Breast Augmentation Chip Splinter, MD (San Diego, CA)
	June 2004 June 2005	Transumbilical Breast Augmentation Peter Cheski, MD (Beverley Hills, CA)
References	Adam Baker, M.D. 2120 Merchants Row Ste 2 Germantown, TN 38138 Ph: (901) 362-7170 Susan Nelson, M.D. 2032 Satinwood Memphis, TN 38119 (901) 758-8287 William Macmillan Rodney, M.D. Chairman University of Tennessee Department of Family Medicine, 1989–1997 6575 Black Thorn Cove Memphis, TN 38119 (901) 753-0423	
Malpractice Insurance Carrier	State Volunteer Mutual Insurance Company 1M/3M coverage 8/5/96 to present 101 Westpark Drive, Suite 300, P.O. Box 1065 Brentwood, Tennessee 37024-1065 (615) 377-1999 or (800) 342-2239; fax (615) 377-9192	
DEA Certificate	BL3847083, exp 3/31/2014	
Honors	University of Tennessee Community Physicians Award for teaching medical students 2003	
	"Physician Champion" for Baptist Memorial Hospital Celebrate Nursing	
	Germantown News Reader's Choice Award "Best Physician" – 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011	
	Plastic Surgery Practice Best of 2011 Named 'One of the Top Cosmetic Surgeons in the Nation'	
	The Aesthetic Awards 2011-2012 Awarded 'Best Non-Surgical Facial Rejuvenation'	

CURRICULUM VITAE
ALAN W. FRANKLE

Permanent Residence
1491 Lewis Lane
Boise, Idaho 83712
(208) 870-7140

Age: 69
Health: Excellent

Married, two adult children

EDUCATION

Ph.D.	Business Administration, Major in Finance, College of Business and Public Administration, University of Arizona, 1974.
M.B.A.	College of Business and Public Administration, University of Arizona, 1969.
B.S.	Industrial Distribution, Clarkson College of Technology, 1966.

Academic Positions

2009 - Present	Professor Emeritus, Finance and International Business, Boise State University
1984-2008	Professor of Finance and International Business, Boise State University. (Tenured)
2007-2013 Summer	Visiting Professor, Aarhus School of Business, Aarhus, Denmark
2009 Summer	Visiting Professor GSBA, Zurich, Switzerland
2006 Spring	Visiting Professor Scuola Amministrazione Aziendale, Torino, Italy
2004 Summer	Visiting Professor, Charles University, Prague, Czech Republic
2003-2003	Visiting Professor, ITESM, Guadalajara, Mexico
2002-2002	Visiting Professor, University of Otago, Dunedin, New Zealand
2002-2002	Visiting Professor, Universidad del Pais Vasco, Bilbao, Spain
2000 Summer	Visiting Professor, Scuola Amministrazione Aziendale, Torino, Italy
1997 – 1997	Visiting Professor, Scuola Amministrazione Aziendale, Torino, Italy
1994 Summer	Visiting Professor, Scuola Amministrazione Aziendale, Torino, Italy
1990 - 1990	Visiting Professor, University of Otago, Dunedin, New Zealand

1980 – 1984	Associate Professor of Finance (Tenure), University of Tulsa, 600 College Avenue, Tulsa, Oklahoma 74104.
1974 – 1980	Assistant Professor of Finance, School of Business, State University of New York at Albany, 1400 Washington Avenue, Albany, New York 12222.
Summer 1979 Summer 1976	Visiting Assistant Professor of Finance, College of Business and Public Administration, University of Arizona.
Summer 1974	Visiting Assistant Professor of Finance, College of Business and Public Administration, University of Oregon.
1969 – 1973	Part-time Instructor of Finance, College of Business and Public Administration, University of Arizona.

Administrative Positions

1996-1997 Director of International Business Programs, Boise State University, Boise, Idaho 83725.

Responsible for all administrative duties concerning the International Business Programs including class schedules, faculty coordination, faculty and staff recruiting, budgeting, and representing the College and University to corporate and governmental organizations.

1992 – 1995	Chairman of Department of Marketing and Finance, Boise State University, Boise, Idaho 83725. Responsible for all administrative duties concerning the marketing and finance faculty including curriculum development, class scheduling, recruiting of faculty and staff personnel, budgetary matters, and liaison with other University units and corporate enterprises in the community.
1980 – 1984	Chairman of Department of Finance and Real Estate, University of Tulsa, Tulsa, Oklahoma 74104. Responsible for all administrative duties concerning the finance faculty including curriculum development, class scheduling, recruiting of faculty and staff personnel, budgetary matters, and liaison with other University units and corporate enterprises in the community.
1974 – 1977	Area Coordinator, S.U.N.Y. Albany, Albany, New York 12222. Responsible for all internal activities concerning the finance faculty. These responsibilities included curricula development, class scheduling, recruiting faculty, and merit recommendations.
1978 – 1980	Sub-Program Director, S.U.N.Y. Albany, Albany, New York 12222. Responsibilities included all aspects of the finance area's involvement with the M.B.A. program. The most demanding aspect of Sub-Program Director is the role of chief consultant for projects with M.B.A. students acting as staff to lend expertise in all areas of financial management and applications.

OTHER EXPERIENCE

June 1996, January and September 1993	Visiting Professor of Finance for the Russian American School of Business Administration in Blagoveshchensk and Khabarovsk in the Russian Far East. The program is run by the Free Market Business Development Institute at Portland State University. Taught free market managerial finance to Russian entrepreneurs and government officials.
Summers of 1987, 1988, and 1991	Led student workshop on International Business and Finance to Europe. Traveled in England, France, Germany, Switzerland, Italy, Austria, Belgium Slovenia, and Hungary. Organized visits to Arthur Andersen, The Royal Bank of Scotland, H.J. Hienz, IBM, Hewlett Packard, Credit Suisse, Sherson Lehman, Ivoclar, McDonalds, Mercedes, Bank of America and many government agencies.
May 1985 - August 1985	Faculty intern for Morrison-Knudsen Company, Inc., Boise, Idaho. Worked with the Project Finance group evaluating world-wide construction projects.
September 1977 - September 1978	Financial economist and Economic Fellow with the Securities and Exchange Commission resulting from participation in the AACSB-Sear Fellowship program. Member of a study group participating in projects addressing long-range concerns of the Commission and private industry with respect to the capital markets. These studies involved analyzing and making recommendations concerning the role of banks in the securities markets relating to institutional investment programs and impact on broker-dealers, structure, and market efficiency of the securities industry, effectiveness of the Commission's full disclosure and reporting system, and the impact of new legislation on investors and markets. Specific emphasis was directed towards activities involving the municipal market.
January 1977 - September 1977	Research Associate, National Science Foundation Grant, "Improving State and Local Government Cash Management," (on leave from S.U.N.Y. Albany). Responsibilities included the development and application of cash management techniques for more effective cash management, evaluation of banking services and relationships with state and local governments, and the evaluation of alternative policy recommendations for a more effective cash management operation.
1966 – 1968	Industrial Engineer, IBM, Owego, New York. Worked in the production control department as a junior engineer responsible for meeting schedules and expediting special government projects through commercial production line. Member of task force involved with automating high speed production line for printed circuit boards.

Consultancies

"Forensic Economics", expert witness for local and regional law firms, 1991-2013..

"Capital Budgeting for Public Utilities", Idaho Power Corporation, 1994.

"Position Justification" Idaho Power Corporation, 1993.

"ESOP" Valuation, Extended Systems Inc., Boise, Idaho 1987 - 1991.

Idaho Insurance Commission, "Merger Analysis," Boise, Idaho, 1988.

Idaho First National Bank, Boise, Idaho, 1986, "Forecasting Loan-Loss Provisions."

Expert Witness Tulsa Law Firm, 1983, "Valuation of Closely Held Firm."

Tulsa Chamber of Commerce, 1981-82, "Alternative Funding Sources."

Professional Insurance Agents of (New York, New Jersey, Connecticut), 1978-79, "An Analysis of Agency Profits."

Council of State Housing Agencies, research association studying "An Analysis of Mortgage Revenue Bonds," 1979.

New York State External Degree Program, Finance Sub-Committee, 1974-79.

Environmental Protection Agency, research associate studying "Financing the Local Share of Constructing Municipal Wastewater Treatment Facilities," 1976-77.

PROFESSIONAL DEVELOPMENT SEMINARS

Boise State University, Micro-MBA instructor for finance, 1993-1997.

Boise State University, Professional Development Program, instructor for finance, 1993-2005.

"Accounting and Finance for Non-financial Managers", CMD Certificate Program, Fall 1998, Spring 1999.

Finance for Executives," J. R. Simplot Company, 1991.

"Accounting and Finance for Production Managers," Micron Technology, Inc., 1990, 1992.

"Financing Strategies," Professional Management Development Center, Boise State University, June 6, 1989, Sun Valley, Idaho.

"Accounting and Finance for Non-financial Managers," J.R. Simplot Company, Food Division, May 23 and 24, 1989, Boise, Idaho.

"Accounting and Finance for Executives," J.R. Simplot Company, Food Division, January 24 and 25 and March 2 and 3, 1989, Boise, Idaho.

"Accounting and Finance for Non-financial Managers," Ore-Ida Foods, Inc., February 15 and 16, 1990, Boise, Idaho.

"Accounting and Finance for Non-financial Managers, Boise Cascade Corporation, September 27 and 28, 1988, April 4-5, 1990, Boise, Idaho.

"Accounting and Finance for Attorneys," December 2-4, 1987 and May 6-7, 1988, Boise, Idaho.

"Corporate Liquidity Management," Idaho Public Accountants, May 16, 1986, Boise, Idaho.

"Corporate Liquidity Management," Professional Management Development Program, Boise State University, Boise, Idaho, May 13-15, 1985.

"Corporate Liquidity Management," Management Development Center, University of Tulsa, May 3-6, 1983.

"Innovative Financing Techniques," presented at the Southwest Municipal Finance School, Texas Tech University, Lubbock, Texas, May 25, 1982.

"Professional Insurance Agents of New Jersey Cost of Business," testimony before Insurance Commission, State of New Jersey, September 25, 1979.

"Professional Insurance Agents Cost Study Survey," New York State Professional Insurance Agency Convention, September 18, 1979. Co-presented with W. Christian Buss.

"Disclosure Economics and the Market for Municipals," presented for the staff of the Securities and Exchange Commission, April 10, 1978.

"Cash Budgeting and Forecasting" and "Evaluating Financial Services and Banking Relationships," presented at the Junior and Senior Professional Advancement Conference for Municipal Finance Executives, May 22-28, 1977, The University of Wisconsin, Oshkosh.

JOURNAL PUBLICATIONS (REFEREED)

"Fact-finding in State and Local Government: Using a Municipal Finance Expert in Collective Bargaining," The Public Manager, Winter 2003-04, pp. 11-13. Co-authored with Alan Herzfeld.

"Cash Management of Practices of Stock Exchange Listed New Zealand Companies: Research Findings," Journal of Financial Management and Analysis, July-December 1993, pp. 33-42. Co-authored with Kate Brown.

"Reserve Requirements and the Inflation Tax: A Comment," Journal of Money Credit and Banking, August 1990. Co-authored with L. Dwayne Barney and Harry White.

"Investment Practices of the Domestic Cash Managers," Journal of Cash Management, May/June

1987, pp.50-53. Co-authored with J. Markham Collins.

"Constructing a Loan Loss Model for Consumer Loans," Journal of Retail Banking, Fall 1987, pp. 65-70. Co-authored with James D. Hogan and C. Mike Merz.

"International Cash Management Practices of Large U.S. Firms," Journal of Cash Management, July/August 1985, pp. 42-48. Co-authored with J. Markham Collins.

"Liquidity Services and Capital Market Equilibrium: The Case for Money Market Mutual Funds," Journal of Financial Research, Summer 1983, pp. 141-152. Co-authored with Hany Shawky and Ronald W. Forbes.

"Characteristics of Temporal Price Behavior of Long-Term Corporate Bonds," Review of Economic and Business Research, Winter 1980-81, pp. 43-55. Co-authored with Clark A. Hawkins.

"Voluntary Social Reporting: Iso-Beta Portfolio Analysis," Accounting Review, July 1980, pp. 467-479. Co-authored with John C. Anderson.

"Old Tools and Techniques: Help Solve Hospitals' Cash Flow Problems," Journal of Commercial Bank Lending, March 1979, pp. 29-37. Co-authored with Robert J. Halonen.

"Tax Exempt Revenue Bonds: Are Ratings a Proxy for Credit Quality?," Review of Business and Economic Research, Winter 1978-79, pp. 68-77. Co-authored with Ronald W. Forbes.

"The Impact of the Disclosure of the Environmental Effects of Organizational Behavior on the Market: Comment," Financial Management, Summer 1978, pp. 76-78. Co-authored with John C. Anderson.

"Capital Budgeting Procedures Under Inflation: Comment," Financial Management, Autumn 1976, Vol. 5, No. 3, pp. 86-87.

"An Estimate of Convertible Bond Premiums: Comment," Journal of Financial and Quantitative Analysis, June 1975, pp. 369-373.

"A Note on Beta Coefficients for Convertible Bonds," Journal of Finance, March 1975, pp. 207-210. Co-authored with C. A. Hawkins.

"The Behavior of Convertible Debenture Premiums: Comment," Mississippi Valley Review of Business and Economics, Winter 1973-74, pp. 65-68. Co-authored with C. A. Hawkins.

OTHER PUBLICATIONS (NON-REFEREED)

"The Russian Far East: The Economic Wild West," Idaho's Economy, Winter 1993, pp. 1-4.

"The Advent of 'Nonbank Banks': What Does it Mean to Idaho," Idaho's Economy, Winter 1987, pp. 6-7. Co-authored with Michael B. Bixby.

The Impact of New Federalism on Tulsa, Oklahoma," Administrating the New Federalism, edited by Lew G. Bender and James A. Stever, Boulder, CO: Westview Press, January 1986. Co-authored with Raymond Rosenfeld.

"A Survey of Hedging By Large Nonfinancial Corporations," Intermarket, September 1985, pp. 32-33. Co-authored with J. Markham Collins.

"The Financial Management of State and Local Governments," Chapter 4 in The Municipal Bond Handbook: Vol. 2, edited by Sylvan Feldstein, Frank Fabozzi, and Irving Pollack, Homewood, IL: Dow Jones-Irwin, 1983.

"The Oklahoma Portfolio Summary," Oklahoma Business, April 1982.

"State Industrial Base Firm Foundation for Significant Future Growth," Oklahoma Business, September 1981, pp. 9-16.

"Effects of Proposition 13 on Tax-Supported Municipal Bonds in California, The Property Tax Revolt: The Case of Proposition 13, edited by George G. Kaufman and Kenneth T. Rosen, Cambridge, MA: The Ballinger Publishing Company, 1981. Co-authored with Ronald W. Forbes and Philip Fischer.

"Tax-exempt Housing Bonds Continue to Attract Public Sector," American Banker, October 15, 1979, pp. 12 and 36. Co-authored with Philip Fischer and Ronald W. Forbes.

"Public Debt in the Northeast: The Limits of Growth;" The Northeast: Managing a Way Out, proceedings of a symposium on legislative actions for survival in the credit market, the Council for Northeast Economic Action, April 1977, pp. 103-154. Co-authored with Ronald W. Forbes and Christopher A. Carter.

FUNDED RESEARCH

Case Analysis, "ULA-Equipment," Funded by NIBEN, University of Washington, 2004-05.

"Ada County Consolidation Study: Fire and Emergency Services" Ada County, 1993-94. Co-authored with Stephanie Witt.

"Position Justification," Idaho Power Corporation, 1992.

"Forecasting Loan-Loss Provisions," co-authored with Mike Merz and Brad Brown. Funded by Idaho First National Bank, 1987.

"Alternative Funding Sources: Meeting the Capital Expenditure Needs of the City of Tulsa," et al., Office of Business Research, University of Tulsa, 1981-83. Funded by the Economic Development Commission of Tulsa and the Metropolitan Tulsa Chamber of Commerce.

"An Analysis of Agency Costs for Personal Lines of Insurance," October 1979. Prepared for the Professional Insurance Agents of Connecticut, New Jersey, and New York. Co-authored with W. Christian Buss.

"An Analysis of Mortgage Revenue Bonds," published by the Council of State Housing Agencies, April 1979. Co-authored with Philip Fischer and Ronald W. Forbes.

TEXTS AND CLASS MATERIALS

Study Guide to Accompany Principles of Financial Management, by Benton E. Gup, John Wiley and Sons, Inc., 1983.

Instructor's Manual to Accompany Principles of Financial Management, Benton E. Gup, John Wiley and Sons, Inc., 1983.

PROFESSIONAL PARTICIPATIONS

Papers

"Ultra Light Adventure Equipment: A Buyout? Presented at the *College Teaching & Learning Conference*, San Juan Puerto Rico, March 17-20, 2008.

"Global Net Discount Rates: A Statistical Update" Presented at the winter meetings of the National Association of Forensic Economists in Hawaii, February 6-8, 2004.

"Global Net Discount Rates: An Initial Analysis," with Philip Fry. Presented at the National Association of Forensic Economists international meeting in Puerto Vallarta, Mexico, February 2-5, 2001.

"Position Justification: A Proactive Workforce Strategy," with Nancy K. Napier. Presented at the Pan-Pacific Conference, Chiba, Japan, May 27-31, 1996.

"Pricing the Tradeoff of Interest Savings and Conversion Value for Convertible Bonds," with C.A. Hawkins, Western Decision Science Institute Meetings, Lihue, Hawaii, March 19-22, 1991.

"Cash Management Practice of Listed New Zealand Companies," Western Decision Sciences Institute Meetings, Lihue, Hawaii, March 18-21, 1991. Co-authored with Kate Brown.

"Pricing New Issue Convertible Bonds: Yields versus Conversion Values," Decision Science Institute Meetings, Boston, Massachusetts, November 23-25, 1987. Co-authored with Norman Gardner and Clark A. Hawkins.

"Estimating the Cost of Construction Guarantees: An Option Pricing Model Application," Decision Science Institute, Honolulu, November 23-25, 1986. Co-authored with Patrick W. Shannon and I. George Pool.

"International Cash Management Practices of 'Fortune 1000' Firms," Eastern Finance Association,

Williamsburg, Virginia, April 24-27, 1985. Co-authored with J. Markham Collins.

"The Effect of Restricted Borrowing on OTC Common Stock Performance," Eastern Finance Association, Orlando, Florida, April 18-20, 1984. Co-authored with Richard C. Burgess.

"The Investment Performance of Money Market Mutual Funds," Financial Management Association, Cincinnati, October 21-24, 1981. Co-authored with Hany Shawky and Ronald W. Forbes.

"Yield Determinants for Corporate Tax Exempt Bonds," Financial Management Association, Boston, October 11-13, 1979. Co-authored with Philip Fischer.

"Proposition 13: A Study of Bond Market Efficiency," Western Economic Association, Las Vegas, June 17-21, 1979. Co-authored with Philip Fischer and Ronald W. Forbes.

"Comparative Market Efficiency for Regulated and Unregulated Fixed Income Securities," Western Economic Association, Las Vegas, June 17-21, 1979. Co-authored with David Chase.

"Margin Effects and Bidirectional Causality of Equity and Convertible Bond Prices," Western Economic Association, Las Vegas, June 17-21, 1979. Co-authored with Unghi Lim.

"Municipal Underwriting: Interindustry Competition," Southern Finance Association, Washington, D.C., November 1978. Co-authored with George Kaufman and Ronald W. Forbes.

"Efficient Markets for Corporate Bonds: Some Empirical Evidence," Western Finance Association, Honolulu, Hawaii, June 20-26, 1978. Co-authored with Clark A. Hawkins.

"Market Effects of Voluntary Municipal Disclosure," Western Finance Association, Kona, Hawaii, June 20-26, 1978. Co-authored with Ronald W. Forbes.

"Voluntary Social Reporting: An Iso-Beta Portfolio Analysis," Eastern Finance Association, Boston, April 20-22, 1977. Co-authored with John C. Anderson.

"Market Impact of Social Disclosure: An Initial Inquiry," Financial Management Association, Montreal, Canada, October 14-16, 1976. Co-authored with John C. Anderson.

"An Objective Methodology for Determining Homogeneous Risk Classes for Industrial Bonds," Eastern Finance Association, Columbia, South Carolina, April 1976. Co-authored with Ronald W. Forbes and Arthur Hierl.

"Defining Homogeneous Risk Classes for Municipal General Obligation Bonds," Western Finance Association, Las Vegas, June 1976. Co-authored with Ronald W. Forbes and Arthur Hierl.

"The Optimum Convertible Bond Financing Decision: Corporate Behavior Indicated by a Model of Investor Preference," workshop presentation, Financial Management Association, San Antonio, October 15-16, 1972.

Discussant

"Economic Perspectives on Global Enterprise Management," (three papers), Western Academy of Management International Meetings, Leuvin, Belgium, June 21-24, 1992
"A Conceptual Options Framework for Capital Budgeting" by Lenor Trigeorges, Decision Science Institute, Boston, Massachusetts, November 23-25, 1987.

"The Merger Acquisition Game: Is There a Winner's Curse?", by Frederick Dark, Financial Management Association, October 15-17, 1987.

"Tests of Duration Based on Bond Pricing Models," by G. O. Beirwag, George Kaufman, Cynthia Latta, and Gordon Roberts, Financial Management Association, Denver, October 9-12, 1985.

"A Comparative Analysis of the Selection of Acquisition Candidates: Probit Versus Logit and Discriminant Analysis," by Ronnie Clayton and M. Andrew Fields, Financial Management Association, Atlanta, October 22, 1983.

"The Effects of Term-to-Maturity on Tax-Exempt Bond Default Premia," by Paul Leonard, Financial Management Association, San Francisco, October 13-16, 1982.

"The Impact of Convertible Debt Registration on Security Prices," by Steven Katz and Steven Lilien, Northeast American Accounting Association, New York City, April 20-22, 1977.

Chairman

Track Chairman for Finance, Western Decision Science Institute, Palm Springs, California, March 9-11, 1987.

"Options" session, Decision Science Institute, Honolulu, Hawaii, November 23-26, 1986.

"Investment Potpourri" session, Midwest Finance Association, Louisville, Kentucky, April 1981.

"Convertible Bonds" session, Financial Management Association, Seattle, October 13-15, 1977.

Professional Affiliations

National Association of Forensic Economics
Pan-Pacific Business Association

Community Service

President of the Pioneer Inn Home-owners Association, 1995-2001.
Bogus Basin Ski Racing Alliance, Financial Vice President, 1988-91.
Bogus Basin Ski Racing Alliance, Board of Directors, 1987-93.
Idaho Red Cross, Finance and Audit Committee, 1986-89.
Tulsa Economic Summit, Speaker, 1982.

Tulsa Ad Hoc Committee on Mortgage Revenue Housing Bonds, 1980.

John P. Lundeby, MD, FACS, FAACS

Curriculum Vita

Office Address:

Shape Cosmetic Surgery and Med Spa, PLLC

AAAHC Accredited Surgery Center

524 W. 6th Avenue

Spokane, WA 99204

Birth Information:

Cottonwood, Idaho USA

Current Positions:

Owner- Shape Cosmetic Surgery & Med Spa, PLLC

Nov 2009-current

Owner- North Idaho Surgery, PLLC

Nov 2009-current

Previous Positions:

Co-Owner- The Laser & Vein Center, PLLC, dba Reflections Med Spas

Jan 2005-Jan 2010

Co-Owner- Lake City Surgeons, PLLC

Jan 2005-current

Senior Partner and Owner- Palouse Surgical Associates, PLLC

Aug 1996-Dec 2007

Education:

University of Washington School of Medicine, MD

Jun 1991

University of Idaho, BS Zoology with Chemistry Minor

May 1987

North Idaho College, AAS Machine Shop

May 1982

Postgraduate Medical Education:

Chief Resident in General Surgery

San Joaquin General Hospital, Stockton, CA

Jul 1994-Jun 1996

Resident in General Surgery

San Joaquin General Hospital, Stockton, CA

Jul 1992-Jun 1994

Intern in General Surgery

San Joaquin General Hospital, Stockton, CA

Jun 1991-Jun 1992

Professional Licensure/Certification:

Board Certified, American Board of Cosmetic Surgery,

Body, Breast & Extremity Surgery

2012-current

Board Eligible, American Board of Laser Surgery

2010

Board Certified, Recertified, American Board of Surgery

2006-current

Board Certified, American Board of Surgery

1997-2006

Idaho State Medical License

1997-current

Washington State Medical License

1996-current

California State Medical License

1992, now inactive

DEA Certificate Idaho

1992-current

DEA Certificate Washington

2008-current

Idaho Board of Pharmacy Certificate

1997-current

Diplomat, National Board of Medical Examiners

1992

Advanced Cardiac Life Support Certified

1989-current

Advanced Trauma Life Support Certified

Current

Pediatric Life Support

Previously Certified

Professional Society Memberships:

Fellow, American Academy of Cosmetic Surgery

Faculty Member, National Society of Cosmetic Physicians

Fellow, American College of surgeons

Member, American College of Phlebology

Member, American Society for Laser Medicine and Surgery

Member, Idaho Medical Association

Member, Kootenai Benewah Medical Society

Member, Spokane County Medical Society

Member, Washington State Medical Association

Member, American Medical Association

Committee Appointments/Offices Held:

Chairman, Executive Committee and Medical Staff Committee, Shape Cosmetic Surgery & Med Spa, PLLC

2009-present

Chairman, Medical Quality Improvement Committee, Shape Cosmetic Surgery & Med Spa, PLLC

2009-present

President, Kootenai-Benewah Medical Society

2007-2008

Trauma Director, Kootenai Medical Center

2006-2007

Secretary Treasurer/President Elect, Kootenai Benewah Medical Society

2006-2007

Chairman, Board of Directors, Palouse Surgery Center, LLC

2002-2004

Chief of Surgery, Gritman Medical Center

Chief of Staff, Gritman Medical Center

Chief of Trauma, Gritman Medical Center

Co-Director, Intensive Care Unit, Pullman Memorial Hospital

Chief of Surgery, Pullman Memorial Hospital

Vice President Medical Staff, Gritman Medical Center

Secretary Treasurer Medical Staff, Gritman Medical Center

Member, Medical Staff Executive Committee, San Joaquin General Hospital

Editorial Board, Hospital Physician

President, San Joaquin General Hospital Housestaff Association

Honors/Awards:

Most Outstanding Surgical Trainee

San Joaquin General Hospital

1996

Faculty/Teaching Positions:

Clinical Faculty, NSOCP

2009-present

Clinical Lecturer, Cynosure Corporation

2008-present

Certified Trainer in Laser Medicine, Cutera

2006-2008

Clinical Instructor, Surgery

Department of Surgery

University of Washington

1997-2008

Affiliate Faculty, Clinical Instructor

WWAMI Program

University of Idaho

1997-2008

Medical Staff Appointments:

Kootenai Medical Center

Coeur d'Alene, Idaho

2005-present, currently Community Associate Staff

Northwest Specialty Hospital

Post Falls, Idaho

2005-2012

Northern Idaho Advanced Care Hospital

Post Falls, Idaho

August 2006-2012

Research/Presentations/Articles:

"Lasers in Clinical Medicine", Houston, TX

Dec 2010

"Arm Liposuction", NSOCP, Tucson, AZ

Nov 2010

"Pitfalls to Avoid in Liposuction", NSOCP, Tucson, AZ

Nov 2010

"Lasers in Clinical Medicine", Cynosure, Seattle, Las Vegas, Austin,

Houston, New York City, Greenwich, Phoenix, Chicago

2009-2010

"Smartlipo: A Clinician's Perspective", Seattle, WA

Aug 2008

"Smartlipo for Practitioners", Seattle, WA

Jun 2008

"Vein Therapy Using the Cutera 1064 nm Laser", Cutera Clinical Forum, Washington, DC

May 2007

"Thoracic Trauma", CE presentation to the ED Nurses, Kootenai Medical Center,

Mar 2007

"Chest Trauma", CE presentation to Coeur d'Alene Fire Department Paramedics

Feb 2007

"Vein Treatment Using the 1064 nm Cutera Laser", Corporate Webinar, Cutera International

Jan 2007

"Body contouring: Dr. Michelangelo?", North Idaho Business Journal

Dec 2006

"Varicose Vein Treatment", Risk Management presentation, NPIC, Portland, OR

Nov 2006

"Insurance and Varicose Veins", North Idaho Business Journal

Sep 2006

"Dare to be Bare", North Idaho Business Journal

May 2006

"Laparoscopic Nissen Fundoplication" CME presentation, Kootenai Medical Center

Apr 2006

"Embarrassing Rosacea Can Be Controlled", North Idaho Business Journal

Feb 2006

"Scar Treatment Starts with Prevention, Then Appropriate Care", North Idaho Business Journal

Dec 2005

"Consider Laser Safety", North Idaho Business Journal

Nov 2005

"Varicose Veins Now Very Treatable", North Idaho Business Journal

Sep 2005

'What to Look For in a Med Spa", North Idaho Business Journal

2005

"Laparoscopic Nissen Fundoplication", CME presentation, Gritman Medical Center

2001

"Chest Tube Management", CME presentation, Pullman Memorial Hospital

2000

"Wound Healing", CME presentation, Gritman Medical Center

1999

"Post Traumatic Chylous Ascites in a child: Review of the Literature and Case Report",

Stockton Surgical Society

1994

"Evaluation of Triage Criteria for Trauma Victims Utilizing Aeromedical Transport", unpublished research

1990

Geoffrey D. Stiller, MD, FACS, FAACS

Education:

1981-1987	Mining and Mechanical Institute, Freeland, PA
1987-1991	Eastern College, St. Davids, PA Graduated Magna Cum Laude with a B.S. in Biology and minor in Chemistry
1992-1996	University of Minnesota Medical School Graduate medical studies leading to an MD

Residency:

1996-1997	Intern in General Surgery, Graduate Hospital, Philadelphia, PA
1997-2000	Resident in General Surgery, Graduate Hospital, Philadelphia, PA
2000-2001	Administrative Chief Surgical Resident, Graduate Hospital, Philadelphia, PA

Fellowship:

2007-2008	Fellow in Cosmetic Surgery, Southcenter Cosmetic Surgery and Hair Restoration, Inc. Seattle, WA

Employment:

Aug 2001-June 2005	USAF, Mountain Home AFB, Mountain Home, ID Staff General Surgeon, Chief of Surgery, Officer in charge of Surgery Clinic, Interim Chief of Medical Staff
2002-2005	Department of Veterans Affairs, Boise, ID Associate Staff General Surgeon without compensation
Jan 2005-July 2005	Palouse Surgeons, LLC, Pullman, WA General Surgeon Locum Tenem

Aug 2005-Aug 2008	Palouse Surgeons, LLC, Pullman, WA
	Owner, General/Vascular/Thoracic/Laparoscopic Surgeon
Sept 2007-Aug 2008	Southcenter Cosmetic Surgery & Hair Resoration, Inc.,
	Seattle, WA
	Cosmetic Surgery Fellow
Sept 2008-Mar 2009	Genesis ENT and Plastic Surgery, Charlotte, NC
	Cosmetic Surgeon
Apr 2009-Mar 2010	Uplift Cosmetic Surgery, Laser and Skin Center, Charlotte, NC
	Owner
Mar 2010- Feb 2012	Shape Cosmetic Surgery and Medspa, Spokane, WA
	Cosmetic Surgeon
Mar 2012-present	Palouse Surgeons, LLC, Pullman, WA
	Cosmetic and General Surgeon

Faculty Appointment:

Aug 2005-Aug 2008	Affiliate Faculty University of Washington Medical School
	WWAMI program
20010-present	Faculty of the National Society of Cosmetic Physicians

Publications:

Stiller, GD, et al: A Unique Method of Body Contouring after Massive Weight Loss. The American Journal of Cosmetic Surgery. 3:130

Weese, JL, et al: Neoadjuvant chemotherapy, radical resection with intraoperative radiation therapy (IORT): Improved treatment for gastric adenocarcinoma. Surgery 128-4:566-71, 2000

Centeno, RF, et al: An alternative approach: antegrade catheter-directed thrombolysis in a case of phlegmasia cerulean dolens. Am Surg 65(3): 229-31, 1999

Presentations:

Nov 2010	Brazilian Butt Lift. National Society of Cosmetic Physicians
Nov 2010	Awake Inframammary Breast Augmentation. National Society of Cosmetic Physicians
Nov 2011	Brazilian Butt Lift. National Society of Cosmetic Physicians
Nov 2011	Liposuction of the Inner and Outer thigh, Banana roll, and Knees National Society of Cosmetic Physicians
Nov 2011	Abdominoplasty Complications. National Society of Cosmetic Physicians
Nov 2011	Thighplasty. National Society of Cosmetic Physicians
Nov 2011	Breast Augmentation Approaches. National Society of Cosmetic Physicians
Nov 2011	Facial Rejuvenation with Facelift and Fat Transfers. National Society Of Cosmetic Physicians
Apr 2012	Cosmetic Surgery on the Palouse. Gritman Medical Center
Sep 2012	Breast Cancer and Reconstruction. Moscow Breast Cancer Support Group
Oct 2012	Brazilian Butt Lift. National Society of Cosmetic Physicians
Oct 2012	Breast Augmentation Techniques. National Society of Cosmetic Physicians
Oct 2012	Facial Rejuvenation using Autologous Fat Transfer. National Society of Cosmetic Physicians
Oct 2012	Hand Rejuvenation using Autologous Fat Transfer. National Society of Cosmetic Physicians
Oct 2012	Mini-Facelift. National Society of Cosmetic Physicians
Oct 2012	Lipo-Abdominoplasty. National Society of Cosmetic Physicians

Awards:

1998	Robert Lauks Award: chosen by faculty as the exemplary surgical resident in overall knowledge and care of the surgical patient (one award given per year for the entire residency)

2000	Robert Lauks Award: chosen by faculty as the exemplary surgical resident in overall knowledge and care of the surgical patient (one award given per year for the entire residency)
2001	Paul Nemir Award: chosen by faculty and peers as the senior surgical resident with outstanding surgical skills and knowledge
2001-2002	Customer Service Award Hero: Mountain Home AFB patient survey
2002-2003	Customer Service Award Hero: Mountain Home AFB patient survey
2003-2004	Customer Service Award Hero: Mountain Home AFB patient survey
2005	USAF Meritorious Service Medal
2006	Pullman Regional Hospital Patient Satisfaction Award, Runner-up

Medical License:

State of Idaho

State of Washington

State of North Carolina expired, not renewed

State of South Carolina expired, not renewed

State of Pennsylvania expired, not renewed

Board Certification:

Board Certified by the American College of Surgery 2003, re-certified 2012

Board Certified by the American Board of Cosmetic Surgery 2011

Society Memberships:

Fellow of the American College of Surgeons

Fellow of the American Academy of Cosmetic Surgery

Idaho Medical Association

Washington Medical Association

Hobbies:

Hiking, camping, canoeing, fly-fishing, hunting, kayaking, skiing, boating, scuba diving, home remodeling

AMERICAN ACADEMY
OF COSMETIC SURGERY

THE AMERICAN JOURNAL
of COSMETIC SURGERY

A Unique Method of Body Lifting After Massive Weight Loss

Geoffrey Stiller, MD, FACS; E. Antonio Mangubat, MD, FAACS; Wael Kouli, MD, FACS; Lisa Precht, MD

ORIGINAL ARTICLE

A Unique Method of Body Lifting After Massive Weight Loss

Geoffrey Stiller, MD, FACS; E. Antonio Mangubat, MD, FAACS; Wael Kouli, MD, FACS; Lisa Precht, MD

Introduction: The epidemic of obesity has provided a new cosmetic challenge in postbariatric body reconstruction. Traditionally, body lift procedures and circumferential liposuction have been used to address the excess skin and adiposity present after weight loss. After applying alveolar abdominoplasty principles to circumferential body lifts, we describe our experience of the first 24 lipo-circumferential body lift procedures performed as single-stage outpatient surgery.

Materials and Methods: Between October 2007 and August 2009, 24 patients underwent a total body lift using our lipo-circumferential body lift technique. The operative technique is described. Intraoperative and postoperative complications are compared with published series.

Results: All procedures were performed as a single-stage outpatient procedure. The last 20 patients did not receive postoperative drains. Seven patients underwent additional procedures performed in the same setting. No intraoperative or major postoperative complications occurred. Five patients (20.8%) had posterior wound dehiscence (<2 cm). Five patients (20.8%) had anterior wound dehiscence (<2 cm). Two patients (8.3%) had minor wound infection. Two patients (8.3%) had cellulitis. One patient (4.2%) had umbilical necrosis. An overall minor complication rate of 58% was reported.

Conclusions: Our technique of lipo-circumferential body lift is a safe and effective procedure to address the body contouring after massive weight loss in a single stage, outpatient procedure.

Since its inception in 1966, bariatric surgery has offered the greatest degree of sustained weight loss to the morbidly obese.[1] Weight loss of 50 kg or more is common, resulting in significant improvement in patient health but leaving body deformities due to loose hanging skin. Body contouring after massive weight loss has naturally grown in frequency. More than 52000 body contouring procedures were performed in postbariatric weight loss patients in 2003, and a 36% increase was estimated for 2004.[2]

Body contouring surgery is rapidly undergoing modification and refinement. The contour deformities resulting from massive weight loss create diverse and often unexpected changes that involve virtually every body part. Traditional panniculectomy is rapidly fading from the standard of care. With the increase in the number of successful weight loss patients comes an increased need and demand for refined contouring procedures in all regions of the body. No longer are patients and their physicians willing to accept a normal body mass index (BMI) with all its health benefits; their demand to look better and feel better is naturally increasing and presents several technical challenges for the cosmetic surgeon.

The abdominoplasty has been the mainstay of skin removal after weight loss; however, in postbariatric procedures, traditional abdominoplasty has limitations. Severe skin laxity affects the entire body; thus new methods were pioneered to deal with the circumferential skin excess, including belt lipectomy, buttock lift, and body lift.

A relatively new technique in body contouring, lipo-abdominoplasty, was first described in 2000 by Dr Avelar.[3] Since that time, the procedure has evolved, and several papers have described variations. The conventional operative approach to addressing excess skin employs flap elevation, vessel ligation, and limited liposuction. An additional procedure is often required for body sculpting after excess skin excision. Challenging the traditional paradigm, the technique of lipo-abdominoplasty uses aggressive liposuction that

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From the SouthCenter Cosmetic Surgery, Tukwila, Wash.

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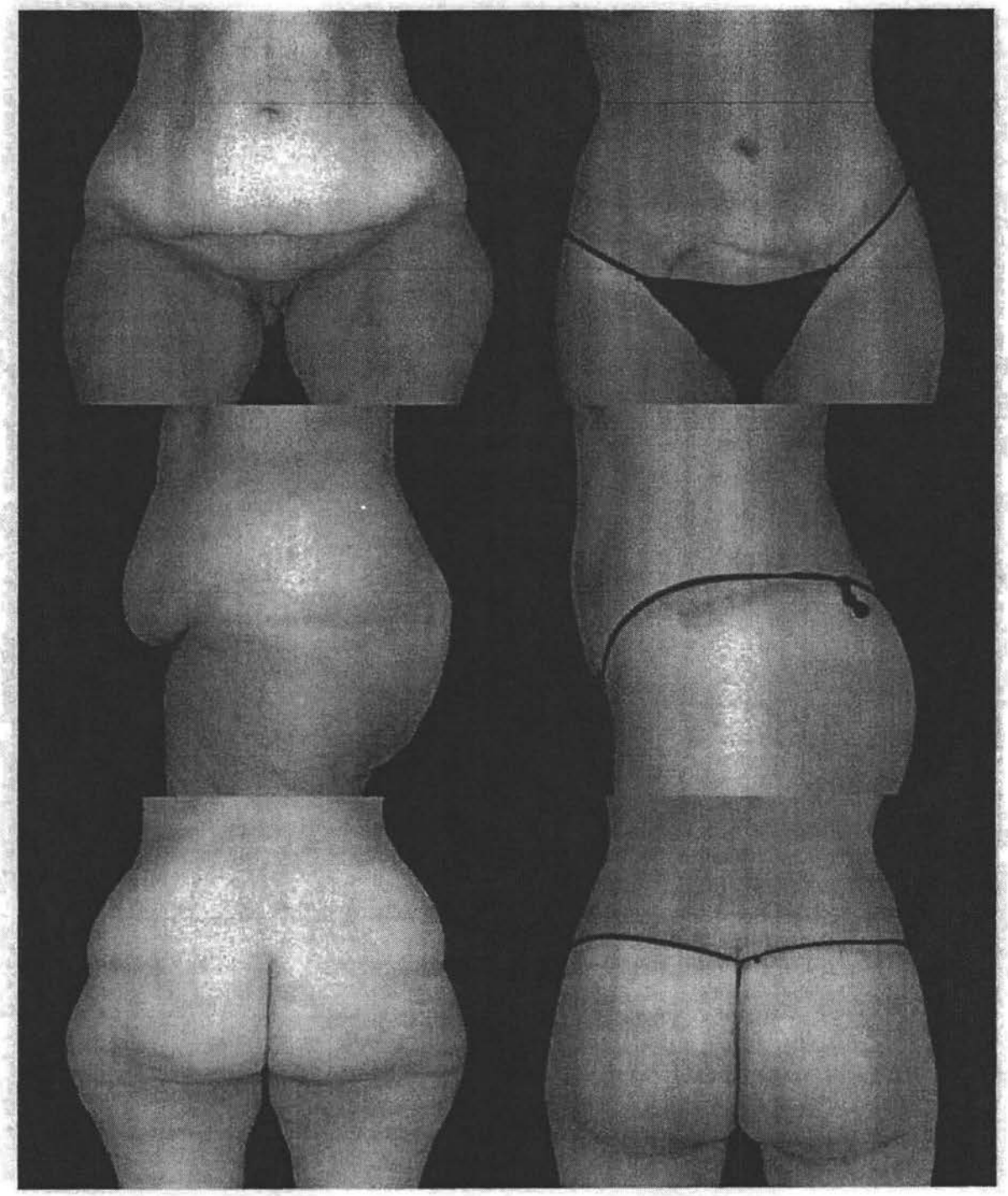

Figure 1. *A 45-year-old female patient who lost 120 pounds through diet and exercise; 1.5 years postoperative from a lipo-circumferential body lift and a medial thigh lift. All body lift scars are hidden by her usual undergarments and bikini.*

mobilizes the flap and minimizes the need for extensive flap dissection and vessel ligation and preserves the vascular supply.

With more than 200 000 bariatric procedures performed yearly in North America,[4] the increased number of bariatric surgery patients has fueled demand for cosmetic procedures after massive weight loss; abdominoplasty, mastopexy, and circumferential body lifts are more frequently performed to achieve optimal aesthetic results.

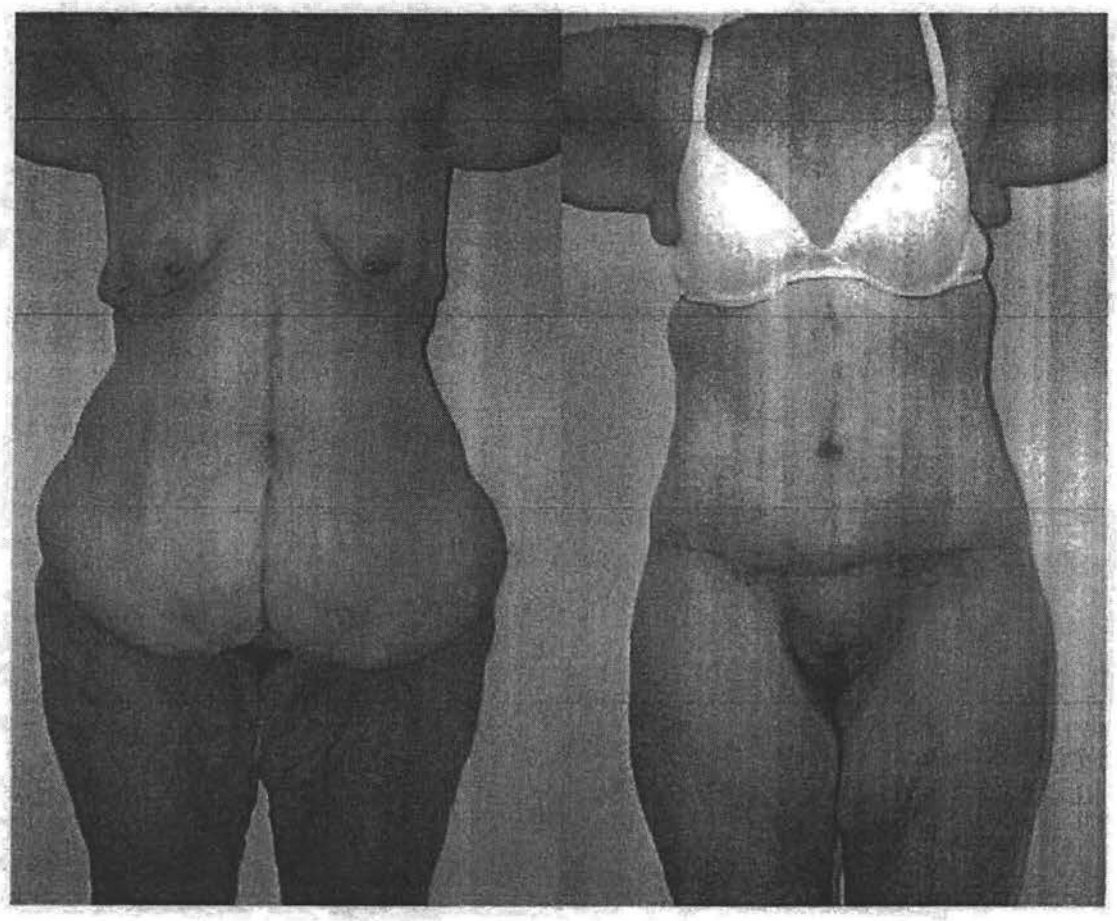

Figure 2. *A 35-year-old female who underwent an open gastric bypass. Maximum body mass index (BMI) was 53. At the time of circumferential body lift and open ventral hernia repair, her BMI was 33. Pictures taken 3 months postoperatively.*

In published experience with body lift procedures, the average hospital stay is up to 5 days, with multiple patients requiring at least 1 unit of blood, and the length of drain placement ranges from 2 to 5 weeks.[5-7] This report highlights the important advantages of applying the lipo-abdominoplasty concept to the circumferential body lift. With this new technique, advantages include short operative times, the ability to perform the procedure safely in an outpatient setting, elimination of drains, and reduced recovery time.

Methods

Twenty-four patients underwent our new body lift procedure from October 2007 to August 2009. A retrospective review was performed to evaluate operative times, liposuction aspirate volume, and complications. Postoperative follow-up ranged from 1 month to 3 years.

The patient is marked in the preoperative holding area in the standing position. The patient is asked to wear a bathing suit or undergarment for the initial marking. After the borders of the undergarment are marked, it is removed. The midline is marked anteriorly and posteriorly. The level of the anterior superior iliac crest (AIC) is then marked laterally and posteriorly to mark the most superior aspect of the proposed incision. The lax skin of the buttock and lateral thighs is then pushed upward to achieve maximum movement of the skin superiorly to the level of the AIC, and a mark is left at that level of the respective anatomy. This marks the estimated position of the inferior borders of the posterior and lateral incisions, and symmetric lines are drawn on the opposite side.

The superior incision is estimated in a similar fashion by pulling the skin downward, and estimated superior incisions are determined and marked. We emphasize that these incisions are estimates, and that final and more precise borders will be determined intraoperatively.

Anterior incisions differ considerably from traditional abdominoplasty in that they do not converge laterally. Instead, they join their respective superior and inferior

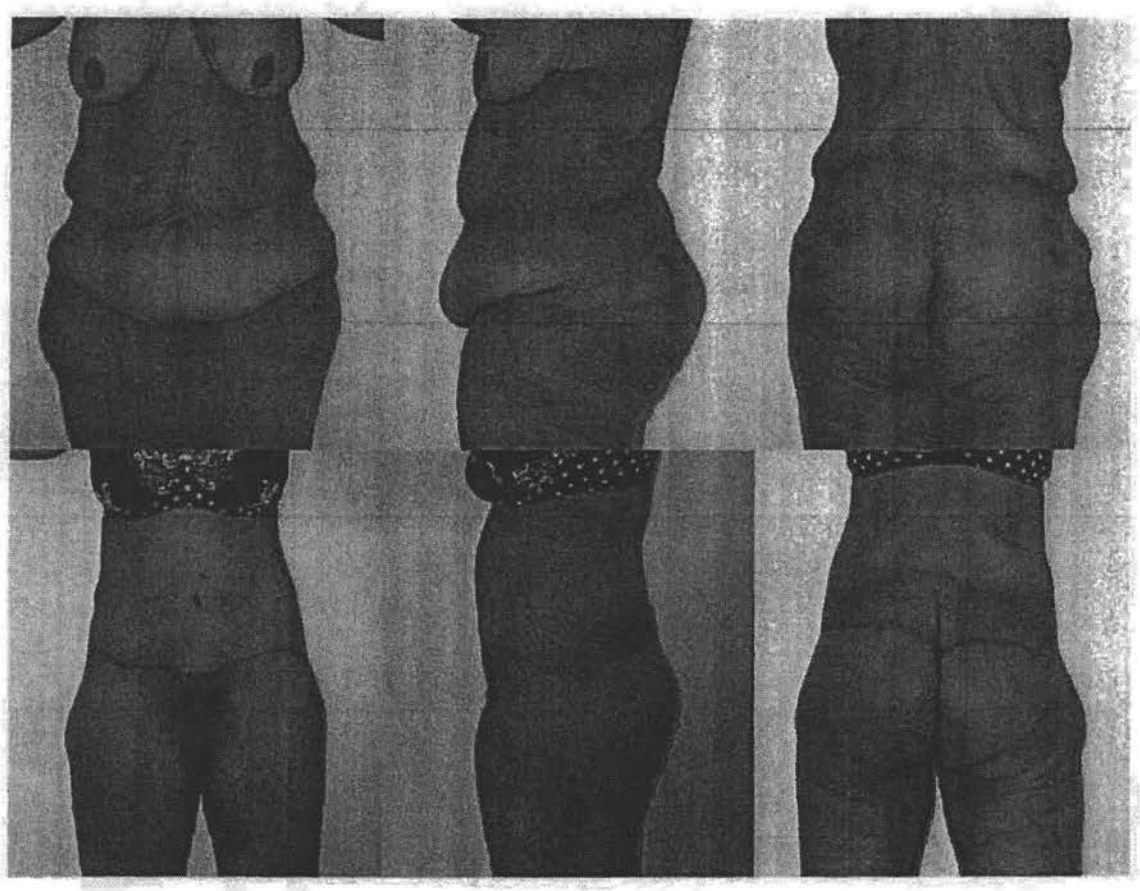

Figure 3. *A 38-year-old female who underwent a laparoscopic band. Her maximum body mass index (BMI) was 55. At the time of her circumferential body lift, her BMI was 28. Pictures taken at 3 months postoperatively.*

markings determined for the estimated posterior incisions. Beginning at the umbilicus, the most superior border of the incision is joined with lateral markings. The inferior border is estimated to be at the level of the mons pubis, with caudal limits of the inferior incision being 6 to 8 cm from the vulvar cleft.

Once the circumferential markings are completed, vertical meridians are marked bilaterally at the midclavicular line, the anterior and posterior axillary lines, and the posterior superior iliac spine. These serve to line up the points across which the superior and inferior flaps can be rejoined after skin excision is accomplished.

These marks are only estimates and will be adjusted intraoperatively to maximize skin excision without excessive tension, and to adjust the incision location to fall within the previously marked undergarment to maximize scar camouflage. Details of this adjustment are described later.

Finally, the areas of liposuction are marked, including the anterior and posterior torso, and often the lateral thighs.

Once the patient is brought to the operating room, deep venous thrombosis (DVT) and antibiotic prophylaxis are administered, and deep sedation is attained with general or epidural anesthesia. With the patient in a prone position, the posterior torso and buttocks are prepped and draped in a sterile fashion. Incisions are made within the area of the planned skin resection, and tumescent solution is infused into the operative areas. After a wait of at least 15 minutes to acquire vasoconstriction, liposuction is performed. In the areas to be excised, more aggressive liposuction is performed to debulk more fat.

When the posterior liposuction is completed, the previously marked skin incisions are assessed using towel clips to approximate the superior and inferior lines. Typically, more skin can be excised safely and the clips are adjusted to include more skin. Inferior and superior adjustments are then marked to achieve the best incisional symmetry and location. The clips are removed, and the final incision lines are drawn. This method provides an added measure of confidence that the wound can be easily closed with good location and symmetry.

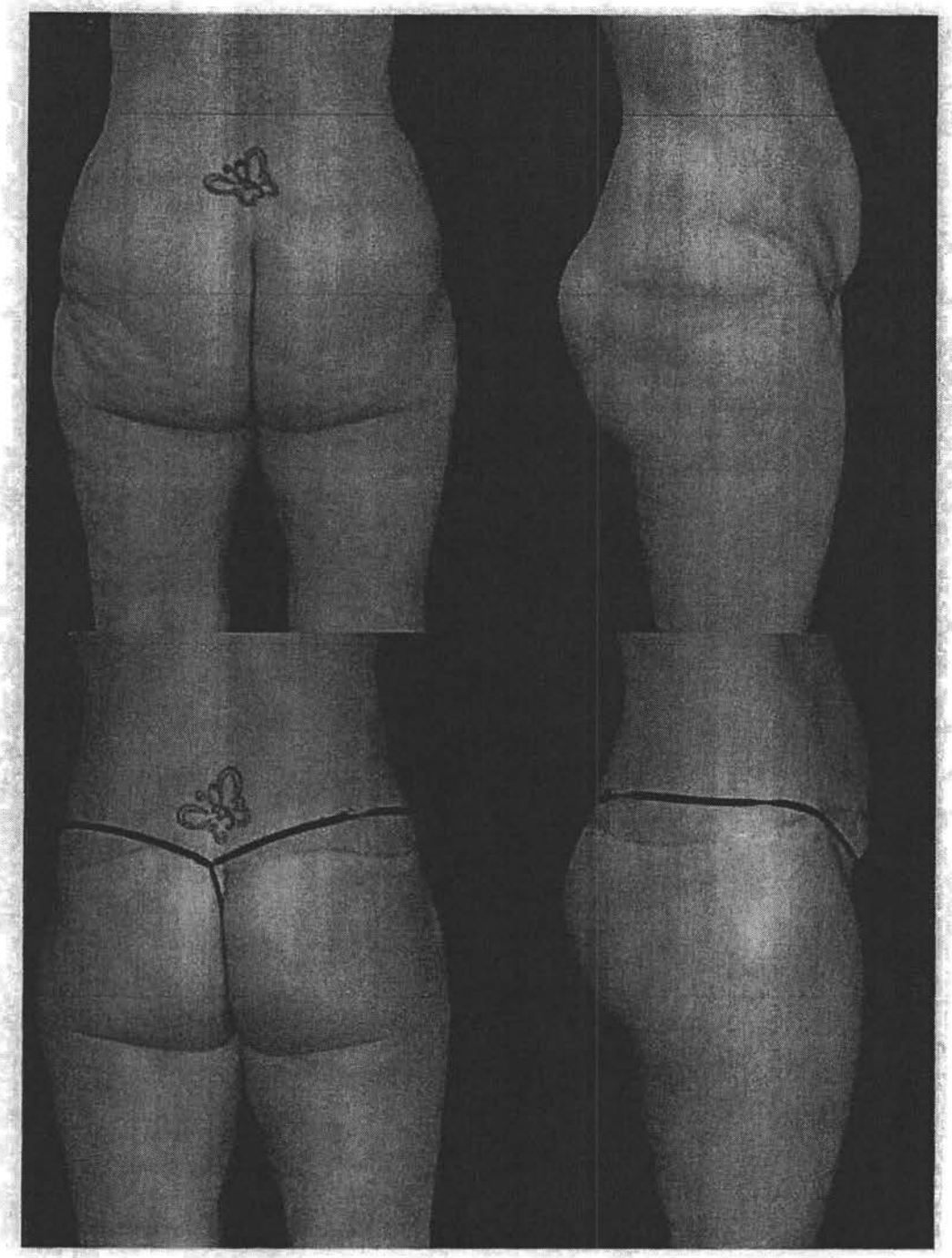

Figure 4. *A 45-year-old who lost 60 pounds through diet and exercise. Pictures taken 3 months postoperatively.*

The incision is made through the dermis with care taken to enter only the superficial subcutaneous layer while leaving Scarpa's layer intact. We believe that an intact Scarpa's fascia preserves lymphatic drainage and eliminates the need for drains.

The skin is then quickly avulsed off the fascia using blunt dissection. Bleeding is usually minimal and is easily controlled with suture ligation. Electrocautery is often unnecessary. Once the skin edges are reapproximated using towel clips, the superior flap is tacked inferiorly at the midline with a 0 polydioxanone suture (PDS) by suturing the superficial fascial system to the fascia above the sacrum. The wound is closed in layers using interrupted 3-0 Monocryl for the deep dermal layer and a running subcuticular with 3-0 Monocryl to reapproximate the skin.

Table 1. Number of Patients With Preoperative Issues

Patient Comorbidities	No. of Patients	%
Hypertension	9	37.5
History of laparoscopic band	4	16.7
Hyperlipidemia	3	12.5
History of gastric bypass	2	8.3
Coronary artery disease	2	8.3
History of duodenal switch	1	4.2
Ventral incisional hernia	1	4.2
Back pain	1	4.2
Depression	1	4.2
Intertrigo	1	4.2
Cardiac murmur	1	4.2
Migraine headache	1	4.2
Hypothyroid	1	4.2

After the skin flaps are excised and passed off the table, the patient is placed in a supine position and is prepped and draped in a sterile fashion. As with the posterior procedure, incisions are again made in the planned area of skin resection, and tumescent anesthesia is infiltrated while waiting the full 15 minutes needed to achieve vasoconstriction. Abdominal liposuction is performed above and below Scarpa's fascia until completed. Again, the infraumbilical area of planned excision is suctioned more aggressively to debulk the fat volume in preparation for the skin flap advancement.

Umbilicoplasty is accomplished by cutting an inverted omega-shaped incision around the umbilicus. Blunt periumbilical dissection is performed down to the anterior rectus fascia. The periumbilical skin is freed of surrounding attachments by blunt dissection. Through this circular periumbilical incision, all fibrous retaining ligaments are removed between the medial borders of the rectus from the umbilicus to the xiphoid process. Care is taken to avoid injuring any neurovascular structures from the rectus abdominus muscles to the overlying skin flap.

The planned superior and inferior incision lines are again tested by approximation with towel clips. Any adjustments are made to adequate tension, and new lines are drawn as described posteriorly. The incisions are made through the dermis. The skin is removed with blunt dissection, while leaving Scarpa's fascia intact. If any significant rectus diastasis is identified, Scarpa's fascia is separated in the midline and taken laterally to the area of diastasis. The diastasis is closed using towel clips. Beginning at the umbilicus, a running 0 PDS is used to close the fascial defect in a baseball fashion, and the incision line is imbricated using the same suture in the manner of a horizontal mattress stitch. Scarpa's fascia is closed over the diastasis repair using 3-0 Monocryl.

Table 2. Procedures Performed at the Same Setting

Upper and lower blepharoplasty
Ventral incisional hernia repair
Augmentation mammaplasty
Revisional augmentation mammaplasty and vertical mastopexy
Medial thigh lift
Brachiaplasty
Fat transfer to the face

An Alice clamp is placed on the superior aspect of the umbilical stalk to be used as a marker. The skin is reapproximated using towel clips. The total superior and inferior excursion of the umbilicus is marked along the midline. Bisecting the distance of excursion determines the most appropriate umbilical position, and a heart shaped incision is made. The umbilicus is brought through this incision and is sutured in place. The skin incision is closed in 2 layers, as described posteriorly (see Figures 1 through 4 for before and after photos).

Results

Our variation of the lipo-circumferential body lift was developed in October 2007. Twenty-four patients have undergone this procedure on an outpatient basis, the first 4 of which had drains placed. The last 20 patients did not have drains. All procedures were performed by one of the first 2 authors.

Table 1 lists the comorbidities of the patients. The most common comorbidity was hypertension followed by history of bariatric surgery. The average preoperative BMI was 27.4. The average preoperative hematocrit was 38.8. The average postoperative hematocrit was 30 with a delta hematocrit of 22.7%. Three patients did not have postoperative hematocrits checked secondary to less than 1000 cm^3 of fat aspirated, as per our policy. None of the patients received blood transfusions.

The average operative time was 289 minutes. Seven patients had additional procedures performed at the same time, as shown in Table 2. The average liposuction

The average amount of liposuction aspirate was greater than 5000 mL total, with an average of 3316 mL supranatant fat aspirate. Although this does exceed the recommendations put forth by the American Society of Plastic Surgery,[14] it falls within the recommendations of the American Academy of Cosmetic Surgery.[15] Each patient was assessed preoperatively and intraoperatively regarding the safety of proceeding with the operation with this volume of liposuction.

Conclusion

Based on our initial results, we concluded that lipoabdominoplasty first described by Dr Avelar can be applied safely to the circumferential body lift. The safety of performing the procedure in an outpatient setting, eliminating the use of drains, and reducing the recovery period without adversely affecting operative times makes this procedure an ideal alternative to the traditional body lift.

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EXHIBIT P

In The Matter Of:

BALLARD vs.

KERR, M.D., et al.

CHARLES GARRISON, M.D.

September 23, 2013

Video Deposition

T&T Reporting, LLC

477 Shoup Avenue, Suite 105

Idaho Falls, Idaho 83402

Min-U-Script® with Word Index

17:00 1 first disclosure was the end of May.
17:01 2 Q. When were -- you're looking at your
17:01 3 computer. Were you E-mailed that disclosure?
17:01 4 A. Yes, sir.
17:01 5 Q. And would you agree with me that that
17:01 6 disclosure on your computer does not reflect fat
17:01 7 embolism as a pathological diagnosis?
17:01 8 A. That's correct.
17:01 9 Q. Were you ever given any subsequent
17:01 10 disclosures that Mr. Quane filed reflecting what
17:01 11 your opinions were?
17:01 12 A. The most recent one, which did not
17:01 13 have --
17:01 14 Q. What was the date of that?
17:01 15 A. I believe the date on that is about
17:01 16 September 19th, if I'm reading this correctly.
17:01 17 Q. All right. On September 19th, did the
17:01 18 disclosure reflect fat embolism as a pathological
17:02 19 diagnosis?
17:02 20 A. No, sir. It did not.
17:02 21 Q. Okay. Is it your testimony that some
17:02 22 time after September 19, you arrived at the
17:02 23 conclusion that Crystal Ballard had a fat
17:02 24 embolism?
17:02 25 A. No, sir. Prior to that.

17:02 Q. So on the September 19th disclosure, it does not reflect an opinion that you had already formed about fat embolism; is that accurate?

17:02 A. I had not formed that opinion as such. It was one of the thoughts that I had in my mind that I was trying to sort through, and that's why it was not discussed with Mr. Quane.

17:02 Q. So you've -- some time after September 19th, you have cemented an opinion that Crystal Ballard had a fat embolism?

17:03 A. That's correct, sir.

17:03 MR. HADDAD: We're going to mark this part of the deposition as being an unfair disclosure of new opinions not set forth in any type of disclosures beforehand, and certainly something I'm not prepared to ask about since it's not appeared in any disclosures of any experts in this case.

17:03 So let's go off -- well, let me ask you this: Jerry, how are we going to handle this? Because obviously, he holds an opinion you didn't set forth in his disclosures, you didn't give me forewarning on.

17:03 MR. QUANE: Well, I didn't know about it --

17:03 MR. HADDAD: It's best to deal with this

17:03 now that we're --
17:03 MR. QUANE: Let me explain this: I
17:03 didn't realize this until yesterday, the first time
17:03 Dr. Garrison told me.
17:03 You have chosen to depose him --
17:03 MR. HADDAD: So --
17:03 MR. QUANE: -- and -- and when you
17:03 decide to depose an expert, the areas you get into
17:03 constitute an automatic extension and
17:04 supplementation of a prior disclosure. And that's
17:04 the risk you take when you depose experts in Idaho.
17:04 And I did not know about this --
17:04 MR. HADDAD: Well, Doctor -- Mr. Quane,
17:04 I disagree because I --
17:04 MR. QUANE: Let me finish my --
17:04 MR. HADDAD: I simply asked him what
17:04 articles he looked at.
17:04 MR. QUANE: Well, you've gone into --
17:04 MR. HADDAD: Period. That's it.
17:04 MR. QUANE: -- why didn't I disclose his
17:04 opinion on this fat embolism previously in my
17:04 disclosures, and the answer is: I did not know
17:04 about it. Dr. Garrison did not tell me about it.
17:04 He told me for the first time yesterday when I met
17:04 with him, and it -- and that's the reason it hasn't

17:19 that.
17:19 Q. What?
17:19 A. I can't answer that specifically.
17:19 Q. Okay. You don't know which is better
17:19 for identifying a fat embolism, CT or chest film?
17:20 A. No, sir. I can't answer that.
17:20 Q. All right. Doctor, because I have no
17:20 idea what your opinions are, have you -- what are
17:20 your opinions in this case?
17:20 A. Well, I think she had a fat embolism,
17:20 but I also think that she --
17:20 Q. Okay. How did that cause her to have an
17:20 infection?
17:20 A. You didn't let me finish.
17:20 Q. Doctor, I apologize. I'm hearing myself
17:20 and thinking you're ending because there's a lag
17:20 time, so it's not intentional. I apologize for
17:20 that.
17:20 A. My opinion is that the decedent had fat
17:20 embolism syndrome. She also most likely had sepsis
17:20 as well. She also had Systemic Inflammatory
17:21 Response Syndrome.
17:21 Q. Does Dr. Groben mention Systemic
17:21 Inflammatory Response Syndrome?
17:21 A. No.

EXHIBIT Q

8-4-2010

Aunt

Angela Neil

#813-787-5429

Krystal Ballard

NOTES

8-4-2010 - Phone call w/ Angela Neil (Aunt to Krystal Ballard) 813-787-5429 (cell phone).
Angela related that Krystal's mother had retrieved Krystal's cell phone messages and that I had left several messages re: how she was doing ~~at~~ around the time of her hospitalization. She was calling to tell me that she had passed away.
I expressed my ~~condolences~~ sympathies and had a conversation about the circumstances re: Krystal. I advised that I did not know results from the autopsy or specifics about the cause of death.
They (the family) were also awaiting results of the autopsy as well - Apparently infection (viral?) or sepsis ~~the~~ had been a suspicion but had apparently not been the & cause of death. They were awaiting toxicology reports that would take several weeks for results.
Angela did state that Krystal had not been ~~that~~ forth coming with them re ~~#~~ what was going on. She in fact told them that she had fallen down the

NOTES

Stacy injuring herself. They felt that she was "not herself" - "speaking slowly" on Saturday and had encouraged her to "call 911". They ~~she~~ asked her if she had hit her head.

They had wanted to talk with Charles regarding her condition to which she said "he was cooking chicken" and then changed the subject.

She added that ~~s~~ after Charles found out what she had done (i.e. lipo/fat (cannula)) she begged him not to tell ~~as~~ any of the family.

We also spoke re Krystal's desire to avoid testing positive in a random military ~~dot~~ drug test.

She (Angela) acknowledged that Krystal's ~~something was to~~ secrecy and desire to hide her procedure may have gotten her into trouble with taking inappropriate amounts of medication such as ibuprofen.

I concluded by expressing my deepest sympathies and asked her to convey that to the family members.

BC Jen

EXHIBIT R

BAILEY&GLASSER LLP

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Internet www.baileyglasser.com
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201 Monroe Street.
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Montgomery, AL 36104

June 20, 2013

VIA FACSIMILE ONLY 208-780-3930

Terrence S. Jones, Esq.
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

Re: Ballard v. Kerr, et al.

Dear Mr. Jones:

In providing dates for experts, please provide dates within the deadlines set by the Court for completion of discovery. To the extent this proves impractical for any particular expert, we are willing to discuss conducting a deposition after the discovery deadline, provided that under no circumstances would such discovery effect the trial date.

We have previously raised with you your disclosure of multiple experts concerning the same subject matter. Specifically, you have disclosed five experts, including Dr. Kerr, in the area of cosmetic and plastic surgery. We are quite certain the Court will not permit you to present redundant expert testimony at trial. Accordingly, we ask that you identify no more than two experts in this field. In other words, tell us the experts you actually intend to call as your trial witnesses so we can avoid unnecessary depositions. If you are not willing to do this, we will seek appropriate relief from the Court.

Thank you for your attention to this matter.

Sincerely,

/s/ James B. Perrine

James B. Perrine, Esq.

JBP/flc

cc: Scott McKay, Esq. (via facsimile only)

EXHIBIT S

Quane Jones McColl, PLLC
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June 21, 2013

VIA FACSIMILE (334) 262-0657
James B. Perrine
BAILEY & GLASSER LLP
201 Monroe Street, Suite 2170
Montgomery, Alabama 36104

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Perrine:

I am writing in response to your letter of June 20th. Regarding the depositions of Drs. Garrison and Frankle, their availability in August is based solely on their limited schedules. I provided you with earlier dates for Dr. Frankle in June, but this was wisely deferred until you are able to produce the requested tax records. Please understand that we are not looking to change the trial date by having these depositions after the discovery deadline. We take the position that we provided you with complete expert witness disclosures in conformity with the requirements of discovery and it is your decision to take depositions that we believe will simply prove duplicative of these disclosures.

Regarding your claim that we have listed multiple experts on the same subject matter, we disagree with your characterization. Rule 403 speaks to the prohibition of presenting needlessly cumulative evidence. We are mindful of this rule and will not run afoul of it at trial. We have listed several experts from different specialties of medicine to testify on behalf of the Defendants. The fact that you elected to only list one expert does not mean that we should be so limited at trial. The jury is entitled to hear from different experts with different background who all agree that Dr. Kerr did not violate the applicable local standard of practice.

In the spirit of cooperation, we will agree to withdraw Dr. Wills as one of our experts. This eliminates the need to take his deposition. We do, however, intend to

call all of our remaining experts at trial and will vigorously oppose any efforts to otherwise limit the number of defense expert witnesses. We do not have an excessive number and your decision to include Dr. Kerr in your numerical calculation is improper. You may consider this our effort to meet and confer and informally resolve this matter.

Very truly yours,

Terrence S. Jones

TSJ/ms
cc: Scott McKay (via fax)
P. Gregory Haddad (via fax)

EXHIBIT T

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D. et al,

Defendants.

Case No. CVOC-12-4792

CERTIFIED ORIGINAL TRANSCRIPT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on July 10, 2013, before

Deborah A. Bail, District Court Judge.

Reported by
Susan G. Gambee
CSR No. 18

A P P E A R A N C E S

FOR THE PLAINTIFF
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FOR THE DEFENDANTS
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*****

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BOISE, IDAHO
Wednesday, July 10, 2013, 2:00 p.m.

THE COURT: I will take up Ballard versus Kerr. Okay. Wasn't it kind of early days to limit your witnesses?

MR. McKAY: I don't think so. And I'm intending to address that.

THE COURT: Okay.

MR. McKAY: And I will start with that, if the court would like me to address that.

THE COURT: Okay. Just feel free.

MR. JONES: Your Honor, I didn't hear your inquiry. What was it?

THE COURT: I just said, isn't it kind of early days to be limiting witnesses?

MR. McKAY: Right, and I think that's a fair question, Your Honor. But this is an issue that's brought about by a discovery deadline that is about to expire at the end of this month.

THE COURT: Okay.

MR. McKAY: And given the fact that the defendants have disclosed what we assert are cumulative experts, we are now -- that we would like to depose, we have to, you know, basically

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chase around the country and the state and spend a bunch of money and depose these experts, who we submit should not be permitted to testify at trial, at least not all of these experts shouldn't be permitted.

And if the court were to look at the case of Edmunds versus Kraner -- it's a 2006 case, 142 Idaho 867 -- the Idaho Supreme Court addressed this very issue, and it's cited in our reply brief.

It's discussed by the defendants under supplemental brief, and what the court said, it's appropriate to consider this issue now at an early stage of the proceeding, because to do otherwise, you run the risk of running afoul of one of the central rules of civil procedure 1(A), that the focus of which is to bring about a fair, just, and inexpensive determination to these civil lawsuits.

So that's what this is. This is a -- of course, a medical malpractice lawsuit against a single physician and his clinic. We represent Staff Sergeant Charles Ballard, who is the husband and former spouse of Crystal Ballard, Staff Sergeant Crystal Ballard, who had a medical procedure performed on her by the defendant in

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this case. It was a liposuction. It was performed in July of 2010 at his clinic in Eagle, and at the time she was 27 years old, enlisted full-time, serving our country through the United States Air Force and was in excellent health, and within five days of that procedure, she died from an infection.

And what we assert in this lawsuit is she died because this defendant failed to follow a sterile technique. And we have timely disclosed an expert, Dean Sorensen -- Dr. Dean Sorensen, who is going to opine at trial that Dr. Kerr violated the applicable standard of care.

And in response to that disclosure, the defendants initially disclosed five experts who would testify that Dr. Kerr did not violate the standard of care.

So shortly after they made that disclosure, then they filed supplemental responses to -- they served supplemental responses to pending interrogatories, and they scaled that back from five to four.

They abandoned, apparently, an intention to call Dr. Wills. But they still intend to call at least four experts to testify on

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the exact same issue. And I say at least, because some of the other experts, if you looked at their 107-page expert disclosure, you would see even causation experts weigh into the issue of sterile technique in this case.

And so we brought this motion prior to the expiration of the discovery deadline to simply ask for the court's help to say, "Judge, will you rule at this stage of the proceeding that the defendant should not be permitted to call more than two experts on any single issue?"

It seems reasonable. This is a -- certainly a matter that is within the court's discretion. I mean, that's exactly what the Edmunds case says, and we think it also is supported by Rule 403.

There are considerations of undue delay, waste of time, presentation of cumulative evidence. I think that would be presented if the defendants in this case are allowed to parade in expert after expert to talk about this same issue, and that's not how trials operate.

You know, trials come down to the jury's consideration of qualitative evidence, not quantitative, and I think that's what's going on

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here, is the defendants either intend to present a duplicative quantitative evidence, or if they only intend to call a couple of these experts, and there is, you know, somewhat of a shell game going on while we are supposed to guess who are their real experts? And so that's the basis for the motion.

They oppose, of course, this motion. They argue that because these experts have different backgrounds, that that somehow would permit them to testify as to the -- on the same issue, and we submit that that is a distinction without a difference.

I mean, every expert, every physician has a different background to some degree, and what's at issue, the central issue in this case, is whether this single defendant, Dr. Kerr, violated the applicable standard of care.

And I understand, they are entitled to present expert testimony on this, and should they do that, they should be limited to calling no more than two experts on the issue. So that's our motion, Your Honor.

THE COURT: Okay.

Response?

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MR. JONES: Thank you, Your Honor, Terry Jones appearing for Dr. Kerr. I have had the privilege of being before this court in some medical malpractice trials with my partner Jerry Quane many years ago.

This issue similarly came up at that time, and I have dealt with this issue in a number of other circumstances.

As an initial matter, the motion that was presented to the court was specifically under Rule 403. That's what the motion was based on. That's was what the memorandum was based on.

In the reply brief, now the recitation of the Edmunds case, appears we are now looking at Rule 16(D). So that's what prompted my supplemental response, which I hope the court will accept and consider.

With respect to the application of each of these rules, I think starting with Rule 403, our brief put forth, I think, a substantial amount of information on why at this particular juncture the presentation of three experts plus the defendant would not amount to the needless presentation of cumulative evidence.

It's not simply evidence that's

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cumulative. It's not simply evidence that's similar or duplicative. It's whether we are talking about bringing in 25 people to say the light was green. We are not seeking to do that in this case.

And I have attempted to provide this court, given the absence of substantial case authority in Idaho, with some fairly point -- on-point decisions, including the one that was just decided three months ago in New Jersey, where this specific issue was addressed on whether or not it was appropriate just to limit the number of experts to come up with a number.

One of the things that opposing counsel did not explain to the court -- and perhaps he will in rebuttal, or his reply -- is how did they come up with two? What's the magic number with two?

And it's -- what I understand they are seeking is, it's my client plus one, so it's really one expert witness is what they are seeking to limit it to, and I'm not aware of any case authority that they have tried to provide this court, nor any case authority that I found for purposes of opposing this motion for the court,

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where it said that there was some magic number that was acceptable.

Now, the Edmunds decision, if we want to turn to Rule 16(D) for a minute, first of all we have to view that case for what it stands for. The issue in Edmunds dealt with the appropriateness of affidavits of two experts submitted by the plaintiff in opposition to summary judgment, whether or not they were timely, and whether or not those could be submitted.

The court ruled in that case one of them was, one of them wasn't. That resolved the issue on whether summary judgment was proper. In dicta, the court went on to address this issue, which was novel, of the court concluding, "Well, this is only a 403 issue. I don't have the ability to get into it, because it's not a discovery issue. It's an evidentiary issue."

And the appellate court said, "No, no. I want to you understand, I want the district court to understand they have this ability, that is, an inherent ability, and Rule 16(D) is the impetus for that ability."

Now what was the issue that was of concern in Edmunds? That Saint Al's had listed 53

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expert witnesses? Okay? Now, in that instance, we also didn't have a disclosure of all the opinions of each one of those expert witnesses.

In this case, we have not only the disclosure of who these witnesses are, but we have a complete 26(B)(4) disclosure that has been provided addressing the opinions as well as the foundation for the opinions.

Now, the concern has been raised that somehow these witnesses will be needlessly cumulative. What has to be kept in mind is, the fact that these doctors are prepared to come in and testify to this court that they don't believe Dr. Kerr violated the standard of practice applicable to him on a whole different panoply of issues, some of which will be similar, some of which will overlap, and some of which will not, the issue is not just the opinion that they don't believe there was a violation.

It's the why. Why do you have the opinion that he didn't violate the standard of practice? That's where there will be a broad variation in the opinions rendered by these experts.

Now, what also comes into play is the

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fact that the three standard of practice experts that the defense has disclosed, one of them is from out of state in Tennessee, where he has a family practice background.

One of them is Dr. Lundeby from Spokane. He has a general surgery background and also provides training to physicians who do cosmetic procedures like the one at issue, including training that he provided to Dr. Kerr.

The last one is Dr. Stiller, who is an Idaho physician. There is very few physicians in Idaho that do this procedure -- these types of procedures and consider themselves to be cosmetic surgical providers.

THE COURT: What's the basis for having a family physician from Tennessee?

MS. JONES: Because he is somebody that's not a plastic surgeon. The plaintiffs have proposed a plastic surgeon is the only one who can do this type of surgery, and that, therefore, since Dr. Kerr, who is an anesthesiologist, provided this type of surgery, that it was a violation for him to do so.

And one of the things that's unique about Dr. Lawrence, Greg Lawrence, is he has a

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cosmetic practice that's almost identical to the cosmetic practice that Dr. Kerr has. And the issue for him goes to, all right, tell us about your background, training, and experience, Dr. Lawrence, and why you believe you are qualified to render opinions and provide this type of care in your own practice when you don't have a surgical background.

That's what Dr. Sorensen says. He has a surgical background and, therefore, he is the one that dictates as a plastic surgeon.

THE COURT: Well, wouldn't your training physician from Spokane cover that area, too?

MS. JONES: But he has the surgical background. We want to be able to present to the jury someone who doesn't have a surgical background who does this type of surgery.

That's the difference. That's the reason for the three different doctors and the three different specialties that all are involved in the provision of cosmetic surgical care.

And so that's why we take the position, Your Honor -- No. 1, the argument is, well, we shouldn't have to go engage in discovery and take all these depositions.

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Well, it's not 53 like it was in Edmunds and, more importantly, in Edmunds, they didn't know the opinions of those experts because the court's scheduling order didn't require the production of that information.

In this instance, we have responded not only to the court's scheduling order but to interrogatories. Well, we have set forth those opinions, the basis for the opinions, and the balance of the information required by Rule 26(B)(4).

It is the plaintiffs who have decided on their own that they want to take it another step and take those depositions. They don't have to take those depositions. They are saying they want to take those depositions.

And point of fact, Your Honor, on the defense side, most of what I do is medical malpractice. Probably less than 50 per cent of the time do we take depositions of the opposing parties' experts, specifically because if there is a Rule 26(B)(4) disclosure requirement in place or an expert witness disclosure deadline, whether it's by interrogatory or the court's scheduling order, that rule governs.

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And we expect and believe that as litigants, we are entitled to rely on those disclosures in order to set forth the opinions. So to the extent the argument is made, "Well, we shouldn't have to spend the money, you don't have to spend that money. If you choose to do so, that's fine," but that shouldn't be used as a basis now, months before trial, to say that three standard of practice experts in a case involving a patient who died of suspicious circumstances where they have asked us for millions of dollars in damages -- this isn't a $50,000 car wreck case.

They want millions of dollars in damages -- that presenting three experts would be needlessly cumulative, or in violation of the court's discretion under Rule 16(D) to limit us.

We believe, and if the court has had a chance to look at a view of those decisions that I have provided attached to my affidavit of counsel, there is some very, I think, helpful discussion by way of the reported decisions that I would like the court to consider.

In particular, this recent decision from the New Jersey case that we cite, which is the McLean versus Liberty Health Systems decided

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in March of this year, the discussion on page 6 of that decision, "We hold now that the trial court erred in limiting experts to only one per side to each relevant field of medicine. In particular, on the critical issue of the deviation from accepted standards of medical care, the court's pretrial ruling was a mistake in exercise of its discretionary authority to control the presentation of evidence."

Now, the court goes on and talks about how important it is when the issue for which the limitation is sought goes to a very critical issue in the case.

Now, one of the points that was raised by opposing counsel during his argument, Your Honor, was that the defense would be parading witnesses, expert witnesses up, and that that wasn't appropriate.

However, the Idaho Legislature seems to disagree, because in passing Idaho Code Section 6-1012, they specifically require expert witnesses to put on the evidence.

So without the presentation of experts, not only can the plaintiff not make a prima facie case, but we can't put on a defense for our

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clients. So the Legislature has dictated -- and this is consistent in states across the nation -- that these medical malpractice cases do become a battle of experts, and that it is a question for the jury on the credibility of these experts, and whether or not they are experts that have adequate credentials, and are they professional witnesses?

Are these people that have valid opinions that should be relied upon by the individual members of the jury in forming their conclusions.

And so I can appreciate the argument of plaintiff's counsel trying to even the numbers out, but plaintiff's counsel had every opportunity to list more experts, had he or she wanted to. And certainly in cases where the liability is beyond question, I have seen many instances involving David Comstock, for example, where he's had no trouble getting multiple expert witnesses to support his opinion.

In addition here, they have three experts to cover the waterfront plus their damages people, so they have three on standard of practice and causation. We have a total of five experts on standard of practice and causation; three for

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standard of practice, two for causation.

The issues in this case, Your Honor, are very interesting. The jury is going to be fascinated by the medicine in this case. They are going to be fascinated because, obviously, we have a terrible outcome, where we have a patient that died.

But we have fascinating issues of medicine, insofar as we are trying to understand how the body responds to either urinary tract infections, to the seeding of bacteria allegedly from lack of sterility, which is the plaintiff's argument, to issues of how these procedures are performed.

There are a host of issues, in addition to which once the patient presented to the hospital and Moore Medical Center, there are all kinds of problems with her organs. Her various organ systems were shutting down in response to a septic shock condition.

All of this is going to be covered by various experts in various capacities, and it's critical to the defense position of presenting their case that we be allowed to present these witnesses that we have disclosed thus far.

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Your Honor, that case is on page 6. Most of what you see there, they talk about the bottom paragraph on page 6 of that decision.

"We see no reason that expert testimony should be treated wholly different from factual testimony with respect to vital opinions that go to the heart of the disputed issues in this case.

That's on point, Your Honor, with this issue I'm trying to address as to the limited number that we have here is not anywhere near on par with what was addressed in the Edmunds decision, and we think that it's distinguishable in that not only was that portion of the decision dicta, but in addition to that, the factual distinguishing issues in this case are substantial.

And while we recognize the court has that inherent authority from a discretionary standpoint, we don't believe the evidence justifies the court exercising that discretion to grant the plaintiff's motion at this time and would request that the court deny the motion.

THE COURT: Response?

MR. McKAY: Thank you, Your Honor. I know defense counsel says we don't have to take a

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deposition, and I certainly would not presume to tell an experienced practitioner like Mr. Jones how to practice or defend his cases, but we have chosen to take the depositions, and the rules allow us to take depositions of experts.

We want to hear what they have to say, we want to take their measure, and so we want to take the depositions of the defendant's trial experts.

And in Edmunds case, it wasn't 53 experts. What the defense made clear on appeal was the 53 witnesses that were disclosed included 50-some providers, treating providers, and that there were actually just three experts that they were intending to call at trial.

And I don't think it's necessary for the court to look beyond Idaho for authority which answers this question. And I'm looking at Edmunds now, which reads, "We have long recognized that courts have broad inherent power to control discovery," and they cite a Bailey case. And then --

THE COURT: Well, I certainly agree that that's true.

MR. McKAY: Right. And this includes the

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inherent authority to limit the number of expert witnesses during discovery. And then they cite a Hansen case out of Nevada finding no abuse of discretion where a district court disallowed three expert witnesses prior to trial.

THE COURT: Right.

MR. McKAY: And so two is a reasonable number. If something were to happen to one of their experts, they would have another expert. Or if they choose to call their client, the defendant Dr. Kerr, they can then call another expert.

The problem is, they are seeking to call the same -- they are seeking to call experts on the exact same issues, and they shouldn't be permitted to do that.

It runs afoul of Rule 403, it runs afoul of Rule 1(A), and it runs afoul of the discovery rule, Rule 16, and so for that reason, we have asked the court to limit their abilities to call cumulative experts.

And Edmunds was not dicta, as the defense argued in their supplemental motion. And we don't quarrel with them having filed a supplemental motion or brief. I know the rules don't address that. But we cited Edmunds in our

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reply brief because they argued that this is premature, that the court shouldn't -- the very question the court started with, you know, why should I consider this now?

Well, because Edmunds says you should, and that's what they argue, that you should not, and so we cite Edmunds for that reason.

So I think it's appropriate for the court to consider that decision, and in fairness, their supplemental brief, but it's not dicta. It says what it says, and it says it for a reason.

THE COURT: Well, and I agree entirely that the court has the power to limit the number of expert witnesses in any case after exercising that discretion with consideration of all the factors that the court should consider.

I don't think that -- the problem I see with the 403 early is that the overriding purpose of the rule is to make sure that all proceedings are just and that each side has a fair opportunity to fully develop their positions with the ultimate factfinders so that all cases should be justly and speedily tried.

And I have no problem in a situation where there is an abusive number of witnesses,

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expert witnesses laid out, where it's pretty clear from what you are seeing in the case that there is a lot of hide the ball going on, and there is a level of gamesmanship that's basically designed to put one party out of court because the expense is so enormous, and I don't think the court should countenance that.

I think that to allow parties to set an extraordinary number of experts and then to play hide the ball with which one is actually going to be the trial expert, I think the court should look carefully and deeply at those cases, and I think courts can and should limit experts in some instances.

The problem I have with this particular motion is I don't think, No. 1, that a court should get into just keeping parity between the numbers of witnesses on both sides.

I think that's too crude an approach, and I think it's so crude that it lends itself to unfairness, so I don't think it would be reasonable for a court to say, "Well, you can have one witness on one issue, and you can have one witness on the other side of that issue."

I don't think that in and of itself is

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a wise approach.

But I do think that anyone who has tried cases faces situations where testimony is quite cumulative, and the court has a responsibility to the jury to limit cumulative testimony, because it's simply not a good use of their time.

The level of hostility that juries frequently demonstrate when that's going on tends to be highly damaging to the case for whoever is doing it. And for many reasons, it's a good idea for a court to be responsive to objections that testimony is becoming cumulative, or it's misleading, or it's creating a situation where there is undue consumption of time.

I think courts have to be responsive to those objections and deal with it, and it's a matter of treating the jurors with respect and making sure that they are not so flooded with irrelevant or repetitive information that they lose sight of what's important in that case.

So I have no problem with the fact that the court has considerable power in that range. I do have -- it does seem to me, though, that this is not an unreasonable number of witnesses to

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address the particular issues presented by this case, and it seems to me that the more prudent approach might be to consider the approach on Idaho Rule of Civil Procedure 26(B)(4), Subsection C, which is to allow discovery to go forward -- because I don't think that having three additional witnesses is an enormous burden on discovery, and to apportion the fees somewhat differently for that reason.

For example, it does seem to be for the witness from Tennessee, it might be reasonable, and I would apportion the fees to that deposition differently, because geographically that's going to present some challenges, and there may be some logistical issues with that.

So what I would rather do in this particular case is allow you to go forward, to give you some additional time in case the setting of this motion has put you too close to your cutoff, to give you some additional time so you can arrange the depositions of these witnesses, and I may -- I'm inclined to require that the defense, at least initially, carry at least half the fees for the Tennessee witness, because it seems to me it's a family physician, a little bit

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farther out.

I think counsel's arguments are counterweight to the concern that maybe that's an unnecessary witness. It seems to me that counsel makes some good reasons why that could be a useful witness, but it does present logistical challenges, and it seems to me it might be more reasonable to deal with that by apportionment of fees differently.

MS. JONES: Your Honor, with respect to that issue -- I'm sure Mr. McKay was going to say this as well -- lead counsel for the plaintiffs is actually in Alabama.

THE COURT: Oh, well, then that should be way simpler. I still might require some apportionment of the fees for the farthest geographical witnesses, also in a different specialty. He is a family physician.

Seems to me it makes a great deal of sense to have that witness from Spokane because he has very relevant experience. You have a local witness. There are many reasons why that's a good choice.

And so it seems to me it's the family physician in Tennessee who's really the one who

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raises a question mark beside his name, and it seems to me that apportioning the fees and giving him some flexibility on your discovery deadline might be the better way to adjust for that if you need it, because I think to bar it altogether at a discovery stage is a big step.

I wouldn't have any problem when you are talking about loads of witnesses, because I have certainly seen the fall of Carthage approach to litigation, and I think courts have an absolute affirmative duty to make sure that doesn't go on. But this doesn't seem to me to be that unreasonable so that the court should completely bar it.

So I'm not going to limit the experts, but I will give you flexibility on your scheduling, and I will also require that there be an apportionment of the fees so that the entire cost of that deposition isn't placed on the plaintiffs.

MR. McKAY: I understand, Your Honor, and I just want to be -- make sure I understand.

THE COURT: Now, that's not precluding you from objecting at trial to testimony being cumulative, because it seems to me that there is a

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risk of that, and I don't think three extra witnesses because you already expect the doctor to cover -- stick up for himself -- I don't think three extra witnesses is one of those deals where you are worried that the jury is going to see that this side of the teeter totter has more people on it than this side.

But -- and that can be dealt with in an instruction, but I think it could be a real problem -- I certainly think it could be a potential problem, and I have no problem with considering the objection at that time.

MR. McKAY: Right. And I think this court should anticipate that we will be making that objection.

THE COURT: You bet. Right. I will anticipate that right now.

MR. McKAY: Right, right and, of course, the statute that Mr. Jones cites, Idaho Code 6-1012, I mean, it defines the standard of care, and it's not that, you know, the fact that these physicians come from different backgrounds. It doesn't permit them to then say the standard of care is different.

THE COURT: Still they have more hoops to

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get through.

MR. McKAY: Right, right. And so -- but the operative question is going to be whether they have the opinion that he violated or did not violate the standard of care applicable to him, and so if there is this parade of experts saying the exact same thing, we submit that it will be cumulative.

And I respect the court's ruling. I just want to be clear, we plan to, you know, front this issue at trial.

THE COURT: Oh, I expect you will.

MR. McKAY: Okay.

THE COURT: And, frankly, I'm never opposed to people pursuing that where it's warranted, because it's a dreadful use of jury time to be unduly cumulative, and I think it's not sensible for a trial judge to allow it.

MR. McKAY: I agree. Thank you, Your Honor.

MR. JONES: Your Honor, may I just make sure I clarify and understand the court's order?

THE COURT: Um-hmm.

MR. JONES: So the motion as it's been submitted is denied.

THE COURT: Correct.

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MR. JONES: The court will allow the parties to extend discovery deadlines, if necessary, to allow the expert depositions to occur, and then as relates to the deposition of Dr. Gregory Lawrence, who's in Tennessee, that as it relates to his fee for his deposition, for his deposition time, which is normally covered by the plaintiffs, that the defense will pay half of that cost.

THE COURT: Right.

MR. JONES: Okay.

THE COURT: I think that would be a reasonable approach at this point, and we will deal with the rest when it comes up. But, no, I would welcome objections to cumulative testimony, if there is cumulative testimony.

MR. JONES: Does the court require an order? I'm not -- I'm only bringing that up because we have lead counsel for the plaintiffs that are in Tennessee.

THE COURT: That might be a good idea.

MR. JONES: Okay.

THE COURT: Why don't you go ahead and run it by counsel first.

MR. McKAY: Thank you. And the court is saying that the deadline for taking depos

depositions, that applies to defendants' experts, because as I understand it --

THE COURT: Yes, exactly.

MR. McKAY: -- the defendant doesn't intend to depose our experts.

THE COURT: No. That's just the -- to give you a little bit more -- your side a little bit more flexibility in dealing with this so that you can get their information, because it seems to me it's fairer at this point --

MR. McKAY: Okay.

THE COURT: -- to allow both sides to explore the other side's experts and views --

MR. McKAY: Okay. Thank you, Your Honor.

THE COURT: -- than to cut it off.

MR. McKAY: All right. Thank you.

THE COURT: Okay. We will recess.

(Proceedings concluded.)

--oo0oo--

REPORTER'S CERTIFICATE

I, Susan G. Gambee, Official Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand August 16, 2013.

Susan G. Gambee, Official Court Reporter
CSR No. 18

CSC? Bail Tolla DRB 10-23-13

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM

ORIGINAL

COMES NOW Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rule 51(a)(1) of the Idaho Rules of Civil Procedure, as well as the Court's amended scheduling order of September 9, 2013, and submits Plaintiff's Proposed Jury Instructions and Proposed Special Verdict Form. In accordance with Idaho Rule of Civil Procedure 51(a)(1), an original copy of Plaintiff's proposed instructions is attached hereto at **Exhibit A**; a duplicate copy is attached hereto at **Exhibit B**. Plaintiff's Proposed Special Verdict Form is attached hereto at **Exhibit C**.

Plaintiff hereby requests that the Court give the following pattern jury instructions, some of which have been modified to comport with the underlying circumstances of this case:

- IDJI 1.07 (Facts Not in Dispute);
- IDJI 2.10.3 (Charging Elements of Medical Negligence);
- IDJI 2.20 (Definition of Negligence);
- IDJI 2.10.1 (Standard of Care: Health Care Professionals are Specialists);
- IDJI 2.30.2 (Proximate Cause – "Substantial Factor" Without "But For" Test);
- IDJI 6.40.1 (Agency Defined);
- IDJI 6.41.1 (Agency Admitted);
- IDJI 2.25 (Definition of Willful or Reckless);
- IDJI 9.05 (Damages for Wrongful Death);
- IDJI 9.13 (Present Cash Value); and
- IDJI 9.15 (Mortality Tables).

Additionally, Plaintiff requests that the jury be instructed on the presumption of general damages upon the death of a spouse, as set forth in *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 236, 141 P.3d 1099, 1105 (2006) (*quoting Garner v. Hobbs*, 69 Idaho 288, 294, 206 P.2d 539, 543 (1949)). Plaintiff also requests that the jury be instructed as to the differentiation between negligence and

informed consent claims, as set forth in *Foster v. Traul*, 141 Idaho 890, 894, 120 P.3d 278, 282 (2005) and *Shabinaw v. Brown*, 125 Idaho 705, 709, 874 P.2d 516, 520 (1994) (same).

Plaintiff further requests that the proposed special verdict form be employed during the trial of this matter.

Dated this 22nd day of October, 2013.

Respectfully submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2013, I served a true and correct copy of the foregoing ***Plaintiff's Proposed Jury Instructions and Special Verdict Form*** by delivering the same to the following by hand delivery:

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Terrence Jones
QUANE, JONES, McCOLL, PLLC
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Scott McKay

EXHIBIT A

PLAINTIFF'S INSTRUCTION NO. 1
(Facts Not in Dispute)

The following facts are not in dispute:

At all relevant times, Defendant Brian Calder Kerr, M.D. was a licensed medical doctor residing in Idaho and who practiced medicine in the City of Eagle, County of Ada, State of Idaho. At all relevant times, Dr. Kerr acted within the course and scope of his employment as an employee of Silk Touch Laser, LLP.

On July 21, 2010, Dr. Kerr performed liposuction and fat transfer procedures on Krystal Ballard. Krystal Ballard died on July 26, 2010. At the time of Krystal Ballard's death, Charles and Krystal Ballard were married and living together in Mountain Home, Idaho, while both were stationed at the Mountain Home Air Force Base in Mountain Home, Idaho.

IDJI 1.07 (Modified).

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 2
(Charging Elements of Medical Negligence – Dr. Brian Calder Kerr)

On his claim of medical negligence against Dr. Brian Calder Kerr for failure to meet the standard of care, the Plaintiff has the burden of proof on each of the following propositions:

1. That Dr. Kerr's failed to meet the applicable standard of care as defined in these instructions;

2. That the acts of Dr. Kerr, which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;

3. That the Plaintiff was injured by the death of Krystal Ballard; and

4. The elements of damage and the amount thereof.

IDJI 2.10.3 (Language modified to conform to the facts of the case; elements 2 and 3 reversed).

Given X
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 3
(Charging Elements of Medical Negligence – Silk Touch Laser, LLP)

On his claim of medical negligence against Silk Touch Laser, LLP for failure to meet the standard of care, the Plaintiff has the burden of proof on each of the following propositions:

1. That an agent of Silk Touch Laser, LLP, failed to meet the applicable standard of care as defined in these instructions;

2. That the acts of the agent, which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;

3. That the Plaintiff was injured by the death of Krystal Ballard; and

4. The elements of damage and the amount thereof.

IDJI 2.10.3 (Language modified to conform to the facts of the case; elements 2 and 3 reversed).

Given X
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 4
(Standard of Care: Health Care Professionals are Specialists)

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree and learning ordinarily possessed and exercised by other health care providers of the same or similar specialty practicing in the community in which such care is provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

Defendant, Dr. Brian Calder Kerr is a health care provider within the meaning of this instruction.

IDJI 2.10.1 (Modified to include the name of Defendant, Dr. Kerr).

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 5
(Negligence Separate from Informed Consent)

The issue of negligence is completely separate from that of informed consent. A physician can be liable for failure to obtain informed consent before treatment without being negligent in the actual treatment of the patient. The opposite is also true in that a physician can be negligent without failing to obtain before treatment.

Foster v. Traul, 141 Idaho 890, 894, 120 P.3d 278, 282 (2005) (informed consent vs. negligence); *Shabinaw v. Brown*, 125 Idaho 705, 709, 874 P.2d 516, 520 (1994) (same).

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 6
(Proximate Cause – "Substantial Factor" Without "But For" Test)

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, the loss, or the damage complained of. It is sufficient if it is a substantial factor in bringing about the injury, loss, or damage. It is not a proximate cause if the injury, loss, or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the death regardless of the extent to which each contributes to the injury.

IDJI 2.30.2.

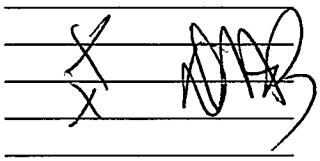
Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 7
(Agency Defined)

The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the scope of the agent's scope of authority.

IDJI 6.40.1.

Given
Refused
Modified
Covered
Other



PLAINTIFF'S INSTRUCTION NO. 8
(Agency Admitted – Dr. Kerr)

There is no dispute in this case that, at all relevant times, Dr. Kerr was acting within the scope of his authority as an agent of the principal, Silk Touch Laser, LLP, which was doing business as Silk Touch Med Spa, Silk Touch Med Spa And Laser Center, and Silk Touch Med Spa , Laser, and Lipo of Boise. Therefore, Silk Touch Laser, LLP is responsible for Dr. Kerr's conduct at all relevant times.

IDJI 6.41.1 (Modified).

Given _____
Refused _____
Modified X
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 9
(Agency Admitted – Briana Kerr)

There is no dispute in this case that, at all relevant times, Briana Kerr was acting within the scope of her authority as an agent of the principals, Dr. Brian Calder Kerr and Silk Touch Laser, LLP, which was doing business as Silk Touch Med Spa, Silk Touch Med Spa And Laser Center, and Silk Touch Med Spa, Laser, and Lipo of Boise. Therefore, Dr. Brian Calder Kerr and Silk Touch Laser, LLP are responsible for Briana Kerr's conduct at all relevant times.

IDJI 6.41.1 (Modified).

Given
Refused
Modified
Covered
Other

PLAINTIFF'S INSRUCTION NO. 10
(Definition of "Willful or Reckless")

Willful or reckless misconduct, when used in these instructions and when applied to the allegations in this case, means more than ordinary negligence. Willful or reckless misconduct means intentional or reckless actions, taken under circumstances where the actor knew or should have known not only that his actions created an unreasonable risk of harm to another, but also that his actions involved a high degree of probability that such harm would actually result.

IDJI 2.25 (Modified to reflect use of "willful or reckless" from I.C. § 6-1603 regarding the cap on non-economic losses); s*ee also* Comment (citing cases for the proposition that "[t]here appears to be no distinction between 'reckless' and 'willful and wanton' or 'willful or wanton.'"); *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 751; 274 P.3d 1256, 1266 (2012).

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 11
(Damages for Wrongful Death)

If the jury decides Charles Ballard is entitled to recover from the Defendants, the jury must determine the amount of money that will reasonably and fairly compensate Mr. Ballard for any damages proved to be proximately caused by Defendants' negligence.

The elements of damage the jury may consider are:

1. The reasonable cost of Krystal Ballard's funeral.

2. The reasonable value of necessary medical care and expenses incurred prior to Krystal Ballard's death.

3. The reasonable value to Charles Ballard of the loss of Krystal Ballard's services, training, comfort, conjugal relationship, and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of Mr. Ballard, Krystal Ballard's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.

4. Charles Ballard's loss of financial support from Krystal Ballard, and the present cash value of financial support Krystal Ballard would have provided to Charles Ballard in the future, but for Krystal Ballard's death, taking into account Mr. Ballard's life expectancy, Krystal Ballard's age and normal life expectancy, Krystal Ballard's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

IDJI 9.05 (Modified to include the names of Plaintiff, Charles Ballard, and the decedent, Krystal Ballard).

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 12
(General Damages Presumed Upon Death of Spouse)

General damages, such as loss of society and companionship, will be presumed upon death when the plaintiff in a wrongful death action is the spouse of the decedent.

Horner v. Sani-Top, Inc., 143 Idaho 230, 236, 141 P.3d 1099, 1105 (2006) (*quoting Garner v. Hobbs*, 69 Idaho 288, 294, 206 P.2d 539, 543 (1949)).

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 13
(Present Cash Value)

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

IDJI 9.13.

Given _____
Refused _____
Modified _____
Covered _____
Other _____

PLAINTIFF'S INSTRUCTION NO. 14
(Mortality Tables –Charles Ballard)

Charles Ballard is thirty-one years old. Under a standard table of mortality, the life expectancy of a thirty-one year-old male is 46.4 years. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy of Charles Ballard, including his occupation, health, habits, and other activities.

IDJI 9.15 (Modified to include information relevant to Charles Ballard); Elizabeth Arias, Ph.D., *United States Life Tables, 2008*, National Vital Statistics Reports, Vol. 61, No. 3, Sept. 24, 2012, at Table 2.

Given X
Refused
Modified X
Covered
Other

PLAINTIFF'S INSTRUCTION NO. 15
(Mortality Tables – Krystal Ballard)

Krystal Ballard was twenty-seven years old at the time of her death. Under a standard table of mortality, the life expectancy of a twenty-seven year-old female is 54.5 years. This figure is also not conclusive. It, too, is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy of the decedent, Krystal Ballard, including her occupation, health, habits, and other activities.

IDJI 9.15 (Modified to include information relevant to Krystal Ballard); Elizabeth Arias, Ph.D., *United States Life Tables, 2008*, National Vital Statistics Reports, Vol. 61, No. 3, Sept. 24, 2012, at Table 3.

Given
Refused
Modified
Covered
Other

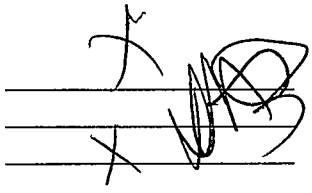


EXHIBIT B

INSTRUCTION NO. ____

The following facts are not in dispute:

At all relevant times, Defendant Brian Calder Kerr, M.D. was a licensed medical doctor residing in Idaho and who practiced medicine in the City of Eagle, County of Ada, State of Idaho. At all relevant times, Dr. Kerr acted within the course and scope of his employment as an employee of Silk Touch Laser, LLP.

On July 21, 2010, Dr. Kerr performed liposuction and fat transfer procedures on Krystal Ballard. Krystal Ballard died on July 26, 2010. At the time of Krystal Ballard's death, Charles and Krystal Ballard were married and living together in Mountain Home, Idaho, while both were stationed at the Mountain Home Air Force Base in Mountain Home, Idaho.

INSTRUCTION NO. _____

On his claim of medical negligence against Dr. Brian Calder Kerr for failure to meet the standard of care, the Plaintiff has the burden of proof on each of the following propositions:

1. That Dr. Kerr's failed to meet the applicable standard of care as defined in these instructions;

2. That the acts of Dr. Kerr, which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;

3. That the Plaintiff was injured by the death of Krystal Ballard; and

4. The elements of damage and the amount thereof.

INSTRUCTION NO. ____

On his claim of medical negligence against Silk Touch Laser, LLP for failure to meet the standard of care, the Plaintiff has the burden of proof on each of the following propositions:

1. That an agent of Silk Touch Laser, LLP, failed to meet the applicable standard of care as defined in these instructions;

2. That the acts of the agent, which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;

3. That the Plaintiff was injured by the death of Krystal Ballard; and

4. The elements of damage and the amount thereof.

IDJI 2.10.3 (Language modified to conform to the facts of the case; elements 2 and 3 reversed).

INSTRUCTION NO. ____

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree and learning ordinarily possessed and exercised by other health care providers of the same or similar specialty practicing in the community in which such care is provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

Defendant, Dr. Brian Calder Kerr is a health care provider within the meaning of this instruction.

INSTRUCTION NO. ____

The issue of negligence is completely separate from that of informed consent. A physician can be liable for failure to obtain informed consent before treatment without being negligent in the actual treatment of the patient. The opposite is also true in that a physician can be negligent without failing to obtain before treatment.

INSTRUCTION NO. ____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, the loss, or the damage complained of. It is sufficient if it is a substantial factor in bringing about the injury, loss, or damage. It is not a proximate cause if the injury, loss, or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the death regardless of the extent to which each contributes to the injury.

INSTRUCTION NO. ____

The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the scope of the agent's scope of authority.

INSTRUCTION NO. ____

There is no dispute in this case that, at all relevant times, Dr. Brian Calder Kerr was acting within the scope of his authority as an agent of the principal, Silk Touch Laser, LLP, which was doing business as Silk Touch Med Spa, Silk Touch Med Spa And Laser Center, and Silk Touch Med Spa, Laser, and Lipo of Boise. Therefore, Silk Touch Laser, LLP is responsible for Dr. Kerr's conduct at all relevant times.

INSTRUCTION NO. ____

There is no dispute in this case that, at all relevant times, Briana Kerr was acting within the scope of her authority as an agent of the principals, Dr. Brian Calder Kerr and Silk Touch Laser, LLP, which was doing business as Silk Touch Med Spa, Silk Touch Med Spa And Laser Center, and Silk Touch Med Spa, Laser, and Lipo of Boise. Therefore, Dr. Brian Calder Kerr and Silk Touch Laser, LLP are responsible for Briana Kerr's conduct at all relevant times.

INSTRUCTION NO. ____

Willful or reckless misconduct, when used in these instructions and when applied to the allegations in this case, means more than ordinary negligence. Willful or reckless misconduct means intentional or reckless actions, taken under circumstances where the actor knew or should have known not only that his actions created an unreasonable risk of harm to another, but also that his actions involved a high degree of probability that such harm would actually result.

INSTRUCTION NO. ____

If the jury decides Charles Ballard is entitled to recover from the Defendants, the jury must determine the amount of money that will reasonably and fairly compensate Mr. Ballard for any damages proved to be proximately caused by Defendants' negligence.

The elements of damage the jury may consider are:

1. The reasonable cost of Krystal Ballard's funeral.

2. The reasonable value of necessary medical care and expenses incurred prior to Krystal Ballard's death.

3. The reasonable value to Charles Ballard of the loss of Krystal Ballard's services, training, comfort, conjugal relationship, and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of Mr. Ballard, Krystal Ballard's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.

4. Charles Ballard's loss of financial support from Krystal Ballard, and the present cash value of financial support Krystal Ballard would have provided to Charles Ballard in the future, but for Krystal Ballard's death, taking into account Mr. Ballard's life expectancy, Krystal Ballard's age and normal life expectancy, Krystal Ballard's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

INSTRUCTION NO. ____

General damages, such as loss of society and companionship, will be presumed upon death when the plaintiff in a wrongful death action is the spouse of the decedent.

INSTRUCTION NO. ____

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

INSTRUCTION NO. ____

Charles Ballard is thirty-one years old. Under a standard table of mortality, the life expectancy of a thirty-one year-old male is 46.4 years. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy of Charles Ballard, including his occupation, health, habits, and other activities.

INSTRUCTION NO. ____

Krystal Ballard was twenty-seven years old at the time of her death. Under a standard table of mortality, the life expectancy of a twenty-seven year-old female is 54.5 years. This figure is also not conclusive. It, too, is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy of the decedent, Krystal Ballard, including her occupation, health, habits, and other activities.

EXHIBIT C

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **SPECIAL VERDICT FORM**

We, the jury, answer the questions submitted to us in the Special Verdict as follows:

QUESTION NO. 1: Did Brian Calder Kerr, M.D. breach the applicable standard of health care in his treatment of Krystal Ballard, and if so, was that breach a proximate cause of Krystal Ballard's death?

ANSWER: Yes [___] No [___]

QUESTION NO. 2: Did Silk Touch Laser, LLP breach the applicable standard of health care in its treatment of Krystal Ballard, and if so, was that breach a proximate cause of Krystal Ballard's death?

ANSWER: Yes [___] No [___]

If you answered "Yes" to Question No. 1 or Question No. 2, you should answer Question Nos. 3 through 5. If you answered "No" to Question No. 1 and Question No. 2, you should skip all remaining questions and sign the Special Verdict.

QUESTION NO. 3: Was the conduct of either or both of the Defendants "willful or reckless" as defined in the Court's instructions?

ANSWER: Yes [___] No [___]

QUESTION NO. 4: What is the total amount of economic damages sustained by Plaintiff, Charles Ballard?

ANSWER: $_____

QUESTION NO. 5: What is the total amount of non-economic damages sustained by Plaintiff, Charles Ballard?

ANSWER: $_____

Please sign the verdict form and notify the bailiff that you have finished your deliberations.

DATED: _____, 2013.

_____
Presiding Juror

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Bail
Tara
10/30/13
SW

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S RESPONSES TO DEFENDANTS' MOTIONS *IN LIMINE*

ORIGINAL

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Idaho Code § 9-102, Idaho Rule of Evidence 103(c), and the Court's Amended Scheduling Order of September 9, 2013, and responds to Defendants' Motions *in Limine* as follows. An Affidavit of Counsel, to which all exhibits referenced herein are attached, is filed contemporaneously with these responses.

1. DEFENDANTS' FIRST AND SECOND MOTIONS *IN LIMINE*[1] SHOULD BE DENIED BECAUSE PLAINTIFF SHOULD BE PERMITTED TO PUT ON EVIDENCE OF DR. O'NEIL'S COMPETENCE TO SERVE AS THE SOURCE OF ALL THREE DEFENSE STANDARD OF CARE EXPERTS' KNOWLEDGE OF THE APPLICABLE STANDARD OF CARE.

In Defendants' Memorandum of Law regarding the exclusion of malpractice and board of licensing matters, they reference *only* such evidence as pertaining to "Defendants" or their "experts." Their proposed order, however, broadens the scope of the proposed exclusion to include "defense witnesses" including specifically, "Dr. Kelly O'Neil." Dr. O'Neil is neither a Defendant here, nor is he a disclosed expert. He is, however, the sole source of information about the standard of care in Boise in 2010, upon which Defendants' experts relied to develop their opinions. Indeed, all three of Defendants' experts on the standard of care testified that they relied on Dr. O'Neil to tell them what the standard of care was in Boise, Idaho in 2010. (*See* **Exhibit A**, Lundeby Dep. 51:6-13; **Exhibit B**, Stiller Dep. 18:2-9; **Exhibit C**, Laurence Dep. 55:6 – 56:15).

Plaintiff must be permitted to explore the reliability of this central source, as it is a demonstrably unreliable one. During his medical career, Dr. O'Neil has been subject to numerous disciplinary proceedings. Specifically:

[1] Defendants move for an order *in limine* on six separate issues. (*See* Defs.' Mots. *in Limine*.) Defendants' memorandum of law, however, contains support for only three of those motions. (*See* Defs.' Mem. of Law.) These responses are organized in such a way as to account for all of Defendants' motions *in limine*.

- In 1998, Dr. O'Neil entered into a Stipulated Settlement and Disciplinary Order with the Medical Board of California, based on Dr. O'Neil's *admissions* that he committed "repeated acts of negligence" in the care and treatment of two separate patients. (**Exhibit D**, 1998 Agreement at 3.)

- Also in 1998, the Idaho State Board of Medicine adopted and incorporated the terms of the 1998 California Stipulated Settlement, for the purpose of reciprocal discipline. (**Exhibit E**, 1998 Idaho Order.)

- In 2004, Dr. O'Neil entered into a Stipulated Settlement and Disciplinary Order with the Medical Board of California, arising from allegations that, in 2000, he was grossly negligent and/or incompetent and/or committed repeated negligent acts in his care and treatment of two female patients who developed post-operative complications after being transferred to a hotel for a two day recovery stay pursuant to his arrangements. Both patients required emergency hospitalization. (**Exhibit F**, 2004 Agreement.)

- In 2005, the Medical Board of California issued a Public Reprimand following Dr. O'Neil's probation for the year 2000 infractions. (**Exhibit G**, Public Reprimand.)

- In 2007, Dr. O'Neil entered into another Stipulated Settlement and Disciplinary Order with the Medical Board of California based on his actions with respect to an elderly woman's elective cosmetic surgery and her resulting complications. (**Exhibit H**, 2007 Agreement.)

- In 2008, the Idaho State Board of Medicine issued a Stipulation and Order resolving Dr. O'Neil's application for an Idaho license to practice medicine and surgery. The Order stated the Board's concerns that Dr. O'Neil "had several malpractice cases" and that "the California State Board issued a disciplinary Order" against him. "In addition, Applicant incorrectly answered various questions on the application." The Board ultimately imposed a fine and issued Dr. O'Neil a restricted license to practice medicine. (**Exhibit I**, 2008 Order.)

- In 2009, the Medical Board of California formally adopted a Proposed Decision ordering that Dr. O'Neil be placed on probation for failing to accurately disclose his prior discipline in applications he submitted to Idaho and his discipline in the State of Idaho. (**Exhibit J**, 2009 Decision.)

The similarity of these infractions to the circumstances of Ms. Ballard's death, coupled with their numerosity, overwhelmingly compel a conclusion that they are relevant to whether Dr. O'Neil is a trustworthy source as to the standard of care. For this reason, and for all of those detailed

below, Defendants' motion must be denied.

a. Dr. O'Neil's Background is Relevant Under Idaho Rule of Evidence 401 *et seq.*, Idaho Rule of Evidence 608(b), and Idaho Courts' Application of Idaho Code § 6-1012.

Putting aside for the moment that Dr. O'Neil is *not* in fact their "expert," Defendants' claim, without explanation, that evidence of an expert's malpractice or licensing revocations is simply irrelevant. To the contrary, Dr. O'Neil's history of misconduct, which necessarily implicates his credibility and competency, is directly relevant to his knowledge of the applicable standard of care. Such evidence is thus admissible under Idaho Rule of Evidence 402. The fact that Dr. O'Neil's opinions form the basis of all three of the defense experts' knowledge of the applicable standard of care must outweigh any concern about unfair prejudice under Rule 403.

Furthermore, Dr. O'Neil's failure to provide truthful responses in his application for an Idaho license, which resulted in the imposition of a fine and a restricted license, brings his truthfulness within the scope of I.R.E. 608(b). Providing false information to the State Licensing Board is surely a "specific instanc[e] of conduct" that is "probative of [Dr. O'Neil's] truthfulness or untruthfulness" and thus appropriate for inquiry on cross-examination. *See* I.R.E. 608(b); *see also* discussion, *infra*, at pages 13-14.

Underscoring the relevance analysis, this dispute arises from the rule set forth in Idaho Code Chapter 10, Medical Malpractice, requiring that an expert's testimony as to the applicable standard of care be judged "in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any." Idaho Code § 6-1012. In *Dunlap ex rel. Dunlap v. Garner,* 127 Idaho 599 (1995), the Court found that it is sufficient for an out-of-state expert to gain the requisite familiarity with the standards of the community by conferring with "local *authorized*

personnel" and to state that the standard did not deviate from the national standard. 127 Idaho at 606 (emphasis added).

This allowance of consultation with local experts comes with close restrictions. The out-of-state expert witness must not only show that he or she is familiar with the local standard of care for the relevant timeframe and specialty, but the expert must also state *how* he or she became familiar with that standard of care. *Suhadolnik v. Pressman,* 151 Idaho 110, 116 (2011) (citing *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160 (2002)). Furthermore, there "must be evidence showing that the Idaho physician knows the applicable standard of care." *Ramos v. Dixon*, 144 Idaho 32, 37 (2007) (district court properly sustained objection to testimony of out-of-state doctor who did not know nature of Idaho doctor's experience or when it occurred); *see also Dulaney*, 137 Idaho at 166 (out-of-state expert's opinion lacked foundation when there was no showing that Boise physician would know proper standard of care). Failure to strictly adhere to these requirements has resulted in a finding of inadmissibility as to the out-of-state expert's testimony. *See Rhodehouse v. Stutts*, 125 Idaho 208, 213 (1994) (Because there was no indication that expert inquired of a local doctor, and plaintiff did not state that the local standard of care was the same as the national standard, there was not sufficient foundation in expert's affidavit to show that expert had actual knowledge of the applicable community standard.); *Arregui v. Gallegos-Main,* 153 Idaho 801 (2012) (The Court is not required to believe out-of-state expert's "conclusory statements that the local unidentified chiropractor was familiar with the standard of care.")

The close scrutiny of an out-of-state expert's consultation with a local "expert" compels the conclusion that the local expert's qualifications and competency are admissible to probe the foundation for the out-of-state expert's testimony. Plaintiff must, therefore, be permitted to

explore this highly relevant information, which forms the basis of not one, but three experts' opinions. The jury must be permitted to determine for itself whether Dr. O'Neil indeed "knows the standard of care." *Ramos,* 144 Idaho at 37.

b. Dr. O'Neil is *the* Source on Which Defendants' Experts Relied, Making His Numerous Suspensions and Disciplinary Proceedings Admissible Under I.R.E. 705.

Defendants argue only that Plaintiff be prohibited from mentioning whether "any Defendant or defense expert has been sued for malpractice or has been the subject of any prior administrative licensing matter." (Defs' Mem. of Law 4-7.) Of course, had Dr. O'Neil actually been proposed as an expert, Plaintiff would have had an opportunity to file a challenge to his qualifications. Defendants should not be able to hide behind the fact that Dr. O'Neil is not testifying when his qualifications are, in fact, at issue due to the permitted reliance on local physicians by out-of-state experts.

The test for determining whether a witness is qualified as an expert is "not rigid" and can be found in Idaho Rule of Evidence 702. *West v. Sonke*, 132 Idaho 133, 138-39 (1998). A qualified expert is one who possesses "knowledge, skill, experience, training, or education." I.R.E. 702. The proponent of the testimony must lay foundational evidence showing that the individual is qualified as an expert on the topic of his or her testimony. *State v. Burrow*, 142 Idaho 328, 330 (Ct. App. 2005) (citing *State v. Winn*, 121 Idaho 850, 855 (1992)). It is axiomatic that Defendants also be prepared to lay foundational evidence that the *expert behind the expert* be qualified on the topic of his or her testimony -- and that Plaintiff be permitted to explore that evidence through cross-examination.

The Idaho Rules of Evidence further provide that "[t]he expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts

or data, provided that the court may require otherwise, and provided further that, if requested pursuant to the rules of discovery the underlying facts or data were disclosed. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.*" I.R.E. 705. This is all Plaintiff wishes to explore here. Dr. O'Neil *is* the "underlying fact" of Defendants' experts' testimony, and his competence and credibility should be required to be "disclosed."

c. Alternatively, the Court Should Treat Dr. O'Neil as an Absent Expert and Permit Examination of his Conduct as Evidence of his Competence, Credibility and Motivations.

Even if Dr. O'Neil was a testifying expert, Plaintiff would be able to examine his past misconduct as evidence of his credibility and competence. Idaho law is clear that expert credibility is a question for the jury. *Lunders v. Estate of Snyder*, 131 Idaho 689, 698 (1998). Based on this reasoning, the Court in *Raybeck v. Danbury Orthopedic Assocs.*, 805 A.2d 130 (Conn. App. 2002) upheld the trial court's admission of evidence that an expert witness treated his own wife's wrist fracture with a cast where he asserted the standard of care was to use pins, noting "it is well settled that the credibility of an expert witness is a matter to be determined by the trier of fact." 805 A.2d at 142. Here, Dr. O'Neil is essentially an absent expert, and his credibility should be explored for the jury's benefit.

Consistent with the *Raybeck* decision, courts across the country have routinely permitted cross-examination of an expert witness regarding prior acts, professional license suspension, or malpractice suits in order to probe the witness's competency, credibility, and motivations. *See Navarro de Cosme v. Hosp.l Pavia,* 922 F.2d 926, 932-33 (1st Cir. 1991) (permitting cross-examination of an expert witness concerning the suspension of his license as a notary for failure to submit required reports, as such inquiry was determined to go to the expert's "standing in the community"); *Ferris v. Tenn. Log Homes, Inc.*, 4:06CV-35-M, 2010 U.S. Dist. LEXIS 26272, *8

(W.D. Ky. Mar. 19, 2010) ("plaintiffs' cross-examination regarding [expert's] prior disciplinary proceedings would be probative of [his] competency"; *Wischmeyer v. Schanz,* 536 N.W.2d 760, 766 (Mich. 1995) (evidence of prior failed surgeries performed by expert witness admissible to show witness's lack of competency); *Hock v. New York Life Ins. Co.*, 876 P.2d 1242, 1257 (Colo. 1994) (permitting cross-examination of defense medical expert about a civil suit in which the expert was a party because the questions were relevant to the expert's credibility and bias); *Hayes v. Manchester Mem. Hosp.*, 38 Conn. App. 471, 661 A.2d 123, 126 (Conn. App. 1995) (trial court erred in precluding plaintiff from questioning defense expert about a medical malpractice suit brought against him; an "important function of cross-examination is the exposure of a witness's motivation in testifying"); *Underhill v. Stephenson*, 756 S.W.2d 459, 461 (Ky. 1988) (trial court erred in prohibiting plaintiff from cross-examining defendant's medical expert regarding unrelated medical malpractice case pending against him to show expert's bias); *Irish v. Gimbel*, 691 A.2d 664, 674 (Me. 1997) (trial court erred in barring cross-examination of defense expert with respect to a settlement, without an admission of liability, of a prior medical malpractice case; the excluded evidence was relevant to a "crucial issue, bias or interest, and if admitted, could have had a controlling influence on a material aspect of the case, i.e., whether defendant deviated from the applicable standard of care"); *Willoughby v. Wilkins,* 310 S.E.2d 90, 97-98 (N.C. App. 1983) (trial judge erred in barring cross-examination of defendants' medical expert regarding prior medical malpractice claim; "evidence of prior medical negligence claims brought against the expert witness is admissible to show bias or interest on the part of the expert.")

This line of cases illustrates that the cases cited by Defendants in fact represent a minority and narrow view regarding the exclusion of evidence about an expert's malpractice or

license revocations. Notably, three of the cases cited in Defendants' brief excluded such evidence because of its extremely prejudicial effect on the expert personally. *See Noble v. Lansche*, 735 S.W.2d 63, 64 (Mo. Ct. App. 1987) (evidence that expert physician voluntarily surrendered license to dispense narcotics would have revealed that the expert suffered from personal addiction); *King v. Byrd*, 716 So.2d 831, 835 (Fla. 4th DCA 1998) (involved "highly extraordinary cross-examination with matters involving the doctor's handling of female patients"; court's main concern was that counsel conducting examination had formerly represented the expert in the disciplinary proceeding); *Morrow v. Stivers*, 836 S.W.2d 424, 429 (Ky. Ct. App. 1992) (subject testimony about relinquished license would have involved implication that expert had sex with patients and contracted hepatitis, making it unduly prejudicial). Here, no such salacious details are present, and Dr. O'Neil will not even be on the witness stand to potentially face embarrassment about his disciplinary actions.

In another of Defendants' cases, *Heschelman v. Lombardi*, 454 N.W.2d 603 (Mich. Ct. App. 1990), the court forbade "[m]ere unproven accusations of malpractice stated in a complaint" because such accusations "cannot be used as a basis for attacking a physician's knowledge or credibility." Here, the accusations go far beyond mere allegations, and were instead the basis of formal disciplinary proceedings and orders.

For all of these reasons, Plaintiff must be permitted to explore Dr. O'Neil's qualifications, competence, and ability to serve as the sole source of Defendants' evidence regarding the applicable standard of care. Therefore, Defendants' first and second motions *in limine* should be denied.

2. DEFENDANTS' THIRD MOTION *IN LIMINE* SHOULD BE DENIED.

a. Defendants' Retained Expert, Dr. Gregory Laurence, has been Charged with Federal Felony Offenses Related to his Medical Practice and the Criminal Charges and Evidence Underlying the Criminal Charges are Admissible.

Defendants have retained Dr. Gregory Laurence of Tennessee and intend to call him as an expert witness on the standard of care. To buttress his testimony and credibility, Defendants seek to admit in evidence at trial Dr. Laurence's curriculum vitae, which expounds on his accomplishments, honors, awards, and purported standing in the medical community, and have him also testify to these various matters before the jury. (*See* **Exhibit N**, Dr. Laurence's CV and Defs.' Ans. to Pl.'s Third Set of Discovery 42, July 22, 2013 ("Dr. Laurence will testify regarding his various publications, honors and university appointments as set forth in his curriculum vitae . . . . He will also discuss his various society memberships . . . .").)

In presenting the foregoing picture of Dr. Laurence to the jury, Defendants seek to conceal that Dr. Laurence has been charged with serious federal criminal felony offenses related to his medical practice. These charges, which Defendants euphemistically characterize as "tax evasion," arise out of his medical practice and call into question his character for truthfulness, his fitness to practice, and his qualifications to render an opinion concerning the standard by which Idaho physicians practice. Additionally, Dr. Laurence faces the very real possibility of prolonged imprisonment, imposition of substantial fines, other financial penalties, and the loss of his license to practice medicine. These significant financial consequences bear on Dr. Laurence's potential motive to serve and testify as a retained expert in this case.

b. Dr. Laurence Is Charged with Federal Criminal Felonies Arising Out of his Medical Practice.

On May 8, 2013, a federal grand jury in the District of Colorado returned a six count indictment charging Dr. Laurence and two co-defendants with various felony offenses ranging

from Conspiracy to Defraud the United States to Corruptly Endeavoring to Obstruct or Impede the Due Administration of the Internal Revenue Laws. (*See* **Exhibit K**, Indictment, *United States v. Eva Melissa Sugar, Jerry Lynn Roberts and Gregory Nathan Laurence*, U.S. District Court, District of Colorado, Criminal Case No. 13-cr-00-193 JLK.) Dr. Laurence was charged with this latter crime, as well as Obstruction of Justice. (*Id.* at Counts 5 and 6.) After being charged, Dr. Laurence was ordered to surrender his passport and remains free on a personal recognizance bond pending trial. (*See* **Exhibit L**, Docket No. 19 (Order Setting Conditions of Release as to Gregory Nathan Laurence on PR Bond); **Exhibit M**, Docket No. 22 (Receipt of Surrendered Passport as to Gregory Nathan Laurence).)

Dr. Laurence's medical practice is central to these felony charges. The Indictment at the outset of Count 5 alleges: "At all times relevant to the Indictment, Gregory LAURENCE was a resident of Tennessee. LAURENCE was a doctor who operated two businesses, Germantown Aesthetics, LP ("GA") and Germantown Family Care & Obstetrics, LP ('GFCO')." (Indictment at ¶ 14.) The Indictment proceeds to describe a sophisticated scheme whereby Dr. Laurence, over a nearly seven year period, set up various fictitious trust accounts and entities using his wife to facilitate their operation and caused GFCO to issue checks payable to the fictitious trust entities, which payments he falsely claimed were legitimate deductions or costs of goods sold, thereby reducing GFCO's taxable income. (*Id.* at 12-13.) The Indictment further describes how Dr. Laurence disguised the existence of his cosmetic medical practice, Germantown Aesthetics ("GA"), and how Dr. Laurence did not file federal income tax returns for this entity for a five-year period. (*Id.* at 13-14.) It is further charged that Dr. Laurence used another fictitious trust entity to pay himself and his employees at GA and GFCO as "independent contractors" to avoid paying taxes, that he failed to issue those employees required tax forms, and that he improperly

used funds from a so-called Banking Unincorporated Business Organization ("BUBO") account to pay for business expenses, school tuition for his children, cars, and credit card payments. (*Id.* at 14.)

In Count 6 of the Indictment charging Dr. Laurence with Obstruction of Justice, it is alleged that, after he was contacted by federal agents and served grand jury subpoenas related to GA and GFCO, Dr. Laurence signed and sent to these federal agents, through the US Attorney's office, certain documents including "Public Servant's Questionnaires" requesting the investigating agents provide personal information about themselves and "Disclosure Statements" advising the agents that their failure to respond would result in "Commercial Dishonor," financial penalties, and "being a participant in fraud." (*Id.* at 15.) Dr. Laurence also is alleged to have sent another document styled "Notice of Default and Dishonor of a Lawful Public Servant Questionnaire" to one or more federal agents. (*Id.*) It also is alleged Dr. Laurence failed to comply with Orders issued by the federal district court in Colorado compelling production of the subpoenaed records. (*Id.*)

Germantown Aesthetics or "GA," as used throughout the Indictment, is the entity used by Dr. Laurence to practice cosmetic medicine. Defendants note as much in their expert disclosure by which they list: "Gregory Laurence, M.D., Germantown Aesthetics." (*See* **Exhibit N,** Defs.' Ans. to Pl.'s Third Set of Discovery 37, July 22, 2013.) Dr. Laurence describes himself in his CV as the Medical Director of Germantown Aesthetics. Similarly, Defendants' disclosure touts Dr. Laurence's obstetrical experience, and his CV likewise lists his long association with GFCO, the other medical practice described throughout the criminal Indictment.

c. Evidence of Criminal Conduct by Dr. Laurence in the Operation of His Medical Practice is Admissible, as are the Pending Charges.

Trial courts in Idaho are afforded broad discretion in cross-examination and in allowing

parties considerable latitude in impeaching an opponent's retained experts. The scope of cross examination rests in the court's discretion. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct.App.1985). In *Harmston v. Agro-W., Inc.*, 111 Idaho 814, 820, 727 P.2d 1242, 1248 (Ct. App. 1986), the Idaho Court of Appeals rejected appellants' claim that the cross-examination of their expert was "disrespectful and abusive." In upholding the latitude afforded counsel on cross-examination of a retained expert, the Court noted that "[o]ur system of dispute resolution permits and encourages challenges to the credentials and opinions of an opponent's experts. The limiting and control of cross-examination is within the province of the trial judge." (*Id.* (*citing State v. Cypher*, 92 Idaho 159, 438 P.2d 904 (1968) and *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951)).

Defendants argue that the pending criminal charges against Dr. Laurence are not relevant, or, if relevant, outweighed by the risk of unfair prejudice, and not admissible under IRE 608(b) and 609 because Dr. Laurence has not yet been convicted. Defendants, however, read IRE 608(b) too narrowly. Moreover, an Idaho Court of Appeals opinion issued just last week discusses the distinction between IRE 609 and 608(b) and the broad discretion of a trial judge to permit evidence of a witness's character for truthfulness under I.R.E. 608(b) -- which discretion should be exercised in this case to permit evidence of Dr. Laurence's untruthful character.

In *State v. Bergerud*, the trial court precluded the defendant from impeaching a witness on cross-examination based upon that witness's conviction of a misdemeanor for lying to police. ---- Idaho ---, --- P.3d ----, 2013 WL 5716821 (Ct. App., October 22, 2013). The trial court held that such impeachment was not permissible under IRE 608 and 609, which the trial court held applies only to felonies. *Id.* at *4. On appeal, the Idaho Court of Appeals held that the trial court erred in not separately considering the admissibility of such evidence under IRE 608(b) and the

discretion of a trial judge to permit such evidence. *Id.* at *5-6.

Specifically, IRE 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. *They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning (1) the character of the witness for truthfulness or untruthfulness*, or (2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(Emphasis added).

As noted by the Court in *Bergerud,* although Rule 608(b) prohibits extrinsic evidence of a witness's past conduct to attack credibility, it expressly allows cross-examination of the witness concerning instances of the witness's conduct if it is probative of the witness's truthfulness. (*Bergerud* at *5 (*citing State v. Araiza,* 124 Idaho 82, 90, 856 P.2d 872, 880 (1993); *State v. Guinn*, 114 Idaho 30, 38, 752 P.2d 632, 640 (Ct.App.1988)). With respect to whether the misdemeanor conduct was relevant, the Court further held that "[m]aking a false statement to a law enforcement officer, like perjury, is an act that is intimately connected to credibility. In fact, it is itself a crime." *Id.* at *6 (*citing* I.C. § 18–705). "It not only indicates a willingness to be dishonest when it serves one's own interest, but a willingness to defy authority and break the law when doing so." *Id.*

The described conduct of Dr. Laurence in attempting to obstruct and impede the due administration of the laws of the United State and in obstructing justice is far more egregious than the witness conduct at issue in *Bergerud.* Similarly, the described conduct "indicates a willingness to be dishonest when it serves one's own interest" and it also shows "a willingness to defy authority and break the law when doing so." Of even more significance is the fact that this conduct related directly to the medical practice upon which Dr. Laurence relies to testify in this

case. That he operated and concealed his medical practice through sham trusts, ginned up business deductions, sent federal agents phony forms accusing them of fraud, and sought to extract financial penalties is relevant and bears on his character for truthfulness.

Furthermore, the described conduct demonstrates Dr. Laurence's contempt and disdain for the legal process in refusing to comply with the Colorado district court's order that he produce grand jury materials directed at his medical and cosmetic medicine practice. If Dr. Laurence refused to honor multiple court orders specifically directed at him and his medical practice, how can it be assumed that he complied with the legal requirements associated with rendering testimony in this case, including the requirement that he adequately familiarize himself with the local standard of care? This demonstrates a willingness to "defy authority and break the law," particularly when he believes it serves his own self-interest. Accordingly, Plaintiff should be permitted to inquire of Dr. Laurence regarding this contempt of the legal process, which is probative of his character for truthfulness under IRE 608(b).

Additionally, Dr. Laurence's character for untruthfulness exists through his medical licensure, including in Idaho where he is now licensed. Dr. Laurence testified at his deposition that he had not informed any of the three states where he is licensed, including Idaho, of his pending felony charges. (Laurence Dep. 168:17 – 169:9, Oct. 2, 2013.) In Idaho, a physician is required to report not only a felony conviction but the "commission of any act constituting a felony." Idaho Code § 54-1814(1) (licensed physician required to report conviction of a felony); Idaho Code § 54-1814(21) (licensed physician required to report commission of an act constituting a felony or crime of moral turpitude). In addition, a physician in Idaho, upon renewal of his medical license, is required to report, among other matters, whether they have been "charged with or convicted of a felony...." (*See* **Exhibit O**, State of Idaho, Board of

Medicine, Physician and Surgeon License Renewal Application Form.)

Notwithstanding the foregoing, Dr. Laurence chose to not report his Indictment and underlying actions to the appropriate regulatory boards, including the Idaho Board of Medicine. This is probative of his character for truthfulness and thus admissible.

As set forth above, the foregoing evidence is, in fact, relevant, and contrary to Defendants' IRE 403 argument, this relevance is not outweighed by any prejudice Defendants attribute to the subject evidence. Dr. Laurence is a redundant defense expert on the issue of standard of care. Defendants have identified two other physicians they intend to call to address the standard of care, one from Idaho and one from Spokane who also maintains a practice in Coeur d'Alene. The notion that they will be unfairly prejudiced if the court denies their limine motion and/or if they choose to not call a third standard of care expert from Tennessee is unavailing. Moreover, it is Defendants who did not adequately vet this expert and were surprised when they learned for the first time of Dr. Laurence's indictment at deposition. Plaintiff should neither be faulted, nor disadvantaged, simply because Defendants were unaware of Dr. Laurence's criminal issues or because Dr. Laurence chose to conceal the subject information from defense counsel. In fact, it is Mr. Ballard who will be unfairly prejudiced unless he is allowed a full and fair opportunity to cross-examine this expert -- a process our systems "permits and encourages." *Harmston,* 111 Idaho at 820.

d. The Significant Consequences and Penalties Facing Dr. Laurence Are Admissible.

If convicted, Dr. Laurence faces three years imprisonment and a $250,000.00 fine on Count 5 and ten years imprisonment and a $250,000.00 fine on Count 6. (*See* **Exhibit P**, Information Sheet accompanying Indictment (Docket No. 2-3), *United States v. Gregory Nathan Laurence*, U.S. District Court, District of Colorado, Criminal Case No. 13-cr-00-193 JLK.) In

addition, Dr. Laurence faces additional significant financial consequences as a result of a prolonged history of failing to file required income tax returns and an alleged attempt to minimize his tax obligations through phony deductions and sham trusts.

More significantly, Dr. Laurence is likely to lose his medical license upon a felony conviction. *See* Tennessee Code Annotated 63-6-214(a)(10) (grounds for medical license revocation include conviction of a felony). As noted above, Dr. Laurence is also licensed in Idaho where, like other states, a felony conviction is grounds for revocation of a physician's medical license. Idaho Code § 54-1814(1). Committing acts constituting a felony is likewise grounds for discipline and a physician is required to report such conduct. Idaho Code § 54-1814(21).

The foregoing, looming consequences and termination of his income stream provide Dr. Laurence with a strong motive to work with Defendants and express a favorable opinion that will result in additional, lucrative expert witness work. As such, these charges and myriad of consequences are probative and admissible to show motive. IRE 404(b) (evidence of other crimes, wrongs or acts may be admissible to show motive). In addition, such evidence is admissible to show bias on the part of Dr. Laurence. *State v. Araiza*, 124 Idaho 82, 91, 856 P.2d 872, 881 (1993) ("[T]he bias, prejudice, or motive of a witness to lie concerning issues presented in a trial is always material and relevant to effective cross-examination."); *see also Cosgrove By and Through Winfree v. Merrell Dow Pharmaceuticals, Inc.,* 117 Idaho 470, 476-77, 788 P.2d 1293, 1299-1300 (1989) (discussing impeachment of expert by evidence of amount earned testifying in court).

Accordingly, Defendants' motion *in limine* concerning Dr. Laurence should be denied.

3. DEFENDANTS' FOURTH MOTION *IN LIMINE* SHOULD BE DENIED TO THE DEGREE DR. KERR OPENS THE DOOR FOR CROSS-EXAMINATION ON THE ISSUE OF LIABILITY INSURANCE.

Plaintiff generally agrees that "evidence of Defendants' [liability] insurance is not relevant to this case . . . ." (Defs' Mem. of Law 2.) Plaintiff also acknowledges the command of I.R.E. 411. However, Plaintiff should not be precluded from eliciting testimony and/or from introducing evidence demonstrating the existence of Defendants' liability insurance coverage if Defendants open the door on this issue.

Should Dr. Kerr or any other defense witness suggest that no such insurance coverage exists, or alternatively, that financial hardship would follow an adverse jury verdict and judgment in this matter, Plaintiff should be allowed the opportunity to cross-examine on this topic not only to challenge the truthfulness of the witness, but also to neutralize the unfairly prejudicial effect Defendants themselves recognize by their motion.

4. DEFENDANTS' FIFTH MOTION *IN LIMINE* SHOULD BE DENIED TO THE DEGREE IT SEEKS TO PRECLUDE PROPER CROSS-EXAMINATION OF DEFENDANTS' EXPERT WITNESSES.

By their fifth motion *in limine*, Defendants seek to preclude any mention of "the fact that any of Defendants or any of the defense witnesses have ever been previously represented by [defense counsel]." (Defs' Mots. *in Limine* 3.) Because this motion seeks to preclude Plaintiff from conducting proper cross-examination of Defendants' expert witnesses on the issue of bias, Defendants' motion should be denied accordingly.

As an initial matter, "[t]he scope of cross examination rests in the [C]ourt's discretion." *Cosgrove By & Through Winfree v. Merrell Dow Pharm., Inc.*, 117 Idaho 470, 477, 788 P.2d 1293, 1300 (1989) (*citing Quick v. Crane,* 111 Idaho 759, 727 P.2d 1187 (1986); *State v.*

Wheeler, 109 Idaho 795, 711 P.2d 741 (Ct.App.1985)). And "[a]lthough the Idaho Rules of Evidence do not specifically address impeachment of witnesses by evidence of bias, the right to do so is unquestionable." D. Craig Lewis, *Idaho Trial Handbook* 342 (2d ed. 2005).

The reason for this is simple: "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all* evidence which might bear on the accuracy and truth of a witness' testimony." *State v. Thumm*, 153 Idaho 533, 540, 285 P.3d 348, 355 (Ct. App. 2012) (*quoting U.S. v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 469 (1984)) (emphasis added). For this reason, because "[i]t would not be unusual for a medical expert to have a bias in favor of the party who is paying his expert witness fee . . . cross-examination as to who is paying for the expert is almost always allowed when the expert is testifying." *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 925, 712 P.2d 621, 626 (1985).

As the above-referenced tenants of Idaho law demonstrate, the jury is entitled to hear all evidence as it pertains to the possible bias of Defendants' expert witnesses. If parties are typically allowed to cross-examine expert witnesses as to who is paying them for their testimony, Plaintiff should be allowed the opportunity to cross-examine Defendants' experts as to the full breadth and scope of their relationships with the parties or attorneys who retain them. Surely, if the compensation received by the defense experts in this case is probative as to possible bias, so too must evidence demonstrating a relationship extending beyond the instant litigation.

Therefore, to the extent Defendants' motion seeks to preclude Plaintiff from conducting a proper and thorough cross-examination of Defendants' expert witnesses, their motion must be denied.

5. DEFENDANTS' SIXTH MOTION *IN LIMINE* REGARDING OBAMACARE IS UNOPPOSED.

By their sixth motion *in limine*, Defendants seek to preclude evidence pertaining to "the effect of this, or any medical malpractice case on the cost of health care or the implementation of the [A]ffordable [C]are [Act] also known as "Obamacare." Because Plaintiff has no intention of offering evidence or argument pertaining to either of these issues, Plaintiff does not oppose the instant motion.

Dated this 29th day of October, 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2013, I served a true and correct copy of the foregoing **Plaintiff's Responses to Defendants' Motions *in Limine*** by delivering the same to the following via hand delivery:

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S PRETRIAL EXCHANGE OF INFORMATION CERTIFICATION

ORIGINAL

Counsel for the parties were ordered to hold a conference for the exchange of information and discussion of matters specified by Rule 16 of the Idaho Rules of Civil Procedure and thereafter certify that such a conference has taken place, provide a list of persons disclosed as possible witnesses and provide a descriptive list of all exhibits proposed to be offered in evidence reciting which exhibits will be received without objection and those to which no objection will be made on grounds other than irrelevancy or immateriality. Court's Amended Notice of Trial Setting and Order Governing Further Proceedings dated September 9, 2013. Pursuant to this Order and for purposes of exchanging pretrial information, the undersigned counsel for plaintiff met with defense counsel at defense counsel's office on October 22, 2013, with other plaintiff's counsel participating telephonically from his office in West Virginia. In accordance with the foregoing Order, Plaintiff further discloses the following

1. Possible Witnesses for Plaintiff

The parties agreed that Plaintiff and Defendants would separately provide a list of possible trial witnesses. The following is Plaintiff's list of possible trial witnesses.

a. Charles Ballard, Plaintiff
b. Brian Kerr, M.D., Defendant
c. Susan Kerr
d. Donna Berg
e. Briana Kerr Dumas
f. Karl Olson, M.D.
g. Matthew Campbell, M.D.
h. Edward Jong Wook Kim, M.D.
i. Howard Schaff, M.D.
j. Erwin Sonnenberg
k. Glen Groben, M.D.
l. Dean Sorensen, M.D.
m. Keith Armitage, M.D.
n. George Nichols, M.D.
o. Rachel Towler, Vincent Brooks, Antwan Carlisle, Terri Jones, Jeremy Williams, and/or Michael Auel – USAF personnel
p. Leroy Chatman
q. Ray Roman

r. Jonelle Cadiz Buchanan (by previously taken Video Deposition)
s. Cornelius Hofman, GEC Group
t. Custodians of records or records certifications for: Elmore Medical Center, Elmore Ambulance, Life Flight, Saint Alphonsus Regional Medical Center, United States Air Force, Tillman Funeral Home, Rost Funeral Home

2. Exhibits to be Received In Evidence Without Objection

During the aforementioned conference, the parties agreed that the following exhibits would be received in evidence without objection. Where appropriate, bates numbering from discovery are included for these exhibits for the convenience of the parties:

a. Complete medical record and chart for Silk Touch and Dr. Kerr including
    i. Contemporaneous photos of Krystal Ballard
b. Complete medical record and chart for Elmore Ambulance
c. Complete medical record and chart for Elmore Medical Center
d. Complete medical record and chart for Saint Alphonsus Regional Medical Center
e. Complete Medical Record and Chart Ada County Coroner and Dr. Groben including
    i. Autopsy Report, Photos, and
    ii. Tissue Slides
f. Funeral Placards for Krystal Ballard (BALLARD000148, 149)
g. Photos of Charles & Krystal Ballard (BALLARD000136, 137, 145)
h. Photo of Krystal Ballard (Tubing) (BALLARD000146)
i. Marriage License for Charles and Krystal Ballard (BALLARD000001)
j. Death Certificate for Krystal Ballard (USAF00143)
k. Curricula Vitae for Plaintiff and Defendants' Retained Expert Witnesses
l. CT Scans of Krystal Ballard
m. Cell Phone Records of Dr. Brian Kerr and Susan Kerr
n. Autopsy tissue slides (recuts) and photos of tissue slides (used by plaintiff and defendants' experts)

3. Additional Proposed Plaintiff's Exhibits to Which No Agreement was Reached

During the aforementioned conference, defense counsel stated an objection to the following proposed exhibits from Plaintiff "on all grounds."

a. Tillman Funeral Home Invoice
b. Artistic Flowers Invoice
c. Memorial Program for Krystal Ballard Memorial
d. Bill from St. Alphonsus Regional Medical Center
e. Bill from Elmore Medical Center
f. Bill from Rost Funeral Home

g. Bill from Lifeflight
h. Memorandum - Extension of Enlistment for PCS for Krystal Ballard (Elmendorf AFB)
i. USAF Records Certification for Krystal Ballard - USAF
j. Line of Duty Determination for Krystal Ballard - USAF
k. Awards & Decorations Info for Krystal Ballard - USAF
l. Air Force Achievement Medal for Krystal Ballard - USAF
m. Air Force Commendation Medal for Krystal Ballard - USAF
n. DJMS LES for Krystal Ballard - USAF
o. DJMS LES for Charles Ballard – USAF
p. Letter from Major Thomas Brown to SSgt Charles Ballard from 2010 following death of Krystal Ballard
q. Statement of Service
r. Enlisted Performance Review 2010 for Krystal Ballard - USAF
s. Enlisted Performance Review 2009 for Krystal Ballard - USAF
t. Enlisted Performance Review 2008 for Krystal Ballard - USAF
u. Enlisted Performance Review 2007 for Krystal Ballard - USAF
v. Reenlistment Eligibility Annex for Krystal Ballard - USAF
w. Air University CCAF Transcript for Krystal Ballard - USAF
x. BSU Transcript for Krystal Ballard - USAF
y. Embry-Riddle Transcript for Krystal Ballard - USAF
z. University of Maryland Transcript for Krystal Ballard – USAF
aa. Charts and tables generated and/or employed by plaintiff's economic expert Cornelius Hofman, GEC Group (*see Assessment of Economic Loss Krystal Melissa Ballard* dated May 8, 2013) (some tables/charts offered for demonstrative or illustrative purposes)

4. Demonstrative and Illustrative Aids and Exhibits

Plaintiffs anticipate offering certain exhibits as demonstrative or illustrative aids. These include relevant anatomical drawings as well as tables/charts of plaintiff's economic expert referenced above and produced in discovery.

5. Offer of Mediation

Plaintiff offered to engage in mediation with Defendants. Defense counsel declined.

Dated this 29th day of October, 2013.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2013, I served a true and correct copy of the foregoing **Plaintiff's Pretrial Exchange of Information Certification** by delivering the same to the following via hand delivery:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
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101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S RESPONSES TO DEFENDANTS' MOTIONS *IN LIMINE*

AFFIDAVIT OF SCOTT MCKAY

STATE OF IDAHO,
COUNTY OF ADA, TO WIT:

I, Scott McKay, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am one of the attorneys representing Plaintiff in this litigation.

2. On this date, Plaintiff filed his Responses to Defendants' Motions *in Limine*.

3. True and accurate copies of the exhibits referenced within Plaintiff's Responses to Defendants' Motions *in Limine* are attached hereto as follows.

4. A true and accurate copy of excerpts of the deposition of John P. Lundeby, M.D., dated July 26, 2013, is attached hereto at **Exhibit A**.

5. A true and accurate copy of excerpts of the deposition of Geoffrey Stiller, M.D., dated July 19, 2013, is attached hereto at **Exhibit B**.

6. A true and accurate copy of excerpts of the deposition of Gregory Laurence, M.D., dated October 2, 2013, is attached hereto at **Exhibit C**.

7. A true and accurate copy of the 1998 Medical Board of California Stipulated Settlement and Disciplinary Order pertaining to Kelly J. O'Neil, M.D. is attached hereto at **Exhibit D**.

8. A true and accurate copy of the 1998 Idaho State Board of Medicine Order for Reciprocal Discipline pertaining to Kelly J. O'Neil, M.D. is attached hereto at **Exhibit E**.

9. A true and accurate copy of the 2004 Medical Board of California Stipulated Settlement and Disciplinary Order pertaining to Kelly J. O'Neil, M.D. is attached hereto at **Exhibit F**.

10. A true and accurate copy of the Medical Board of California's Public Reprimand of Kelly J. O'Neil, M.D., dated July 15, 2005, is attached hereto at **Exhibit G**.

11. A true and accurate copy of the 2007 Medical Board of California Stipulated Settlement and Disciplinary Order pertaining to Kelly J. O'Neil, M.D. is attached hereto at **Exhibit H**.

12. A true and accurate copy of the 2008 Idaho State Board of Medicine Stipulation and Order pertaining to Kelly J. O'Neil, M.D. is attached hereto at **Exhibit I.**

13. A true and accurate copy of the 2009 Decision of the Medical Board of California pertaining to Kelly J. O'Neil, M.D. is attached hereto at **Exhibit J**.

14. A true and accurate copy of the Indictment, dated May 8, 2013, returned against Dr. Gregory Laurence in the U.S. District Court, District of Colorado, is attached hereto at **Exhibit K**.

15. A true and accurate copy of the Order Setting Conditions of Release as to Gregory Nathan Laurence on PR Bond, issued by the U.S. District Court, District of Colorado, is attached hereto at **Exhibit L**.

16. A true and accurate copy of the Receipt of Surrendered Passport as to Gregory Nathan Laurence is attached hereto at **Exhibit M**.

17. A true and accurate copy of excerpts of Defendants' Answers and Responses to Plaintiff's Third Set of Discovery, dated July 22, 2013, including a true and accurate copy of the Curriculum Vitae of Gregory Laurence, M.D., is attached hereto at **Exhibit N**.

18. A true and accurate copy of the Idaho State Board of Medicine Physician and Surgeon License Renewal Application Form is attached hereto at **Exhibit O**.

19. A true and accurate copy of the Information Sheet Accompanying the Indictment returned against Dr. Gregory Laurence in the U.S. District Court, District of Colorado, is attached hereto at **Exhibit P**.

And further affiant saith not.

Scott McKay

STATE OF IDAHO;
COUNTY OF ADA, to-wit:

Taken, subscribed and sworn to before me this 29 day of October, 2013.

My Commission expires: 11-8-13

Debi C. Presher

Notary

DEBI C. PRESHER NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2013, I served a true and correct copy of the foregoing ***Affidavit of Counsel in Support of Plaintiff's Responses to Defendants' Motions in Limine*** by delivering the same to the following via hand delivery:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
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101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

EXHIBIT A

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, MD; Silk Touch Laser, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, DBA SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA and LASER CENTER, and/or SILK TOUCH MED SPA, LASER and LIPO of BOISE, Defendants.	)	NO. CV OC 1204792

VIDEOTAPED DEPOSITION OF JOHN P. LUNDEBY, MD

Deposition upon oral examination of John P. Lundeby, MD, taken at the request of the Plaintiff, before Danelle Bungen, CSR, and Notary Public, at the law offices of Ramsden & Lyons, 700 Northwest Boulevard, Coeur d'Alene, Idaho, commencing at 8:30 a.m. on July 26, 2013, pursuant to the Idaho Rules of Civil Procedure.

recommend the Vaser equipment be sterilized?

MR. JONES: Object to form. You used the word "instructions."

Q. (BY MR. HADDAD) Go ahead.

A. I have not.

Q. Okay. Is it fair to say that in the questions that you formulated in your mind to ask and discuss with Dr. O'Neil, that you utilized the answers given by Dr. O'Neil during this 45-minute conversation with him to gain an understanding as to what the standard of practice was in Boise in 2010?

A. To the extent that you can without practicing there at the time, yes.

Q. Okay. Now, have you done, other than that one AMA page on staff privileges, have you done any other research, medical research, associated with this case?

A. Aside from my previous training and experience, I have looked over a few things, I've looked at some of the surgical prep solution recommendations, looked at some of my textbooks about techniques for fat transfer and -- I think that's mainly it.

Q. All right. Now, surgical prep solution recommendations, resources you might have looked at, what resources did you use?

A. I don't recall the specific resources, I didn't print

EXHIBIT B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD; Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	))))Case No. CV OC 1204792))))))))))

DEPOSITION OF GEOFFREY STILLER, M.D.
TAKEN ON BEHALF OF THE PLAINTIFF
AT MOSCOW, IDAHO
JULY 19, 2013, AT 9:09 A.M.

Reported by Nancy K. Towler, CSR, Notary Public

BY MR. HADDAD:

Q. Have you spoken with any attorneys or any of the doctors in order to understand the standard of practice as it might exist in Boise?

A. I have.

Q. Okay. So when I say, have you spoken to anybody else, that would include that doctor. Is there -- who did you speak with?

A. Dr. O'Neil.

Q. Okay. What's Dr. O'Neil's first name?

A. I do not know. It would be in my e-mails.

Q. Okay. Other than Dr. O'Neil, have you spoken with any other physician in order to gain an understanding as to the standard of practice for cosmetic physicians practicing in Boise?

A. I have not.

Q. Now, when you worked for Mountain -- first of all, when is the first occasion that you would have performed cosmetic procedures?

A. Other than residency where we did -- as a general surgeon, we were in plastic surgeries, and we did cosmetic procedures in residency.

Q. Okay.

A. Otherwise, I started my fellowship in 2007, I believe. And that's when I started.

EXHIBIT C

Deposition of
Gregory N. Laurence, MD

Date: October 2, 2013

Case: Ballard v. Kerr, Silk Touch

Case No: CV OC 1204792

Reporter: Andrea J. Wecker, CSR#716, RMR, CRR, CBC

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Internet: www.associatedreportinginc.com

Pages: 1 to 172

vibration or energy or heat to the tissue to help process the fat or help with the contouring before you actually do the removal of the fat.

I've used just about everything that's out there.

Q. Okay. In terms of a cosmetic practice, have you spoken to any physicians that practiced in Boise, Idaho, in 2010 which is the time period that Krystal Ballard had a procedure about the standard of practice in Boise in 2010?

A. Yes, I did.

Q. Who did you speak with?

A. Dr. Kelly O'Neil who practiced in this area around that time.

Q. And I think within the materials that are either part of Exhibit 1 or Exhibit 2, whichever is the stack of your file --

A. Yeah, it's 2.

Q. -- there's reference to Dr. O'Neil.

And you remember speaking with him?

A. That's correct.

Q. All right. Is your discussions with Dr. O'Neil --

Well, first of all, did you rely upon Dr. O'Neil exclusively in order to understand what

the standard of practice was in Boise, Idaho, in 2010 in performing similar procedures and services to patients in --

MR. JONES: Object to form; vague.

THE WITNESS: There were no other physicians that I spoke to who practiced in Boise, Idaho, around that time to whom I spoke or communicated in any way.

Q. (BY MR. HADDAD) Okay. And Dr. O'Neil is a physician that you were referred to by Mr. Quane to contact in order to avail yourself of what the standard of practice was in Boise in in 2010, correct?

A. Yeah, correct. I did not know him before.

Q. Okay. Basically, counsel for Dr. Kerr told you, "You need to learn what the standard of practice was in 2010, and here's the guy that can tell you what the standard of practice is," and they named Dr. O'Neil, correct?

MR. JONES: Object to form.

THE WITNESS: So, yes, I spoke to him after they referred me to him as someone who was reliable.

Q. (BY MR. HADDAD) Okay. Did you know

EXHIBIT D

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

MEDICAL BOARD OF CALIFORNIA
I do hereby certify that this document is true and correct copy of the original on file in this office.
Nancy C. Garcia 10-14-98
SIGNED DATE
Assistant Custodian of Rec
TITLE

In the Matter of the Accusation Against:	)	
KELLY J. O'NEIL, M.D. Certificate No. A-36888	)	No. 09-93-26899
Respondent.	)	

OCT 19 1998

DECISION

The attached Stipulation in Settlement and Decision is hereby adopted by the Division of Medical Quality as its Decision in the above-entitled matter.

This Decision shall become effective on September 14, 1998

IT IS SO ORDERED August 14, 1998.

By: Carole Hurvitz
CAROLE HURVITZ, M.D.
Chair - Panel B
Division of Medical Quality

OCT 19 1998

DANIEL E. LUNGREN, Attorney General
of the State of California
STEVEN H. ZEIGEN,
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Department of Justice
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Post Office Box 85266
San Diego, California 92186-5266
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Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: KELLY J. O'NEIL, M.D. 42400 Via Nortada Temecula, CA 92590 Physician's and Surgeon's Certificate No. A36888 Respondent.	NO. 09-93-26899 L-9612025 STIPULATION IN SETTLEMENT AND DECISION

Complainant, Ron Joseph, Executive Director of the Medical Board of California, by and through his attorney, Daniel E. Lungren, Attorney General of the State of California, by Steven H. Zeigen, Deputy Attorney General, and Kelly J. O'Neil, M.D. ("respondent"), by and through his attorney Richard K. Turner, Esq., hereby stipulate as follows:

1. Complainant Ron Joseph is the Executive Director of the Medical Board of California (Board) and is represented by Daniel E. Lungren, Attorney General of the State of California by Steven H. Zeigen, Deputy Attorney General.

2. Respondent, Kelly J. O'Neil, M.D. is represented by Richard K. Turner, Esq., who has met with respondent and advised him concerning the effects of this stipulation. Respondent has carefully read and fully understands the contents of this stipulation.

3. The Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs ("Division") acquired jurisdiction over respondent by reason of the following:

A. Respondent was duly served with a copy of the Accusation and First Supplemental Accusation, Statement to Respondent, Request for Discovery, Form Notice of Defense and copies of Government Code sections 11507.5, 11507.6 and 11507.7 as required by section 11503 and 11505, and respondent timely filed a Notice of Defense within the time allowed by section 11506 of the code.

B. Respondent has received and read the Accusation and First Supplemental Accusation, which is presently on file as Case No. 09-93-26899, OAH No. L-9612025, before the Division. Respondent understands the nature of the charges alleged in the Accusation and the First Supplemental Accusation, and that the charges and allegations constitute cause for imposing discipline upon respondent's license to practice medicine which was issued by the Medical Board of California ("Board").

4. Respondent and his counsel are aware of each of respondent's rights, including the right to a hearing on the charges and allegations, the right to confront and cross-examine

witnesses who would testify against respondent, the right to present evidence in his favor and call witnesses on his behalf, or to testify, his right to contest the charges and allegations, and other rights which are accorded to respondent pursuant to the California Administrative Procedure Act (Gov. Code, § 11500 et seq.), including the right to seek reconsideration, review by the superior court, and appellate review.

5. Respondent freely and voluntarily waives each and every one of the rights set forth in paragraph 4.

6. Respondent understands that in signing this stipulation rather than contesting the Accusation and the First Supplemental Accusation, he is enabling the Division to issue the following order without further process.

7. For the purpose of resolving Accusation and First Supplemental Accusation No. 09-93-26899, respondent admits he committed repeated acts of negligence in the care and treatment of patient J.G., as alleged in paragraph 5 of the Accusation, and repeated acts of negligence in the care and treatment of patient V.F. as alleged in paragraph 15 of the First Supplemental Accusation, which are attached as exhibits hereto. Respondent hereby gives up his right to contest that cause for discipline exists based on these charges. The remaining allegations in the Accusation and First Supplemental Accusation are dismissed.

Complainant shall not file any case against respondent which did not arise from facts occurring subsequent to the date this agreement was signed by the respective parties.

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8. The admissions made by respondent herein are for purposes of this proceeding, for any other disciplinary proceedings by the Division, and for any petition for reinstatement, reduction of penalty, or application for relicensure, and shall have no force or effect in any other case or proceeding.

9. It is understood by respondent that, in deciding whether to adopt this stipulation, the Division may receive oral and written communications from its staff and the Attorney General's office. Communications pursuant to this paragraph shall not disqualify the Division or other persons from future participation in this or any other matter affecting respondent. In the event this settlement is not adopted by the Division, the stipulation will not become effective and may not be used for any purpose, except for this paragraph, which shall remain in effect.

10. Based upon the foregoing, it is stipulated and agreed that the Division may issue the following as its decision in this case.

ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. A36888 issued to Kelly J. O'Neil, M.D., is revoked.

Respondent may enroll in the Physician Assessment and Clinical Evaluation (PACE) program at the University of California at San Diego, School of Medicine (UCSD). The subject matter of the program shall pertain to patient assessment, plastic surgery and anesthesia, or any subject matter determined appropriate by the program administrator following assessment of

respondent. The exact number of hours and specific content of the program shall be determined by the PACE program. The effective date of this order shall be no sooner than the date upon which the PACE program first offers respondent a position in the program.

Respondent, while in attendance at the PACE program at UCSD medical facilities, may practice medicine for the limited purpose of participating in the PACE program. For all other purposes, respondent's medical license is revoked and he may not resume the practice of medicine until and unless he is notified in writing by the Division that he meets the conditions set forth in accord with this paragraph.

If Respondent successfully completes the PACE program, and all examinations required by the PACE program pertaining to the program's contents, the Division shall timely notify Respondent.

Upon written notification to respondent that he has successfully completed the PACE program, the revocation previously issued shall be stayed and respondent shall be placed on probation for five (5) years on the terms and conditions set forth below. Within 15 days after the effective date of this decision, respondent shall provide the Division, or its designee, proof of service that respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent or where respondent is employed to practice medicine and on the Chief Executive Officer at every insurance carrier

where malpractice insurance coverage is extended to respondent.

1. EDUCATION COURSE

Within 90 days from the effective date of this decision, and on an annual basis thereafter, respondent shall submit to the Division or its designee for its prior approval an educational program or course to be designated by the Division, which shall not be less than 40 hours per year, for each year of probation. This program shall be in addition to the Continuing Medical Education requirements for re-licensure. Following the completion of each course, the Division or the course provider may administer an examination to test respondent's knowledge of the course. Respondent shall provide proof of attendance for 65 hours of continuing medical education of which 40 hours were in satisfaction of this condition and were approved in advance by the Division or its designee.

2. MONITORING

Within 30 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval a plan of practice in which respondent's practice shall be monitored by another physician who shall provide periodic reports to the Division or its designee.

If the monitor resigns or is no longer available, respondent shall, within 15 days, move to have a new monitor appointed, through nomination by respondent and approval by the Division or its designee.

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3. RESTRICTION OF PRACTICE

During probation, respondent agrees not to use general anesthesia in his accredited surgery center. Respondent further agrees that during probation he shall comply with the requirements of the Accreditation Association for Ambulatory Health Care (AAAHC) concerning the staffing of his surgery center.

During probation, respondent agrees to limit the amount of aspirate withdrawn during any one liposuction procedure to 5,000 ccs or less.

During probation, respondent agrees not to remove more than 3,000 ccs of aspirate during any liposuction which is done as part of multiple cosmetic procedures in one sitting.

4. OBEY ALL LAWS

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California, and remain in full compliance with any court ordered criminal probation, payments and other orders.

5. QUARTERLY REPORTS

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation.

6. PROBATION SURVEILLANCE PROGRAM COMPLIANCE

Respondent shall comply with the Division's probation surveillance program. Respondent shall, at all times, keep the Division informed of his addresses of business and residence

which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record.

Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) days.

7. INTERVIEW WITH THE DIVISION, ITS DESIGNEE OR ITS DESIGNATED PHYSICIAN(S)

Respondent shall appear in person for interviews with the Division, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

8. TOLLING FOR OUT-OF-STATE PRACTICE, RESIDENCE OR IN-STATE NON-PRACTICE

In the event respondent should leave California to reside or to practice outside the State or for any reason should respondent stop practicing medicine in California, respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty (30) days in which respondent is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the Division or its designee shall be considered as time spent in the practice of medicine. Periods of temporary or permanent residence or practice outside California or of non-practice within California,

as defined in this condition, will not apply to the reduction of the probationary period.

9. COMPLETION OF PROBATION

Upon successful completion of probation, respondent's certificate shall be fully restored.

10. VIOLATION OF PROBATION

If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

11. COST RECOVERY

The respondent is hereby ordered to reimburse the Division the amount of $5,000.00 for its investigation and prosecution costs. Respondent shall pay the entire amount within the five year period of probation in amounts to be agreed upon between respondent and the Division. Failure to reimburse the Division's cost of its investigation and prosecution shall constitute a violation of the probation order, unless the Division agrees in writing to another payment plan because of financial hardship. The filing of bankruptcy by the respondent shall not relieve the respondent of his responsibility to reimburse the Division for its investigative and prosecution costs.

12. PROBATION MONITORING COSTS

Respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Division at the beginning of each calendar year. Failure to pay such costs shall constitute a violation of probation.

13. LICENSE SURRENDER

Following the effective date of this decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may voluntarily tender his certificate to the Division. The Division reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, respondent will no longer be subject to terms and conditions of probation.

We concur in the stipulation and order.

DATED: 6-27-98

DANIEL E. LUNGREN, Attorney General
of the State of California

Steven H. Zeigen
Deputy Attorney General
Attorneys for Complainant

DATED: 6.11.98

Richard K. Turner, Esq.
Attorney for Respondent

I have carefully read and fully understand the stipulation and order set forth above. I have discussed the terms and conditions set forth in the stipulation and order with my attorney, Richard K. Turner, Esq. I understand that in signing this stipulation I am waiving my right to a hearing on the charges set forth in the Accusation and First Supplemental Accusation on file in this matter. I further understand that in signing this stipulation the Division may enter the foregoing order placing certain requirements, restrictions and limitations on my right to practice medicine in the State of California.

DATED: 6/22, 1998.

Kelly J. O'Neil, M.D.
Respondent

SHZ:pll
O'Neil.stp 03573160-SD95AD0910

EXHIBIT E

ORIGINAL

Jean R. Uranga
URANGA & URANGA
714 North 5th Street
P.O. Box 1678
Boise, Idaho 83701
Telephone: (208) 342-8931
Facsimile: (208) 384-5686

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF

THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:	
KELLY J. O'NEIL, M.D., License No. M-6612,	Case No. 98-083
Respondent.	ORDER FOR RECIPROCAL DISCIPLINE

The Board of Professional Discipline of the Idaho State Board of Medicine, hereinafter referred to as the Board, reviewed the Stipulation in Settlement and Decision executed by and between Respondent on June 22, 1998, his attorney, Richard K. Turner, on June 11, 1998, and Steven H. Zeigen, Deputy Attorney General, on behalf of the Medical Board of California, on June 27, 1998, and the Decision adopting the Stipulation in Settlement and Decision executed by Carole Hurvitz, M.D., Chair - Panel B, of the Division of Medical Quality, Medical Board of California, Department of Consumer Affairs, on August 14, 1998, in Case No. 09-93-26899. The Board also took official notice of the fact that Kelly J. O'Neil, M.D., holds an active Idaho license to practice medicine and surgery, License No. M-6612, issued November 8, 1994. Based upon the foregoing,

ORIGINAL

IT IS HEREBY ORDERED That, pursuant to Idaho Code §54-1806A(6)(i), for the purpose of reciprocal discipline, the Board adopts and incorporates by reference the terms and conditions of the Stipulation in Settlement and Decision entered in Case No. 09-93-26899, a copy of which is attached hereto and incorporated herein as though fully set forth, and Respondent is ordered to comply with said terms and conditions.

IT IS FURTHER ORDERED That, pursuant to Idaho Code §54-1806A(6)(i), the Respondent, Kelly J. O'Neil, M.D., shall have thirty (30) days within which to file with the Board an appropriate motion and notice to appear and show cause why reciprocal discipline should not be adopted and ordered.

DATED This 2 day of November, 1998.

BOARD OF PROFESSIONAL DISCIPLINE

Jane Bennett-Munro

JANE BENNETT-MUNRO, M.D.
Chair

EXHIBIT F

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
Kelly J. O'Neil, M.D.	)	File No. D1-1993-26899
Physician's and Surgeon's Certificate No. A 36888	)	
Respondent	)	

DECISION

The attached **Stipulated Settlement & Disciplinary Order** is hereby adopted as the Decision and Order of the Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on September 10, 2004

IT IS SO ORDERED August 11, 2004.

MEDICAL BOARD OF CALIFORNIA

By: _____

Ronald L. Moy, M.D.,
Chair
Panel B
Division of Medical Quality

BILL LOCKYER, Attorney General
of the State of California
HEIDI R. WEISBAUM, State Bar No. 101489
Deputy Attorney General
California Department of Justice
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Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: KELLY JAMES O'NEIL, M.D. 40971 Winchester Road Temecula, CA 92591 Physician's and Surgeon's Certificate No. A36888 Respondent.	Case No. 09-1993-26899 19-2000-112061 **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceedings that the following matters are true:

PARTIES

1. Complainant, the Executive Director of the Medical Board of California ("Board"), brought this action solely in his official capacity and is represented in this matter by Bill Lockyer, Attorney General of the State of California, by Heidi R. Weisbaum, Deputy Attorney General.

2. Respondent Kelly James O'Neil, M..D. (respondent) is represented in this proceeding by Albert J. Garcia, Attorney at Law, 1995 University Avenue, Suite 265, Berkeley, California 94704.

///

3. On or about June 24, 1981, the Board issued Physician's and Surgeon's Certificate No. A36888 to respondent Kelly James O'Neil, M.D. The certificate was in full force and effect at all times relevant to the charges brought in the First Amended Accusation No.19-2000-112061, is currently in full force and effect, and will expire on January 31, 2005, unless renewed.

JURISDICTION

4. On January 4, 2002, complainant Ron Joseph, in his then official capacity as the Executive Director of the Board, filed Accusation No. 19-2000-112061 against respondent. A First Amended Accusation was subsequently filed on October 16, 2002. (A copy of First Amended Accusation No. 19-2000-112061 is attached as Exhibit A and incorporated herein.) The Accusation and First Amended accusation, together with all other statutorily required documents, were properly served on respondent who timely filed a Notice of Defense.

ADVISEMENT AND WAIVERS

5. Respondent has carefully read and fully understands the charges and allegations contained in First Amended Accusation No. 19-2000-112061, and has fully reviewed and discussed the charges and allegations with his attorney, Albert J. Garcia.

6. Respondent has carefully read and fully understands the contents, force and effect of this Stipulated Settlement and Disciplinary Order, and has fully reviewed and discussed the same with his attorney, Albert J. Garcia.

7. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in First Amended Accusation No. 19-2000-112061, the right to be represented by counsel at his own expense, the right to confront and cross-examine the witnesses against him, the right to present evidence and to testify on his own behalf, the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents, the right to reconsideration and court review of an adverse decision, and all other rights accorded by the California Administrative Procedure Act and other applicable laws, having been fully advised of them by his attorney, Albert J. Garcia.

///

8. Respondent, having the benefit of counsel, hereby voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

CULPABILITY

9. Respondent admits that if the allegations in First Amended Accusation No. 19-2000-112061 were proved they would constitute grounds for discipline of his license.

10. Respondent agrees that his Physician's and Surgeon's Certificate No. A36888, is subject to discipline. Respondent further agrees to be bound by the Board's imposition of discipline as set forth in the Disciplinary Order below.

RESERVATION

11. The admissions made by Respondent herein are only for the purposes of this proceeding, or any other proceedings in which the Medical Board or other professional licensing agency is involved, and shall not be admissible in any other criminal or civil proceeding.

CONTINGENCY

12. The parties agree that this Stipulated Settlement and Disciplinary Order, shall be submitted to the Division for its consideration in this matter and, further, that the Division shall have a reasonable period of time in which to consider and act on this Stipulated Settlement and Disciplinary Order after receiving it.

13. The parties agree that this Stipulated Settlement and Disciplinary Order shall be null and void and not binding on the parties unless approved and adopted by the Division, except for this paragraph, which shall remain in full force and effect. Respondent fully understands and agrees that in deciding whether to approve and adopt this Stipulated Settlement and Disciplinary Order the Division may receive oral and written communications from its staff and/or the Attorney General's Office. Communications pursuant to this paragraph shall not disqualify the Division, any member thereof, and/or any other person from future participation in this or any other matter affecting or involving respondent. In the event that the Division, in its discretion, does not approve and adopt this Stipulated Settlement and Disciplinary Order, with the exception of this paragraph, it shall not become effective, shall be of no evidentiary value

whatsoever, and shall not be relied upon or introduced in any disciplinary action by either party hereto. Respondent further agrees that should the Division reject this Stipulated Settlement and Disciplinary Order for any reason, respondent will assert no claim that the Division, or any member thereof was prejudiced by its/his/her review, discussion and/or consideration of this Stipulated Settlement and Disciplinary Order or of any matter or matters related hereto.

ADDITIONAL PROVISIONS

14. This Stipulated Settlement and Disciplinary Order is intended by the parties herein to be an integrated writing representing the complete, final and exclusive embodiment of the agreements of the parties in this matter.

14. The parties understand and agree that facsimile copies of this Stipulated Settlement and Disciplinary Order, including facsimile signatures thereto, may be used in lieu of original documents and signatures, and shall have the same force and effect as originals.

15. In consideration of the foregoing admissions and stipulations, the parties agree that the Division of Medical Quality may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. A36888 issued to Respondent Kelly James O'Neil, M.D. is revoked; however, the revocation is stayed for one (1) year pursuant to the following terms and conditions:

A Public Letter of Reprimand shall issue from the Medical Board of California Division of Medical Quality to Kelly James O'Neil, M.D., upon completion of the following condition precedent:

1. PHYSICIAN ASSESSMENT AND CLINICAL EDUCATION PROGRAM Within 90 days of the effective date of this decision, Dr. O'Neil, at his expense, shall enroll in The Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine (hereinafter the "PACE Program"). The PACE Program consists of the Comprehensive Assessment Program which is comprised of two mandatory components: Phase 1 and Phase 2. Phase 1 is a two-day program which assesses

physical and mental health; neuropsychological performance; basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment pertaining to the specialty or sub-specialty of the respondent. After the results of Phase 1 are reviewed, Dr. O'Neil shall complete Phase 2. Phase 2 comprises five (5) days (40 hours) of Clinical Education in respondent's field of specialty. The specific curriculum of Phase 2 is designed by the PACE Faculty and the Department or Division of respondent's specialty, and utilizes data obtained from Phase 1. After Dr. O'Neil has completed Phase 1 and Phase 2, the PACE Evaluation Committee will review all results and make a recommendation to the Division or its designee as to whether further education, clinical training (including scope and length), treatment of any medical and/or psychological condition and any other matters affecting Dr. O'Neil's practice of medicine will be required or recommended. The Division or its designee may at any time request information from PACE regarding Dr. O'Neil's participation in PACE and/or information derived therefrom. The Division may order Dr. O'Neil to undergo additional education, medical and/or psychological treatment based upon the recommendations received from PACE.

Upon approval of the recommendation by the Division or its designee, Dr. O'Neil shall undertake and complete the recommended and approved PACE Program. At the completion of the PACE Program, Dr. O'Neil shall submit to an examination on its contents and substance. The examination shall be designed and administered by the PACE Program faculty. Dr. O'Neil shall not be deemed to have successfully completed the program unless he passes the examination. Dr. O'Neil agrees that the determination of the PACE Program faculty as to whether or not he passed the examination and/or successfully completed the PACE Program shall be binding.

If Dr. O'Neil successfully completes the PACE Program, including the examination referenced above, he agrees to cause the PACE Program representative to forward a Certification of Successful Completion of the program to the Division or its designee. If Dr. O'Neil fails to successfully complete the PACE Program as required here, it shall be considered a violation of the condition precedent to the issuance of the Public Letter of Reprimand.

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2. FAILURE TO COMPLETE PACE If Dr. O'Neil fails to complete the condition precedent in the one year stay period, or as extended by the Division in its discretion, the Division may, in its discretion, following notice and an opportunity to be heard, extend the stay and impose standard terms and conditions of probation, including completion of a suitable education course and probation costs or may remand to an administrative law judge for the imposition of a suitable probationary period, with similar terms and conditions.

3. Upon successful completion of the condition precedent, the stayed revocation shall become permanent and the Public Letter of Reprimand shall issue.

ACCEPTANCE

I, Kelly James O'Neil, M.D., have carefully read this Stipulated Settlement and Disciplinary Order and enter into it freely, voluntarily, intelligently, with the benefit of counsel, and with full knowledge of its force and effect on my Physician's and Surgeon's Certificate No. A36888.

DATED: 6/28/04

KELLY JAMES O'NEIL, M.D.

I have read and fully discussed with respondent Kelly James O'Neil, M.D., the terms and conditions and other matters contained in the above Stipulated Settlement, Decision and Disciplinary Order. I approve its form and content.

DATED: 7/2/04

ALBERT J. GARCIA
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Division.

DATED: July 20, 2004

BILL LOCKYER, Attorney General
of the State of California

HEIDI R. WEISBAUM
Deputy Attorney General
Attorneys for Complainant

EXHIBIT A

BILL LOCKYER, Attorney General
of the State of California
T. Douglas MacCartee, State Bar No. 77252
Deputy Attorney General
California Department of Justice
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P.O. Box 85266
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Facsimile: (619) 645-2061

Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: KELLY JAMES O'NEIL, M.D. 40971 Winchester Road Temecula, CA 92591 Physician's and Surgeon's Certificate No. A 36888 Respondent.	Case Nos. 09-1993-26899, 19-2000-112061 **FIRST AMENDED ACCUSATION**

Complainant alleges:

PARTIES

1. Ron Joseph (Complainant) brings this Accusation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs.

2. On or about June 24, 1981, the Medical Board of California issued Physician's and Surgeon's Certificate Number A 36888 to Kelly James O'Neil, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on January 31, 2003, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Division of Medical Quality, Medical Board of California (Division), under the authority of the following sections of the Business and Professions Code (Code) and the Disciplinary Order in Case No. 09-1993-26899.

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Division deems proper.

5. Section 2234 of the Code states:

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this chapter [Chapter 5, the Medical Practice Act].

"(b) Gross negligence.

"(c) Repeated negligent acts.

"(d) Incompetence.

"(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

"(f) Any action or conduct which would have warranted the denial of a certificate."

6. Section 125.3 of the Code provides, in pertinent part, that the Division may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

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7. Section 14124.12(a) of the Welfare and Institutions Code provides, in pertinent part, that upon receipt of written notice from the Medical Board of California that a licensee's license has been placed on probation as a result of a disciplinary action, the department may not reimburse any Medi-Cal claim for the type of surgical service or invasive procedure that gave rise to the probation, including any dental surgery or invasive procedure, that was performed by the licensee on or after the effective date of probation and until the termination of all probationary terms and conditions or until the probationary period has ended, whichever occurs first. This section shall apply except in any case in which the relevant licensing board determines that compelling circumstances warrant the continued reimbursement during the probationary period of any Medi-Cal claim, including any claim for dental services, as so described. In such a case, the department shall continue to reimburse the licensee for all procedures, except for those invasive or surgical procedures for which the licensee was placed on probation.

8. Section 2271 of the Code states: "Any advertising in violation of Section 17500, relating to false or misleading advertising, constitutes unprofessional conduct."

9. Section 651 of the Code provides in part that "(a) it is unlawful for any person licensed under this division or under any initiative act referred to in this division to disseminate or cause to be disseminated, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed. A 'public communication' as used in this section includes, but is not limited to, communication by means of mail, television, radio, motion picture, newspaper, book, list or directory of healing arts practitioners. Internet or other electronic communication.

(b) A false, fraudulent, misleading, or deceptive statement, claim or image includes a statement or claim that does any of the following:

(1) Contains a misrepresentation of fact.

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) (A) Is intended or is likely to create false or unjustified expectations of favorable results, including the use of any photograph or other image that does not accurately depict the results of the procedure being advertised or that has been altered in any manner from the image of the actual subject depicted in the photograph or image.

(B) Use of any photograph or other image of a model without clearly stating in a prominent location in easily readable type the fact that the photograph or image is of a model is a violation of subdivision (a). For purposes of this paragraph, a model is anyone other than an actual patient, who has undergone the procedure being advertised, of the licensee who is advertising for his or her services.

(C) Use of any photograph or other image of an actual patient that depicts or purports to depict the results of any procedure, or presents 'before' and 'after' views of a patient, without specifying in a prominent location in easily readable type size what procedures were performed on that patient is a violation of subdivision (a). Any 'before' and 'after' views (1) shall be comparable in presentation so that the results are not distorted by favorable poses, lighting, or other features of presentation, and (2) shall contain a statement that the same 'before' and 'after' results may not occur for all patients.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors.

(5) Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) Makes a claim either of professional superiority or of performing services in a superior manner, unless that claim is relevant to the service being performed and can be substantiated with objective scientific evidence.

(7) Makes a scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies.

(8) Includes any statement, endorsement, or testimonial that is likely to mislead or deceive because of a failure to disclose material facts.

(a-d) . . . .

(e) Any person so licensed may not use any professional card, professional announcement card, office sign, letterhead, telephone directory listing, medical list, medical directory listing, or a similar professional notice or device if it includes a statement or claim that is false,

fraudulent, misleading, or deceptive within the meaning of subdivision (b).

(f) Any person so licensed who violates any provision of this section is guilty of a misdemeanor. A bona fide mistake of fact shall be a defense to this subdivision but only to this subdivision.

(g) Any violation of any provision of this section by a person so licensed shall constitute good cause for revocation or suspension of his or her license or other disciplinary action."

10. In accordance with the public safety finding in Business & Professions Code § 2215, section 2216 provides in pertinent part: "On or after July 1, 1996, no physician and surgeon shall perform procedures in an outpatient setting using anesthesia, except local anesthesia or peripheral nerve blocks, or both, complying with the community standard of practice, in doses that, when administered, have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes, unless the setting is specified in Section 1248.1.

11. Health and Safety Code § 1204(b) provides, in pertinent part that the following shall be eligible for licensure as specialty clinics pursuant to this chapter:

(1) A "surgical clinic" means a clinic that is not part of a hospital and that provides ambulatory surgical care for patients who remain less than 24 hours. A surgical clinic does not include any place or establishment owned or leased and operated as a clinic or office by one or more physicians or dentists in individual or group practice, regardless of the name used publicly to identify the place or establishment, provided, however, that physicians or dentists may, at their option, apply for licensure.

12. Health and Safety Code § 1248.1 provides, " No association, corporation, firm, partnership, or person shall operate, manage, conduct, or maintain an outpatient setting in this state, unless the setting is (d) Any primary care clinic licensed under subdivision (a) and any surgical clinic licensed under subdivision (b) of Section 1204; or (g) An outpatient setting accredited by an accreditation agency approved by the division pursuant to this chapter.

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13. Health and Safety Code § 1248.15 provides that out patient settings shall not be accredited unless they have the following minimum standards for the settings' operations:

(a) (1) Outpatient setting allied health staff shall be licensed or certified to the extent required by state or federal law.

(2)(A) Outpatient settings shall have a system for facility safety and emergency training requirements.

(B) There shall be onsite equipment, medication, and trained personnel to facilitate handling of services sought or provided and to facilitate handling of any medical emergency that may arise in connection with services sought or provided.

(C) In order for procedures to be performed in an outpatient setting as defined in Section 1248, the outpatient setting shall do one of the following: (i) Have a written transfer agreement with a local accredited or licensed acute care hospital, approved by the facility's medical staff. (ii) Permit surgery only by a licensee who has admitting privileges at a local accredited or licensed acute care hospital, with the exception that licensees who may be precluded from having admitting privileges by their professional classification or other administrative limitations, shall have a written transfer agreement with licensees who have admitting privileges at local accredited or licensed acute care hospitals. (iii) Submit for approval by an accrediting agency a detailed procedural plan for handling medical emergencies that shall be reviewed at the time of accreditation. No reasonable plan shall be disapproved by the accrediting agency.

(D) All physicians and surgeons transferring patients from an outpatient setting shall agree to cooperate with the medical staff peer review process on the transferred case, the results of which shall be referred back to the outpatient setting, if deemed appropriate by the medical staff peer review committee. If the medical staff of the acute care facility determines that inappropriate care was delivered at the outpatient setting, the acute care facility's peer review outcome shall be reported, as appropriate, to the accrediting body, the Health Care Financing Administration, the State Department of Health Services, and the appropriate licensing authority.

(3) ... [Dentists and Oral Surgeons] ...

(4) Outpatient settings shall have a system for maintaining clinical records.

(5) Outpatient settings shall have a system for patient care and monitoring procedures.

(6)(A) Outpatient settings shall have a system for quality assessment and improvement.

(6)(B) Members of the medical staff and other practitioners who are granted clinical privileges shall be professionally qualified and appropriately credentialed for the performance of privileges granted. The outpatient setting shall grant privileges in accordance with recommendations from qualified health professionals, and credentialing standards established by the outpatient setting.

(6)(C) Clinical privileges shall be periodically reappraised by the outpatient setting. The scope of procedures performed in the outpatient setting shall be

periodically reviewed and amended as appropriate.

(7) Outpatient settings regulated by this chapter that have multiple service locations governed by the same standards may elect to have all service sites surveyed on any accreditation survey. Organizations that do not elect to have all sites surveyed shall have a sample, not to exceed 20 percent of all service sites, surveyed. The actual sample size shall be determined by the division. The accreditation agency shall determine the location of the sites to be surveyed. Outpatient settings that have five or fewer sites shall have at least one site surveyed. When an organization that elects to have a sample of sites surveyed is approved for accreditation, all of the organizations' sites shall be automatically accredited.

(8) Outpatient settings shall post the certificate of accreditation in a location readily visible to patients and staff.

(9) Outpatient settings shall post the name and telephone number of the accrediting agency with instructions on the submission of complaints in a location readily visible to patients and staff.

(10) Outpatient settings shall have a written discharge criteria.

(b) Outpatient settings shall have a minimum of two staff persons on the premises, one of whom shall either be a licensed physician and surgeon or a licensed health care professional with current certification in advanced cardiac life support (ACLS), as long as a patient is present who has not been discharged from supervised care. Transfer to an unlicensed setting of a patient who does not meet the discharge criteria adopted pursuant to paragraph (10) of subdivision (a) shall constitute unprofessional conduct.

(c) An accreditation agency may include additional standards in its determination to accredit outpatient settings if these are approved by the division to protect the public health and safety.

(d) No accreditation standard adopted or approved by the division, and no standard included in any certification program of any accreditation agency approved by the division, shall serve to limit the ability of any allied health care practitioner to provide services within his or her full scope of practice. Notwithstanding this or any other provision of law, each outpatient setting may limit the privileges, or determine the privileges, within the appropriate scope of practice, that will be afforded to physicians and allied health care practitioners who practice at the facility, in accordance with credentialing standards established by the outpatient setting in compliance with this chapter. Privileges may not be arbitrarily restricted based on category of licensure."

14. Health and Safety Code section 1248.65 provides, "It shall constitute unprofessional conduct for a physician and surgeon to willfully and knowingly violate this chapter."

15. Board Disciplinary Order No. 09-93-26899 requires, as Condition # 4 of the Conditions of Probation ("Stipulation in Settlement and Decision, p. 7), that respondent "... shall obey all federal, state and local laws governing the practice of medicine in California

and remain in full compliance with any court ordered criminal probation, payments and other orders."

FIRST CAUSE FOR DISCIPLINE AND REVOCATION OF PROBATION

(Gross Negligence, Incompetence, Repeated Negligent Acts)

16. Respondent is subject to disciplinary action under section 2234, subdivisions (b), (c) and/or (d) and subject to revocation of probation under Disciplinary Order No. 09-93-26899 in that he was grossly negligent and/or incompetent and/or committed repeated negligent acts in his care and treatment of patients A.H. and H.B. The circumstances are as follows:

A. On or about July 18, 2000, A.H., then 70 years of age, had a chemical peel (called "O'Neil's Skin Rejuvenation") of her face performed by respondent. During the peel, A.H. had ventricular arrhythmia, which respondent treated with intravenous Lidocaine. Postoperatively, A.H.'s cardiac instability continued, and respondent treated her with Inapsine.

B. After the surgery, A.H. was discharged and driven to the Embassy Suites Hotel, in Temecula by employees of respondent and placed under the care of nurses from Q.C. Enterprises, Inc., (aka "Cual Care"), a nursing registry effectively controlled by respondent.

C. At about 5:30 p.m. on July 18, 2000, the nurse found that A.H.'s pulse was 124 beats per minute (bpm). She paged respondent for orders.

D. Another nurse came on duty at about 7:00 p.m. She found that A.H.'s blood pressure was still high and that A.H. was restless, anxious and hyperventilating. Shortly thereafter, respondent called, the nurse reported A.H.'s symptoms to him and asked respondent to come to the Embassy Suites Hotel.

D. While respondent was on his way, A.H. complained of chest pain, and the nurse called 911. Respondent arrived at the Embassy Suites about the same time as the paramedics. A.H. was taken to the hospital.

E. H.B. was 72 years of age when she came under respondent's care.

She had a chemical peel of her face and liposuction of her thighs performed by respondent on or about July 26, 2000.

F. H.B. had a preoperative history and physical performed by another physician, D.W.S., M.D. Dr. S noted varicose veins, stasis dermatitis, and trace edema. Dr. S. also noted that H.B. had a history of varicose vein surgery. A preoperative EKG showed PVC's, or premature ventricular contractions.

G. Respondent sedated H.B. for the peel procedure, and performed that procedure. During the procedure, H.B. twice experienced ventricular arrhythmias. Respondent then performed liposuction of H.B.'s knees. H.B. was prematurely discharged from the respondents clinic and driven by respondent's employees to the Embassy Suites Hotel, where she was cared for by nurses from Q C Enterprises, Inc., (aka "Qual Care") a nursing registry effectively controlled by respondent. H.B. was sedated to the extent that she had to be lifted out of her wheel chair and place into bed where upon she immediately went into deep sleep. She remained largely sedentary for two days following the procedures.

H. On or about July 26, 2000 at 9:00 a.m., the nurse attending H.B. found that H.B. was in shock, and contacted respondent at that time. Respondent authorized the nurse to call 911 at about 9:15 that morning. H.B. was taken to the hospital, where she was diagnosed as having venous thrombus and pulmonary embolism.

17. Respondent is subject to disciplinary action under Code section 2234, subdivisions (b), (c) and/or (d) in that he was grossly negligent and/or incompetent and/or committed repeated negligent acts in his care and treatment of A.H. and H.B. The circumstances are as follows.

A. Paragraph 16 of the Accusation is incorporated by reference and hereby formally realleged as if set forth here in full.

B. Respondent inappropriately discharged A.H. to the Embassy Suites Hotel despite having treated her for cardiac instability and hypertension during the chemical peel respondent performed on A.H.

C. Respondent failed to respond to the initial page to him, placed by the nurse caring for A.H. postoperatively.

D. When respondent was contacted the second time by the nurse caring for A.H., he apparently failed to recognize signs and symptoms of A.H.'s severe cardiac instability. He also improperly delayed the nurse in calling paramedics to take A.H. to the hospital, instead electing to observe A.H. in the hotel room.

E. Respondent improperly performed lower extremity liposuction on H.B. She was not an appropriate patient for this procedure in light of her lower extremity venous insuffiency (found in her preoperative workup).

F. Respondent excessively sedated H.B.and then prematurely discharged her to Embassy Suites Hotel in the care of Qual Care .

G. Respondent improperly continued the cosmetic surgery on H.B. after she suffered two episodes of ventricular arrhythmia during the chemical peel portion of respondent's surgery.

H. Respondent failed to timely cause H.B. to be transferred to the hospital for treatment when H.B. suffered postoperative complications while staying at the Embassy Suites Hotel.

SECOND CAUSE FOR DISCIPLINE AND REVOCATION OF PROBATION

(False or Misleading Advertisement)

18. Respondent is subject to disciplinary action under section 2271 in that he engaged in false and/or misleading advertising. The circumstances are as follows.

A. Respondent used an advertising video which creates the impression that he completed a post-graduate residency and to post-graduate training at the University of California, Davis. Respondent did not complete a residency and did not have post-graduate training other than a one-year internship.

B. Respondent uses videos, brochures, and other advertising media to represent that his practice is safe and has low complication rates. In fact, respondent is on probation for treatment of patients resulting in death and serious complications.

C. Pre-operative patient photographs are taken in different lighting that post-operative photographs. Pre-operative photographs are taken without makeup, while post-operative photos feature patients with makeup. The effect of these photographs is to exaggerate the benefits of respondent's treatments.

D. Respondent has sent a letter to prospective patients falsely claiming that his is the only medical office in southern California that specializes in cosmetic skin rejuvenation.

THIRD CAUSE FOR DISCIPLINE AND REVOCATION OF PROBATION

(False and misleading advertisement)

19. Respondent is subject to disciplinary action under section 651 of the Code in that he engaged in fraudulent, misleading or deceptive advertising. The circumstances are set forth in paragraph 18 of the Accusation, which is incorporated by reference and hereby formally realleged as if set forth here in full.

FIRST CAUSE FOR PROBATION REVOCATION

(Violation of laws relating to the practice of medicine)

20. Respondent is subject to probation revocation because he violated the provisions of the Board's Decision in Case No. 09-93-26899, In the Matter of the Accusation Against Kelly J. O'Neil, M.D. Paragraph 4 of the Order mandates that respondent obey all federal, state and local laws relating to the practice of medicine. The circumstances are as follows.

A. Paragraphs 10 through 16 and 17 of the Accusation are incorporated by reference and hereby formally realleged as if set forth here in full.

B. On or about August 2, 2000, respondent and /or Qual Care Nursing Services, Inc. were served with two notices of violations by M.S., a Code Enforcement Officer for the City of Temecula. Code Enforcement Officer S. issued notices for violations of Temecula Municipal Code section 17.24, a zoning violation, and ordered the Embassy Suites to immediately cease all operations of medical care in Citation No. 0484. Respondent was ordered to cease renting rooms for medical use, and admonished that

failure to comply could result in a citation in Citation No. 486.

C. Paragraphs 8, 9, 18 and 19 of the Accusation are incorporated by reference and hereby formally realleged as if fully set forth herein.

D. Respondent has falsely advertized to potential patients; engaged in improper patient selection and other acts in violation of Business and Professions Code section 2234(b) (c) and (d); used general anesthesia on his patients and has continued his operation of an uncertified out patient setting for the care and treatment of his post-operative patients.

DISCIPLINE CONSIDERATIONS

21. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that there was a prior disciplinary action against respondent entitled In the Matter of the Accusation Against Kelly James O'Neil, M.D. before the Medical Board of California, Case Number 09-1993-26899. Respondent's license was revoked for repeated negligent acts in the care and treatment of two patients. Respondent admitted in the Stipulation in Settlement and Decision, his negligence in his use of general anesthetics and 50% phenol solution on a patient who died on the operating table of cardiac arrest; operation of an unlicensed health facility he used to house his post-operative chemical face peel patients; and, to falsely advertizing his medical credentials.[Paragraph 4A-I of the Accusation which is incorporated by paragraph 5A (Acts of Repeated Negligence)]. He further admitted to negligent selection of an improper candidate for liposuction procedure [Paragraph 15/13A-N of Supplemental Accusation]; and, delay in recognition of a life threatening infectious disease in a post-operative patient.[Paragraph 13A-N].

Under the Decision, Respondent was revoked and ordered to successfully complete the PACE Program; and upon successful completion of the program the revocation was stayed and respondent was placed on probation for five years on certain terms and conditions. The effective date of that decision was August 14, 1998. That decision is now final and is incorporated by reference as if fully set forth. Respondent's conduct is a continuation of those acts which precipitated his Stipulation for Settlement and Decision and which acts are prohibited by the

Decision.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Division of Medical Quality issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate No. A 36888, issued to Kelly James O'Neil, M.D.;

2. Revoking, suspending or denying approval of Kelly James O'Neil, M.D.'s authority to supervise physician's assistants, pursuant to section 3527 of the Code;

3. Ordering Kelly James O'Neil, M.D. to pay the Division of Medical Quality the reasonable costs of the investigation and enforcement of this case, and, if placed on probation, the costs of probation monitoring;

4. Taking such other and further action as deemed necessary and proper.

DATED: Oct 16, 2002

Douglas MacCartee
Deputy Attorney General

FOR

BILL LOCKYER
Attorney General

TDM

Albert J. Garcia (SBN 70917)
Attorney At Law
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Attorney for Petitioner,
Kelly O'Neil, MD

FILED
San Francisco County Superior Court
OCT 29 2003
GORDON PARK-LI, Clerk
BY: _____ Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Kelly O'Neil, MD, Petitioner, vs. Medical Board of California, Respondent.	Case No. 503614 Stipulation ~~Continuing~~ Setting Hearing Date on Petition for Writ of Mandate and Extending Stay ~~Order~~ [~~Proposed~~] Order Hearing Date: January 29, 2004 Time: 9:30 a.m. Dept.: 302

BY FAX

Stipulation

Petitioner and respondent, through their respective counsel, hereby stipulate to a hearing date of January 29, 2004 on the petition for writ of administrative mandamus and to an extension of the stay order currently in effect, as follows:

The following probationary conditions of respondent's disciplinary order of August 28, 2003, in Medical Board of California Case No. D1-1993-26899, are hereby stayed pending hearing on petitioner's Petition For Writ of

Administrative Mandamus, which will be heard on January 29, 2004: Condition 1 (providing for a suspension of petitioner's California Physician's and Surgeon's Certificate) and Condition 9 (restricting petitioner's practice). All other conditions of probation are to remain in effect.

So Stipulated:

Heidi Weisbaum, Deputy Attorney General
Attorney for Respondent
Medical Board of California

Dated: 10/17/03

So Stipulated:

Albert J. Garcia
Attorney for Petitioner
Kelly James O'Neil, MD

Dated: 10/17/03

ALBERT J. GARCIA
ATTORNEY AT LAW

~~[Proposed]~~ Order

BASED ON THE STIPULATION OF COUNSEL, AND GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the hearing on petitioner's Petition For Writ of Administrative Mandamus will be conducted on January 29, 2004, and that the following probationary conditions of respondent's disciplinary order of August 28, 2003, in Medical Board of California Case No. D1-1993-26899, are hereby stayed pending hearing and judgment on the aforesaid petition: Condition 1 (providing for a suspension of petitioner's California Physician's and Surgeon's Certificate) and Condition 9 (restricting petitioner's practice). All other conditions of probation are to remain in effect pending hearing and judgment.

Dated: OCT 23 2003

Hon. Ronald E. Quidachay
Judge of the Superior Court

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against KELLY JAMES O'NEIL, M.D. 40971 Winchester Road Temecula, CA 92591 Physician's and Surgeon's Certificate No. A 36888 Respondent.	Case No. D1-1993-26899 OAH No. L2002020038

DECISION AFTER NONADOPTION

Administrative Law Judge Joyce A. Wharton, Office of Administrative Hearings, State of California, heard this matter in San Diego, California on October 21, 22, 23, 24, 25, 28, 29 and 30, 2002.

T. Douglas MacCartee, Deputy Attorney General, represented the complainant.

Albert J. Garcia, Attorney at Law, represented respondent Kelly James O'Neill, M.D., who was present.

The matter was submitted on October 30, 2002.

The proposed decision of the administrative law judge was submitted to the Division of Medical Quality, Medical Board of California (hereafter "division") on March 13, 2003. After due consideration thereof, the division declined to adopt the proposed decision and thereafter on April 10, 2003 issued a Notice of Non-Adoption and subsequently issued an Order Fixing Date for Submission of Written Argument. On July 3, 2003, the division issued a Notice of Hearing for Oral Argument. Oral argument was heard on August 1, 2003. The time for filing written argument in this matter having expired, written argument having been filed by both parties and such written argument, together with the entire

record, including the transcript of said hearing, having been read and considered, pursuant to Government Code Section 11517, Panel B of the division hereby makes the following decision and order:

FACTUAL FINDINGS

1. On January 4, 2002, Ron Joseph (hereinafter "complainant"), acting in his official capacity as the Executive Director of the Medical Board of California (hereinafter "the Board"), filed Accusation No 19-2000-112061 against Kelly James O'Neil, M.D. (hereinafter "respondent"). Complainant charged respondent with unprofessional conduct in connection with his care and treatment of two patients in July 2000. Specifically, complainant alleged gross negligence, repeated acts of negligence and incompetence in violation of Business and Professions Code,[1] section 2234, subdivisions (b), (c) and (d); and false and misleading advertising in violation of sections 651 and 2271. Complainant also alleged that respondent violated a term of probation in case No. 09-93-26899 and, therefore, the order of probation should be revoked. Complainant filed a First Amended Accusation on October 16, 2002.[2]

Respondent filed a timely Notice of Defense.

2. Respondent is 49 years old. In 1975, he graduated U.C. Davis with a Bachelor of Science degree in Physiology. In 1980, he obtained a medical degree from Tulane Medical School. In 1981, he completed a one-year rotating internship at UC Davis but did not perform a residency. On June 24, 1981, the Board issued physician's and surgeon's certificate No. A 36888. The certificate is renewed and current with an expiration date of January 31, 2003.

Respondent moved to Temecula and opened a private family practice in late August 1981. Respondent soon met a physician who specialized in chemical peels and was about to retire. The physician trained respondent in the peel procedure and respondent incorporated it into his practice. Respondent took courses and attended seminars on peel procedures. In 1987, he gave up his family practice to primarily devote time to the skin peel procedure. In about 1994, he began doing tumescent liposurgery as well. Respondent has continued to limit his practice to chemical peels and liposurgery. He conducts his practice at the O'Neil Skin Center located at 40971 Winchester Road in Temecula. Respondent is not board certified in any specialty.

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[1] All statutory references are to the California Business and Professions Code unless stated otherwise.

[2] Respondent did not object to the new allegations made shortly before the date of hearing.

3. Complainant filed Accusation No. 09-03-26899 against respondent in November 1996, and a Supplemental Accusation in January 1998. The parties resolved the matter by a Stipulation in Settlement and Decision effective September 14, 1998. The stipulation contained the following pertinent language:

> "7. For the purpose of resolving Accusation and First Supplemental Accusation No. 09-93-26899, respondent admits he committed repeated acts of negligence in the care and treatment of patient J.G. as alleged in paragraph 5 of the Accusation, and repeated acts of negligence in the care and treatment of patient V.F. as alleged in paragraph 15 of the First Supplemental Accusation. . . . . The remaining allegations in the Accusation and First Supplemental Accusation are dismissed."[3] (Emphasis added.)

J.G. was a 72-year-old patient on whom respondent performed a chemical facial peel in March 1993. During the procedure the patient went into respiratory arrest and never regained consciousness. Pursuant to the stipulation, respondent admitted the following: He failed to perform a complete preoperative physical; he failed to order a pre-operative electrocardiogram or chest x-ray which would have determined the extent of the patient's chronic condition; he failed to detect the patient was suffering from chronic congestive heart failure; he failed to record the patient's peripheral edema in his history and physical; he proceeded with the chemical face peel without first obtaining a cardiac clearance from a physician; he failed to properly intubate the patient prior to arrival of paramedics; he failed to establish a properly operating intravenous route; he gave the patient multiple sedatives without a nurse anesthetist or anesthesiologist present.

V.F. was a 37-year-old female, weighing 247 pounds, on whom respondent performed liposuction in September 1996. After surgery the patient developed blisters from the girdle prescribed by respondent. The condition worsened to a life-threatening soft tissue infection. Pursuant to the stipulation, respondent admitted the following: He failed to properly assess the patient for liposuction surgery; the patient was not a proper candidate for the surgery because of her generalized obesity; he administered an excessive amount of tumescent solution; he removed an excessive amount of aspirate from the patient.

The Board revoked respondent's certificate and stayed the order for five years on probationary terms that included: completion of a Physician Assessment and Clinical Evaluation (PACE) program in patient assessment, plastic surgery and anesthesia at UCSD School of Medicine prior to the revocation order being stayed; a practice monitor; practice

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[3] Complainant asserted respondent's stipulated admissions included admitting to placing a false advertisement in the Yellow Pages stating he was board certified in general practice, and admitting he operated an unlicensed health facility. A plain reading of the matters admitted does not support this contention. Respondent admitted only "repeated negligent acts" in the care and treatment of specific patients in violation of section 2234(c).

restrictions that preclude use of general anesthesia and limit the amount of aspirate withdrawn during certain procedures; compliance with all federal, state and local laws and rules governing the practice of medicine in California.

4. In June and July 1998, respondent underwent a comprehensive PACE assessment, which included measurement of medical skills and knowledge, appraisal of physical health and psychological testing. Respondent was found to be in good physical and mental health.

In compliance with terms of his probation, respondent submitted to a psychological assessment on June 1, 1998. William Perry, Ph.D. interviewed respondent and administered numerous tests. He found no cognitive or neurocognitive deficits, nor was there indication of serious psychopathology. In September 1998, respondent attended a weeklong clinical program including Dermatology and Anesthesiology. On September 25, 1998, PACE issued a certificate of completion indicating that respondent successfully completed and met all requirements of the PACE program. The order of revocation was stayed on that date.

Respondent testified that as a result of the disciplinary action, he has instituted changes in his practice. At the initial consultation he applies stricter guidelines to evaluate the patient for the procedure and he refuses more patients at that stage. Patients under 50 must have blood work and patients over 50 must also have an EKG and chest x-ray. All patients must be examined by their primary care physician and provide that physician's authorization for the chemexfiliation and/or liposurgery. It is not uncommon for the procedure to then be cancelled because of abnormal testing, or "more often just delayed." In addition to his initial consultation with the patient, on the morning of the procedure respondent also takes a medical history, performs a physical examination and documents findings in his chart. Respondent adheres to the probationary requirement to limit the amount of aspirate for liposurgery and believes this was a good idea.

As of October 29, 2001, respondent was deemed in compliance with all terms and conditions of his probation. Respondent's practice monitor reported he did not find any problems with respondent's care of patients.

5. At all times relevant to the pending Accusation, respondent conducted his practice at 40971 Winchester Road in Temecula under the name "O'Neil Skin and Lipo Center, Kelly James O'Neil, M.D." Effective October 25, 1999, the facility became accredited by the Accreditation Association for Ambulatory Health Care, Inc. Respondent lost his hospital privileges due to the 1998 disciplinary action. However, he has a standing transfer agreement with the local hospital allowing him to transfer patients to the hospital by means of a 911 call.

As of July 2000, respondent had performed about 6,000 full phenol peels and 2,000 more partial peels. Approximately one-third of his patients were aged 60 or older.

6. Respondent's procedures were performed on an outpatient basis. He gave each patient a written set of instructions titled "O'Neil Skin Rejuvenation After Care Instructions for the First 48 Hours." The instructions advised the patient in pertinent part as follows:

> "1. You must have a **driver** to take you from Dr. O'Neil's office.
>
> 2. You must have **someone help you** so you can rest in bed (only getting up for the restroom) for the next 48 hours.
>
> 3. . . . **Diet**: Full liquid diet through a straw. If nauseated have clear liquids through a straw.
>
> 4. Sleep with your **head elevated at 45 degrees** for the first 24 hours and then position as you are comfortable.
>
> 5. **Apply ice packs to eyelids** for 20 minutes each hour for the first 24 hours. . . .
>
> 6. **Medications:** Keep these at your bedside. . .
> . . . Please **do not take** any xanax, ativan, or restoril past midnight on the second day after your treatment, because the doctor would like you to be more active the day your tape comes off.
> **Remove the mask** on the morning of the third day and **apply the powder** that was supplied to you. . . . .
>
> **Notify Dr. O'Neil if your:**
> Blood pressure is greater than 100 diastolic
> If your blood pressure is greater then [sic]180 systolic
> If your pulse is greater then [sic] 100
> If your tempeture [sic] is greater then [sic] 100 degrees
> If you have any questions"[4]

7. Respondent believed that to achieve optimum cosmetic outcome, the 24 to 40 hour period after the procedure was an important, integral part of the skin rejuvenation process. Some, but not all, of the peel procedures required application of a tape mask that was to remain in place for about two days. The tape mask must stay on with minimal movement around the mouth and eyes in order to achieve the best cosmetic outcome for the patient. Respondent wanted the patients to remain quiet and undisturbed for the first

[4] Additional instructions were included for liposurgery patients.

48 hours so they would not touch their faces or disturb the tape mask and thus risk scarring or a poor result.

Respondent explained that he wanted his patients in a controlled post operative care environment, not necessarily for medical reasons, but for a good result of the facial peel so the patient would be happy and he would not have future complaints about the result.

8. In 2000, as part of the skin rejuvenation package, respondent offered his patients post operative care options that included staying two nights in a nearby hotel where they could be monitored and assisted until they removed the mask. Once the mask was removed, the patients could go home or spend from 1 to 9 days at a private "retreat" where healthful meals, recreational activities and relaxation were provided by an attentive staff. The aftercare options were attractive to the patients, especially those who lived far from the clinic or had no one at home to provide care and assistance. Respondent would not perform the procedure on certain patients who lived far away with no one at home to help them unless they agreed to go to the hotel.

Over the years respondent had used several different post operative care facilities or retreats including the local hospital. When his license was placed on probationary status, respondent lost his hospital privileges at Inland Valley Hospital and sought another provider of post operative care. Respondent wanted a location that was close to his office "for transport and to keep an eye on patients." In about 1999 he learned that QualCare, Inc., a nursing registry, was providing post procedure care for cosmetic surgery patients at an upscale hotel in Riverside. Because that location was too far from his office, he contacted the owner of QualCare to see if the service could be provided in Temecula.

9. QualCare Inc., aka QC Enterprises, was a company owned and operated by Jo-Ann Jordan, R.N. Ms. Jordan and a friend started the business, which operated for an unknown period of time before it was incorporated as a closely held corporation in May 1999. Ms. Jordan described QualCare as a nursing registry that provided care on an as needed basis in various settings. The major part of QualCare's business was to provide care to discharged outpatients in a setting similar to that at home.

Ms. Jordan hired registered nurses who worked for QualCare as independent contractors. She required that the nurses also work in hospitals so they would have the necessary and up-to-date skills. QualCare scheduled and paid the nurses. The nurses wore scrubs and used latex gloves, had a stethoscope and blood pressure measuring equipment, but did not provide oximeters or EKG equipment. The nurses did not give injections or intravenous treatment, nor did they dispense drugs. They assisted with suppositories and the patients' regular oral medications. The patient's physician would send someone to administer any injection that was required. The nurse was expected to use her professional judgment to call 911 if an emergency arose.

Ms. Jordan was familiar with other companies that provided aftercare to cosmetic surgery patients in hotel settings in southern California. Jordan testified that she contacted the appropriate state and local agencies about providing aftercare services in a hotel setting and was not advised of any illegality. She testified that when the city of Temecula served the notice of violation at the Embassy Suites Hotel, Riverside County was "in the process" of approving Qual Care's activities. Before Ms. Jordan met respondent, QualCare had provided aftercare services for a Loma Linda plastic surgeon. QualCare arranged for the patients to stay in rooms at the Mission Inn, a very upscale hotel in Riverside. QualCare provided one nurse to care for three patients. If a patient persisted in trying to remove the bandages, an unlicensed "sitter" would be provided for one-on-one attention to do nothing but watch the patient.

10. In 1999, at least one year after QualCare started doing business, Ms. Jordan learned that respondent was looking for aftercare services for his skin peel patients. She met with respondent and he discussed his expectations for aftercare. Based on her experience at the Mission Inn, she believed QualCare could fashion a program to meet respondent's needs. The patient was to remain quiet and recline at a 45-degree angle; ice was to be applied to the face and the patient must avoid smoking. The setting was to be upscale, with a phone available for personal calls and a microwave for heating broth. Ms. Jordan described the service QualCare was to provide as "a supportive environment in lieu of going home".

Ms. Jordan and her partner used respondent's guidelines and incorporated what they felt was needed for aftercare. Ms. Jordan and respondent agreed that the Embassy Suites Hotel in Temecula would be an appropriate setting. Ms. Jordan approached the Embassy Suites and discussed with the manager the nature of her operation, what the nurses would be doing and the type of rooms needed. Embassy Suites agreed to rent to QualCare a block of adjoining rooms. The hotel also accommodated QualCare by providing unlimited ice, linens and pillows. There was no evidence of any complaints by the management or owner of Embassy Suites nor any indication they were concerned about the legality of QualCare's use of the hotel property for aftercare. The panel found this to be unpersuasive, as a hotel would not likely be familiar with health care facility licensing standards. QualCare entered an arrangement with respondent to provide aftercare to all his facial peel patients. QualCare operated out of Embassy Suites for approximately 18 months.

The patients paid QualCare for its services. As part of the skin rejuvenation "package," the patient wrote a check to respondent for his services and a separate check to QualCare. Both checks were delivered to respondent's office approximately a week before the procedure and QualCare would pick up its checks. Respondent did not receive any portion of the payment made to QualCare.

11. QualCare continued to solicit business from other physicians but was not successful. After 1999, respondent was its only client. There was no arrangement or agreement between respondent and QualCare whereby it would serve only his practice.

12. The evidence did not establish that QualCare, a nursing registry, was "effectively controlled" by respondent as alleged in the First Amended Accusation. Respondent took no part in the formation or incorporation of QualCare and had no ownership or financial interest in it. He had no role in hiring, scheduling or paying the nurses. Respondent provided QualCare nurses the same instructions given to the patients for aftercare and his nurses demonstrated how to remove the tape mask. QualCare nurses called respondent, as the treating physician, if a patient was having a problem and they followed his instructions for aftercare. While the panel concurs with the finding of the administrative law judge that respondent did not control QualCare as an entity, respondent did control his patients receiving post procedure care from QualCare at the Embassy Suites Hotel.

13. In the First Amended Accusation, complainant alleged respondent violated the terms of probation because he failed to obey state and local laws. Complainant's counsel explained the charges were based on complainant's belief that respondent operated, managed, conducted or maintained an "outpatient setting" at the Embassy Suites in violation of Health and Safety Code section 1248.1 and Temecula Municipal Code section 17.24.

The evidence did not establish that use of the hotel for aftercare as provided by QualCare constituted an "outpatient setting." Health and Safety Code section 1248(c) defines outpatient setting for the purpose of section 1248.1 as follows:

> ". . . any facility, . . . center, office or other setting that is not part of a general acute care facility and where anesthesia[5] . . . is used in compliance with the community standard of practice, in doses that, when administered have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes.
>
> "Outpatient setting" does not include, among other settings, any settings where anxiolytics[6] and analgesics[7] are administered . . . in doses that do not have the probability of placing the patient at risk for loss of life preserving reflexes." (Emphasis added.)

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[5] "Anesthesia" is defined as "loss of feeling or sensation, especially to loss of sensation of pain as it is induced to permit performance of surgery or other painful procedures." (*Dorlands Illustrated Medical Dictionary*, 27th Ed.)

[6] "Anxiolytic" is defined as ". . . reducing anxiety." *Id.*

[7] "Analgesic" is defined as "agent that alleviates pain without causing loss of consciousness. *Id.*

Neither respondent nor the QualCare nurses administered anesthesia to patients during their stay at the hotel.

14. A City of Temecula code enforcement officer testified that the City received a call from the fire department regarding the rescue of two of respondent's patients from a surgery recovery facility being run out of the Embassy Suites Hotel. The fire department requested the City get on this matter quickly, due to concern that respondent would move his recovery facility to another location. The enforcement officer investigated the matter and issued a notice to the Embassy Suites Hotel, Qual Care and respondent to cease all operations of medical care.

15. The parties entered the following stipulation with regard to the Temecula Municipal Code:

> "At all times relevant herein the city of Temecula, California had a zoning general plan and ordinance which precluded the Embassy Suites Hotel from operation of any business use other than its own operation as a hotel. Under the ordinance it is illegal for anyone, who has not applied for and received a conditional use permit, to engage [within the premises of Embassy Suites Hotel] in the operation of a Post Surgical Care Facility or any other health care operation whereby medical patients or the infirm are cared for by a medical professional for a fee."

Upon review of the record, the panel finds that respondent's arranging for his patients to receive post operative care at the Embassy Suites Hotel was in violation of the City of Temecula zoning ordinance (which the enforcement officer testified to be Municipal Code section 17-01-080.) The panel found the testimony of the enforcement officer to be credible, and there was no evidence that respondent or Qual Care questioned the validity of the notice of violation, but rather, they acted in accordance with the cease and desist notice and immediately removed their post operative care facility from the hotel.

16. The First Amended Accusation alleged as a violation of law that respondent "continued his operation of an uncertified outpatient setting."

The evidence did not establish that respondent operated an "uncertified outpatient setting." (The evidence in this case indicates that in arranging for postoperative care in a hotel respondent may have been operating an unlicensed health facility in violation of Health and Safely Code Section 1250. However, this violation was not pled in the First Amended Accusation; and therefore, cannot be found in this decision.)

17. For several years respondent has made available to prospective patients a video. The video at issue in this hearing is Exhibit H. Respondent testified the video was made as an "infomercial" to be shown on television approximately seven years ago. The

intent was to promote the chemical peel process that he developed over many years and became his special area of practice. The evidence indicated Exhibit H was made in about 1994.[8]

Respondent testified he felt Exhibit H was too commercialized to give to patients, so he made another similar version to distribute to patients for information. The evidence indicated a video was available to patients at respondent's office and was presented at promotional seminars. The evidence was not conclusive that Exhibit H was the same video presented to individual patients and at seminars.

18. The First Amended Accusation alleged respondent engaged in false or misleading advertising within the meaning of sections 651 and 2271 because he "used an advertising video which creates the impression that he completed a post graduate residency and to [sic] post-graduate training at the University of California, Davis."

In one portion of the Exhibit H video, when describing his background and experience, respondent stated: "I graduated from Tulane Medical School and spent my residency at U.C. Davis in Sacramento." Respondent goes on to say that he then made his specialty in non-surgical rejuvenation of the skin. The panel believes these statements imply respondent completed a residency in his specialty. In fact, respondent completed a one-year rotating internship at U.C. Davis in family practice, and did not do a residency.

Respondent admitted his statement in the video could be construed to mean that he completed a residency program in his specialty, and therefore could be misleading. The panel did not find respondent's testimony regarding his confusion over the terms "intern" and "residency" credible on the issue of whether his representation on the video regarding his residency was misleading.

Respondent testified that his office frequently receives inquiries from prospective patients inquiring about his credentials. The panel believes this fact establishes that representations in the video regarding his training are material.

19. The First Amended Accusation alleged respondent engaged in false or misleading advertising within the meanings of sections 651 and 2271 because he "uses videos, brochures, and other advertising media to represent that his practice is safe and has low complication rates. In fact respondent is on probation for treatment of patients resulting in death and serious complications." The Accusation did not specify statements or language it found objectionable. As evidence of the false statements complainant presented the Exhibit H video, a brochure and an information sheet.

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[8] Alice T is one of respondent's chemical peel patients who appeared in the video and stated her age as 72. She testified at the hearing and stated her current age as 80. This suggests the video was made 8 years ago, in about 1994.

Respondent made the following statements on the Exhibit H video regarding his skin rejuvenation procedures:

> [Regarding the aftercare program provided at the retreat facility and the results of the O.S.R.[9] treatment] ". . . I believe it is the reason my complication rate is so low."
>
> "Safety and results are my main concern."
>
> "There are risks involved as in any procedure but this procedure is inherently safer than cosmetic surgery, dermabrasion or skin peeling. I have performed thousands of these procedures over fourteen years and we provide every possible precaution at the O'Neil Skin Center to insure your success. The reason for our excellent safety record is simple, I provide more aftercare than other doctors, I've also designed a safer system for skin rejuvenation than other doctors, a multilayer system with a moderate strength solution. Some doctors use a harsh solution. I have designed a much gentler formula."

The brochure contained the following statements:

> "*Safety*
> The O.S.R. program offers the most extensive aftercare program of any cosmetic treatment on the market today. The patients heal and recuperate in privacy and seclusion. This enhances the safety of the procedure and insure [sic] uniform results. Other doctors may try to suggest that their skin peel program is "easier" or "safer" because you are sent directly home after the procedure, but wouldn't it be safer to have experienced professionals monitoring and caring for you at this time?"

The information sheet, titled "O'Neil Skin Rejuvenation Versus Conventional Skin Peels" and dated "3/00," stated in pertinent part:

> "At the O'Neil Skin Rejuvenation Center we specialize in cosmetic treatment of the skin. Various types of skin peels are offered as well as the O'Neil Skin Rejuvenation program. By concentrating on one area of expertise, Dr. O'Neil has elevated skin rejuvenation to a different plane. With over 8500 cases behind him, we feel our skin treatments are second to none in quality, safety and results. . . . "
>
> "The O'Neil Skin Center stands for quality, comfort, and safety."

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[9] O'Neil Skin Rejuvenation.

The panel believes respondent's holding himself out as having an "excellent safety record," and "second to none in quality and safety" is misleading, within the meaning of sections 651 and 2271, when in fact his license to practice medicine is revoked, with the revocation stayed, and placed on probation for a term of five (5) years, along with the requirement of a practice monitor.

20. The First Amended Accusation alleged respondent engaged in false or misleading advertising in violation of sections 651 and 2271 because he took pre-operative photographs in different lighting than post-operative photos, and took pre-operative photos without makeup, but post-operative photos feature patients with makeup.

The only evidence of photos is contained in Exhibits O and P, original brochures containing black and white photos, and Exhibit H, the videotape. Complainant presented no credible evidence about the manner in which respondent took any before and after photos. Complainant's expert witnesses, Mark Krugman, M.D. and David T. Morwood, M.D., offered their opinions but to a great extent they were speculating; they had no expertise in photography nor did they know the actual circumstances in which the photos were taken.

In most, it does not appear the lighting before and after was significantly different. In some, it does not appear that make-up was used at all in the after photo. In some photos, lipstick or eye makeup was used in both before and after photos. In others, it appears that eye make-up or lipstick was applied for the after photo, but it is also obvious that the improvement in facial skin is the result of something other than cosmetics and lighting.

The only evidence about the manner in which the photos were taken established they were taken in respondent's office in ambient lighting. The before photos were taken shortly before the procedure. The after photos were taken when patients returned for post-procedure checkups. Respondent explained that the lighting might appear different because he takes the pictures against a wall at different times of the day. Patients are more likely to wear makeup when they come in for a checkup but the makeup will not cover wrinkles. Respondent testified he never touched up photos or tried to misrepresent results; he did not need to use makeup to exaggerate the benefits of the O.S.R. treatment because the results and the patients speak for themselves.

Five of respondent's skin rejuvenation patients, including A.H. and H.B., testified at the hearing. Direct observation of their skin revealed that the "after" photos very likely did not exaggerate the results of the O.S.R. treatment.

The evidence was not sufficiently clear and convincing to establish that the photographs used in respondent's promotional and informational materials constituted false or misleading advertising.

21. The First Amended Accusation alleged respondent engaged in false or misleading advertising in violation of sections 651 and 2271 because he sent a letter to prospective patients falsely claiming that his was the only medical office in southern California that specialized in cosmetic skin rejuvenation. The letter stated:

> "We are, to our knowledge, the only medical office in Southern California that specializes in cosmetic skin rejuvenation. While other physicians may do laser peels, TCA peels, or phenol peels, few, if any, concentrate their practice exclusively on skin rejuvenation."

It is important that the statement contained the qualifying "to our knowledge." Complainant presented no evidence of any other medical office in Southern California that concentrated its practice exclusively on non surgical cosmetic skin rejuvenation. None of the expert witnesses called by the parties concentrated their practice on cosmetic skin rejuvenation to the same extent as respondent. The evidence was not sufficient to establish that respondent's statement constituted a violation of sections 651 and 2271.

22. The First Amended Accusation charged respondent with gross negligence, incompetence and repeated negligent acts in his treatment of patient A.H. in July 2000.

In 1998, at age 69, patient A.H. first consulted respondent. A.H. was impressed by the beautiful skin of her hairdresser, who had been treated by respondent. A.H. attended a seminar given by respondent in Escondido and watched two videos, one at the seminar and one given to her by a friend. The seminar video may have been identical or similar to Exhibit H. Respondent's statement about his medical school and residency did not impress her. Based on the information obtained from the seminar and video, A.H. felt respondent was highly competent in the skin rejuvenation process.

On the intake sheet, A.H. listed previous surgeries including two face-lifts and back surgery. She noted her only medical problems as osteoporosis and previous morphine addiction related to back pain. The patient did not have a facial procedure at that time. She returned to respondent in 2000 and scheduled an O'Neil Skin Rejuvenation procedure, including aftercare by QualCare and the retreat. She agreed to the post operative care program because she thought it was better than going home and caring for herself or having a friend help her. She felt no pressure to go to the aftercare program. She was not aware she would spend the first two days at the hotel. She thought Qual Care was part of respondent's "operation but under a different arm" for tax purposes. She thought Qual Care would be supervised by respondent. She does not recall being in the hotel room. She was too asleep to remember.

Pursuant to respondent's routine procedure, an EKG and x-ray were done on June 15, and a complete blood count was performed on June 18, 2000. The lab results were normal and the x-ray found no acute cardiopulmonary disease. The EKG noted "Sinus

Bradycardia, otherwise normal ECG." Respondent required the patient be examined by her primary care physician and obtain an approval for the procedure. On July 14, 2000, the patient was examined by Jerome Brodkin, M.D., her primary care physician. Dr. Brodkin completed an authorization form that noted the patient's only medical problem as "Back, Lower." The patient's physical examination was normal and there were no abnormal findings on her EKG or chest x-ray. Dr. Brodkin approved the patient for the phenol peel procedure.

23. Patient A.H. arrived at respondent's outpatient center by 7:30 a.m. on July 18, 2000. Upon arrival, the patient signed the QualCare Patient Consent Form, which stated:

> "I do hereby give permission to QualCare nurses and associates to render care as prescribed by the physician during post procedural care in a non-hospital setting. In an emergency situation, I am aware that 911 will be called and I will be transported to the nearest hospital. . . ."

24. Shortly before the procedure, respondent took a history and performed a physical exam of A.H. He noted his findings in the patient's chart: there was no history of heart, liver or renal problems; no history of myocardial infarction, congestive heart failure, angina, shortness of breath, cerebral vascular accident or stroke; he found no abnormalities in the physical exam. He noted "EKG - Sinus Bradycardia."[10]

25. The patient was in the operating room at 9:30 a.m.; her blood pressure was noted as 140/70 and her pulse rate about 60. The first anesthesia was administered at 9:45 a.m. At 10:30 the patient became restless and experienced premature ventricular contractions (PVC); her blood pressure was noted as 160/90 with a pulse of about 100. Respondent administered Lidocaine and by 10:37 the patient was in normal sinus rhythm. At 11:35 the patient's blood pressure rose to 182/100 with a pulse of 90. Respondent administered Inapsine. The blood pressure rose over the next ten minutes to 192/100. By 11:00 the blood pressure was decreasing and the last dose of fentanyl was administered. At noon the last dose of Versed was administered and the procedure was finished. The patient's blood pressure was 170/80 and the pulse was about 80.

Postoperatively the patient's vital signs were monitored for an hour and one-half during which the blood pressure ranged from 164/70 to 170/80, with the pulse in the high 80s. From 12:30 to 1:30 the patient's level of consciousness was noted as "awake." The Doctor's Discharge Summary noted the patient was "oriented & ambulates, vital signs stable" at 1:30 p.m. Blood pressure was 172/80, pulse 88 and respiration 20. The patient was experiencing face pain. Respondent gave the patient Ativan for anxiety and authorized her to be discharged from his facility. The patient was discharged wearing the tape mask.

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[10] "Bradycardia" is "slowness of the heartbeat, as evidenced by slowing of the pulse rate to less than 60." (*Dorland's Illustrated Medical Dictionary*, 27th Edition.)

26. Someone from respondent's office drove patient A. H. to the Embassy Suites Hotel. She arrived with the aftercare instruction sheet and her medications. The QualCare nurse on duty noted the patient was awake and alert, her blood pressure was 156/99 and pulse of 107. The nurse's notes described the patient as restless, anxious and taking water. By 3:00 p.m. the patient was either awake or sleeping normally, her blood pressure was 143/80 and pulse was 119. At 5:30 p.m. the nurse noted the patient had a fever, blood pressure was 131/81 and pulse had risen to 124. The nurse paged respondent for orders.

Respondent testified he was in his office performing a procedure when the nurse called. He did not wear a pager while working on a patient and he did not recall staff notifying him of a call.

27. Shortly before 7:00 p.m. Eliane Heller, R.N. came on for the next shift. Nurse Heller testified at the hearing. Based on her attitude, demeanor and the quality of her testimony, she was found to be a candid and credible witness.

The day nurse advised Nurse Heller of the patient's elevated pulse and that respondent had been called. He had not yet returned the page. Nurse Heller took the patient's vital signs and noted the temperature was 98.2, blood pressure 130/100 and pulse 126. The patient was awake and alert and asked the nurse to assist her into the bathroom. While in the bathroom, the nurse noticed the patient disimpacting herself and advised the patient to stop. The nurse washed the patient's hands and performed the disimpaction. The patient said she felt better and walked back to bed.

Between 7:00 - 7:30 p.m. respondent called for the first time after having been paged at 5:30 p.m. Respondent testified he was still in the operating room with a patient when he spoke to the nurse. Nurse Heller testified she told respondent the patient was in bed and resting, and respondent instructed her to keep watching the patient and he would call back in half an hour. Nurse Heller recalled that after respondent's call, the patient sat up, complained of back pain and said it was time for her morphine. The nurse checked the patient's Oramorph bottle and gave the patient the prescribed dose. The medication record indicated this was done at 7:30 p.m. The patient reclined again and felt calmer. Nurse Heller testified that respondent called again, she told him the patient was resting and he said to give Ativan for anxiety. She did not do so because the patient had recently taken Oramorph. There was no evidence to pinpoint the time of this conversation. The QualCare record noted at 8:00 p.m. that the nurse gave the patient MSM and Famiver per bottle instructions and the pulse was 124. No blood pressure was recorded.

Respondent testified the nurse advised him the patient was restless with a rapid heart rate but not complaining of chest pain and not short of breath. Respondent testified he instructed the nurse to give pain medication and wait an hour or so to let him know how she was doing. Respondent explained he did not consider the rapid heart rate to require sending the patient to the hospital because her other vital signs were stable and pain could cause the rising pulse. The evidence did not establish the time of this conversation.

Nurse Heller testified the patient rested awhile and was "OK." She sat up again and became restless, requiring the nurse's full attention. Because there were two other patients in her care, the nurse called Jo-Ann Jordan to come and assist her. Jordan arrived, sat with the patient and talked to her about relaxation methods. There was no evidence of the time Jordan arrived. Nurse Heller returned and took the patient's pulse, which was elevated and too fast to count. Heller testified she looked at Jordan, shook her head to indicate it was not good and, at that point, Jordan said, "Now she is complaining of chest pains." Heller testified she went to the next room and called 911; she then called respondent and told him she had called 911 because the patient had chest pains. Nurse Heller testified repeatedly that respondent arrived either shortly before or at the same time as the paramedics. She testified repeatedly that she did not tell respondent the patient had chest pains until after she had called 911.

Respondent testified that after the second phone conversation with the nurse he decided to see the patient because her blood pressure was a bit high and she was not responding to the pain medication. When he arrived both Jordan and Heller were present. The nurse told him the patient started to complain of chest pain. Respondent listened to her heart and lungs with a stethoscope and asked about the chest pain. A.H. said she had chest pain but did not have it at that moment. Respondent told the nurse to call 911; he did not recall if she said she already had placed the call. The paramedics arrived within a few minutes.

28. Both the QualCare chart notes and respondent's chart notes establish that respondent arrived at the Embassy Suites Hotel to examine patient A. H. at around 8:30 p.m.

Nurse Heller wrote the following note in the QualCare chart:

> "2130 - Guest remains restless. Dr. O'Neil here & Jo Ann RN. C/O chest pain. Skin is cold & clammy. HR 140/min. Pt is transported via ambulance to the hospital."

A QualCare chart entry also noted a time of 8:45 p.m., "Dr. O'Neil with patient." A pulse of 140 and respiration rate of 10 was also noted at about 8:45 p.m.

On July 19, 2000, respondent wrote a note in his chart summarizing the events and noted:

> "Pt noted to have elevated HB [approximately] 120-130 at [approximately] 6:30 p.m. [illegible] 118 after straining at stool. . . . Pt complained of some facial discomfort [secondary] peel and was given her Oramorph pain meds. This failed to reduce HR. She later developed some chest pain (ache, apex x [illegible], came and went several times, radiating to shoulder). I saw her at

Embassy Suite hotel [approximately] 8:30 p.m. No ch. Pain at that time . . . but HR 130-140. Paramedics called and pt. transferred. . ."

The paramedic record established the 911 call as having been received at 9:18 p.m. and arrival of the paramedics at 9:21 p.m.

The panel found the chart notes of QualCare and respondent to be credible and dispositive as to when respondent was first called, and when he finally arrived to examine patient A.H. at the hotel recovery facility. There is credible evidence that the QualCare nurse placed a page at 5:30 p.m. to respondent for orders regarding patient A. H.'s fever, high blood pressure and pulse rising to 124. Respondent failed to examine the patient until approximately 8:30 p.m., some three hours later. The panel believes failing to have the patient examined for three hours fell below the standard of care.

29. The patient was taken to the hospital where she was diagnosed as having a"non-Q wave myocardial infarction." Dr. Frederick Wood examined the patient at the hospital and took a medical history. His report contained the following pertinent information:

". . . She has had no previous history of coronary events. . . . Cardiac risk factors are negative for hypertension, diabetes mellitus, hypercholesterolemia, previous coronary events.

REVIEW OF SYSTEMS: CARDIAC: No previous history of angina, myocardial infarction, and not previous chest pressure, tightness or squeezing with exertion. Negative for a history of heart enlargement, history of congestive heart failure, paroxysmal nocturnal dyspnea, orthopnea, dyspnea on exertion or pedal edema. Negative history of abnormal heart rhythm or palpitations. . . ."

The patient made a full recovery and testified at the hearing. She was satisfied with the cosmetic result of the O.S.R. procedure.

30. The First Amended Accusation alleged the following conduct by respondent in his treatment of A. H. constituted gross negligence, incompetence and/or repeated negligent acts:

A. He inappropriately discharged A.H. to the hotel despite having treated her for cardiac instability and hypertension during the chemical peel.

B. He failed to respond to the initial page placed by the nurse.

C. He failed to recognize signs and symptoms of severe cardiac instability at the hotel and improperly delayed the nurse in calling 911.

31. The First Amended Accusation charged respondent with gross negligence, incompetence and repeated negligent acts in his treatment of patient H.B. in July 2000.

Patient H.B. was 72 when she consulted respondent on June 26, 2000 in response to a newspaper advertisement. She was interested in skin rejuvenation, spider vein therapy, and liposuction for her knees. H.B. was 5 feet, 4 ½ inches tall and weighed 135 pounds. She did not list any medical problems on the intake sheet and noted she had a partial face-lift in 1995. H.B. did not immediately decide to have the procedures. Respondent gave her a video. H.B. testified she was uncertain whether the video she watched was Exhibit H.

H.B. decided to have the OSR procedure and liposuction on both knees. She scheduled the surgery and aftercare by QualCare followed by the retreat at Casa Royal. She understood she was going to the hotel first and then the retreat. She understood respondent required her to go to the hotel for QualCare monitoring but she was not required to go to the retreat. She felt she would be watched and cared for and, if anything happened, she would get attention and be close to a hospital. H.B. thought QualCare was affiliated with respondent. She testified it had to have been associated with Dr. O'Neil. It had to be a part of what the ladies are subjected to in order to have the procedure done. She thought the nurses at the hotel worked for respondent. H. B. testified that she did not think she had a choice about whether to go to the hotel after the procedure. She would not have gone straight home after that, and she didn't think anybody else could either.

32. On about July 17, 2000, H.B. was examined by her primary care physician David W. Schwartz, M.D. Dr. Schwartz ordered lab tests and reviewed the patient's EKG taken on May 1, 2000. The EKG noted Sinus Bradycardia. Dr. Schwartz noted H.B.'s current medical problems included osteoarthritis of knees, menopause, varicose veins for which she had previously had surgery, cataracts, hypothyroidism and a family history of heart disease. The patient's physical examination was normal but examination of the extremities revealed varicose veins, stasis dermatitis[11] and trace edema. Dr. Schwartz noted the patient's EKG taken May 1, 2000 was within normal limits and her chest x-ray was pending. The radiology report dated July 17, 2000 noted an impression of "possible COPD"[12] and "no evidence of active cardiopulmonary disease."

On July 17, 2000, Dr. Schwartz signed the O'Neil Clinic Physical Form and cleared the patient for "Chemexfiliation of Face and Neck and/or Liposurgery."

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[11] Stasis dermatitis is defined in Dorland's Medical Dictionary as, "a chronic eczematous dermatitis, which initially involves the inner aspect of the lower leg just above the internal malleolus and which later may entirely or partially involve the lower leg, marked by edema, pigmentation, and commonly ulceration; it is due to venous insufficiency."

[12] Chronic Obstructive Pulmonary Disease. There was no evidence the patient had COPD.

33. Patient H.B. arrived at respondent's outpatient clinic early in the morning of July 24, 2000. At 7:50 a.m. she signed the patient consent form for post procedure care by QualCare. Respondent performed a physical examination and noted that the extremities were without edema or cyanosis. He noted the patient's medical history as indicated on Dr. Schwartz's authorization form. Respondent testified he did not see significant varicose veins, edema or stasis dermatitis when he examined the patient.

The patient was taken to the surgical room at about 9:30. The Sedation Record form noted the patient had heart disease and fainting/dizziness. The first doses of Versed and Fentanyl were administered at 9:45 a.m. The patient's blood pressure was approximately 100/70. The chemical peel procedure began at 10:15. At 10:45 the patient had premature ventricular contractions and her blood pressure was 150/90. Respondent administered lidocaine for the PVCs. The operative notes stated that by 11:15 "PVC's better." At 11:45 the patient had more PVCs and again respondent administered lidocaine. Respondent completed the chemical peel and continued on to perform the liposuction of the knees. The last dose of Fentanyl was given at 12:15 and the last dose of Versed at 12:30. At 12:45 the face was taped and "supports" were put on. The operative notes showed the patient was monitored until 1:45 p.m.; her blood pressure remained steady at 120-130/70. At 1:30 her level of consciousness was noted as "arousable" and at 1:45 it was "awake." The sedation record indicated the patient was monitored until shortly after 1:45 p.m.

The Doctor's Discharge Summary differs from the operative notes, stating that at 1:30 the patient was "oriented and ambulates," vital signs stable, blood pressure 120/80 and pulse 76. The patient was driven to the Embassy Suites shortly before 2:00 p.m.

34. Patient H.B. was received into the hotel by QualCare at 2:00 p.m. Sonja Forrest, R.N., was the nurse on duty. At the hearing she testified she did not recall the patient's arrival or putting her into bed. She explained that, unless something went wrong, it does not stay in her mind. Nurse Forrest made the following chart entry after the patient arrived:

> "1400 Elderly female admitted from Dr. O'Neil's office vial w/c. very sedated. Max. assist required to bed. Denied need to void. Too sleepy to sip H2O. To sleep immediately. Ice to eyes. VS stable. BP 182/81."

Nurse Forrest testified that had she believed H.B. was not in a condition to be discharged to the QualCare setting she would have informed respondent's office. H.B.'s recollection of the hotel was like in a day dream when awake, "if it can be called awake." She was just really out of it.

The nurse's notes show that at 3:00 p.m. the patient was sleeping and difficult to arouse; vital signs recorded at 4:00 p.m. show blood pressure 149/83, pulse 90 and the patient sleeping and easily aroused; and the nurse took the patient's pulse for one minute and noted "No pvc's felt."

By 7:00 p.m. the patient was still "mildly sedated" but she was drinking water and got up to go to the bathroom with maximum assistance of the nurse. Throughout the night the patient slept, was easily aroused, drank liquids and went to the bathroom with maximum assistance of the nurse. Her blood pressure remained stable at 121-132/69-72.

At 9:00 a.m. on July 25, 2000, the patient was awake and alert, blood pressure was 130/74, she was taking liquid nourishment and going to the bathroom with moderate assistance from the nurse. She became restless and anxious in the afternoon and took 1 mg of Ativan. At 8:00 p.m. she again became restless; her blood pressure was 153/86. She took 1 m.g. of Ativan. The patient slept through the night, waking to drink water or go to the bathroom. At 4:30 a.m. she experienced pain and was given Darvocet.

35. The patient was awake and alert at 5:00 a.m. on July 26, 2000. At 6:00 a.m. the night nurse removed the tape mask from the patient's face and applied the powder. The patient went back to sleep. At about 7:00 a.m. Nurse Forrest came on duty and relieved the night nurse. At 8:45 she awakened the patient to apply a second coat of powder. The patient was able to get out of bed by herself, and drank water and juice. At about 9:05 a.m. she went to the bathroom by herself. At about 9:10 a.m., upon returning from the bathroom, she complained of dizziness, became unsteady and "lethargic acting" and fell into bed assisted by the nurse. Her lips and eyelids were ashen; she was perspiring, skin clammy, and complained of chills. The nurse noted her blood pressure as "70/?" with pulse of "60-weak." The patient denied chest pain or shortness of breath. Her lungs were clear with a stethoscope. The nurse placed the patient in a position to elevate her feet above her head in order to raise the blood pressure. The nurse did not immediately call 911 because she did not believe the condition was life threatening.

At the hearing H.B. testified that what she remembered about the hotel was having trouble breathing. She recalled having trouble breathing when the nurse first offered her juice.

At 9:15 the nurse called respondent and advised him of the patient's condition. Respondent instructed her to continue the position, monitor vital signs and call him again if the patient did not improve. At 9:30 the nurse called respondent and informed him the blood pressure continued to be "60-70/?," the pulse weak in the 70's, color ashen, and the patient now complained of shortness of breath. Respondent and the nurse agreed that 911 should be called. The nurse called 911 at 9:35 p.m. The EMT records show the 911 call was received at 9:38 a.m. and the paramedics arrived at 9:43 a.m. They administered oxygen and took the patient to Rancho Springs Medical Center.

36. Respondent's chart contained the following entry for July 26, 2000:

> "9:30 am Qualcare nurse called. Pt fainted after going to BR and standing. Pt alert and stable in bed. HR 60. BP unobtainable. They [illegible] called

back 10 minute later. Pt. Now SOB. HR 60. BP unobtainable. PT in bed with legs elevated, told to call 911 and pt transferred to Rancho Springs ER."

37. On July 26, 2000, patient H.B. was admitted to Rancho Springs Medical Center. The emergency evaluation record noted the patient had difficulty breathing with near syncope but had no chest pain. She denied any history of pulmonary or cardiac problems. The physical examination revealed no rashes, no numbness or weakness in the extremities and no peripheral edema. The EKG showed a single PVC. The initial assessment was a post-surgical complication of pulmonary embolus.

Anoop K. Maheshwari, M.D., examined the patient in the hospital. His history noted the patient took diuretics once a week for pedal edema. His physical examination of the extremities found "no cyanosis, clubbing or edema. No calf pain tenderness is present." A venous Doppler exam of the lower extremities showed slow venus flow and no evidence of deep vein thrombosis.

H.B. was discharged from the hospital on July 28, 2000, much improved and in stable condition. Dr. Schwartz' discharge diagnosis for H.B. was bilateral pulmonary emboli with respiratory distress.

38. The First Amended Accusation alleged the following conduct by respondent in his treatment of H.B. constituted gross negligence, incompetence and/or repeated negligent acts:

A. He improperly performed lower extremity liposuction on the patient because her preoperative workup showed lower extremity venous insufficiency making her an inappropriate patient for the procedure.

B. He excessively sedated the patient and prematurely discharged her from his facility.

C. He improperly continued the cosmetic surgery on the patient after she suffered two episodes of ventricular arrhythmia during the chemical peel procedure.

D. He failed to timely have the patient transferred to the hospital when she suffered postoperative complications at the hotel.

39. The evidence complainant presented was insufficient to establish that respondent used general anesthesia on his patients.

40. Complainant called two expert witnesses to testify at the hearing and presented the written report of a physician consultant. Mark Krugman, M.D. and David T. Morwood, M.D. are both board certified plastic surgeons.

Dr. Krugman obtained his medical degree from the University of Maryland Medical School in 1964. He completed a rotating internship at Mount Sinai Hospital in New York City in 1965. At the same hospital he completed a residency in General Surgery in 1966 and a residency in Otolaryngology in 1969. After two years of service in the Air Force, Dr. Krugman completed a plastic surgery residency at U.C. Irvine in 1976. He became board certified in plastic surgery in 1977. Dr. Krugman's curriculum vitae showed that he is very well qualified as a plastic surgeon. His education and professional experience as a plastic surgeon and otolaryngologist are extensive.

Since 1976, Dr. Krugman has maintained a private practice in southern California, specializing in plastic surgery and otolaryngology. He operates a licensed outpatient clinic. He performs laser resurfacing procedures but does not perform phenol peels of the face. Dr. Krugman has no objection to the skin rejuvenation procedure used by respondent. On his resume, Dr. Krugman listed a Chemical Peel Workshop in 1991, an Update on Skin Peeling in 1992, and attendance at conferences on chemical peels in 1992 and 1993.

Dr. Morwood obtained his medical degree from the College of Medicine, University of Vermont, in 1983. He performed his internship and general surgery residency at Beth Israel Medical Center in New York. In 1987, he completed a plastic surgery residency at Mount Sinai Hospital in New York. In 1993, he was board certified in plastic surgery and received a Certification of Added Qualifications in Surgery of the Hand in 1994.

Dr. Morwood maintains a private practice in plastic surgery, specializing in breast, hand, face and reconstructive surgery for children, face lifts, lasers, peels, fractures and injuries. Dr. Morwood has performed some liposuction and has done 20 phenol peels in his career.

A written report by Jeannette Y. Martello, M.D., J.D. was admitted into evidence by stipulation in which the parties agreed it could be received "as if she had testified to these matters under oath." Dr. Martello obtained her medical degree from UCLA School of Medicine in 1988. In 1989 she completed a surgical internship at Massachusetts General Hospital in Boston. She then attended two years of law school at Boalt Hall. While in law school she worked as an emergency room physician at Kaiser Santa Theresa in San Jose. From 1991 to 1995 she performed a Plastic Surgery Integrated Residency at University of Kentucky Medical Center. In 1996 she completed one year as Plastic Surgery Chief Resident at the same facility. During this time she moonlighted at various emergency rooms throughout Kentucky. She returned to law school and obtained her J.D. degree in 1997. In June 1998 she completed a one-year hand surgery fellowship at Kleinert & Kutz Institute of Hand Surgery in Lousiville, Kentucky, and in January 1999 completed a six-month term as Hand Transplant Fellow at the same institute. Since March 1999 Dr. Martello has engaged in the private practice of Plastic Surgery and Hand Surgery in Pasadena and has served as Medical Consultant for the Medical Board of California.

She became board certified in plastic surgery in September 2001. Dr. Martello's resume did not indicate that she performs phenol peels or liposuction.

41. On June 1, 2001 Dr. Krugman issued a written report in which he stated his opinions about respondent's treatment of patients A. H. and H. B. He found three instances in which respondent's actions with regard to H. B. constituted a "departure from the standard of care" and one instance of a "departure from the standard of care" with A. H. On about June 8, 2001, the Board's investigator called Dr. Krugman to clarify whether or not he meant simple or extreme departures. Dr. Krugman told the investigator that all of the departures he found were simple departures.

42. With regard to patient A. H., it was Dr. Krugman's opinion that respondent departed from the standard of care when he failed to call 911 in a timely manner. The testimony wherein Dr. Krugman assumed the patient had been complaining of chest pain for 30 to 60 minutes, with respondent present or aware of the complaint, and there was a 50-minute delay before the 911 call, is supported by the record. Respondent's July 19, 2000 chart note establishes that he saw patient A.H. at the Embassy Suites Hotel at 8:30 p.m. and that he was aware patient A.H. had developed some chest pain radiating to shoulder prior to his arrival at the hotel. Nurse Heller's chart note at 8:45 p.m. states respondent is with patient. The paramedic record established the 911 call as being received at 9:18 p.m.

43. It was Dr. Morwood's opinion that respondent committed extreme departures from the standard of care in his treatment of patient A. H. The standard of care requires a physician to be familiar with possible side effects and potential complications from a treatment. Any side effects or complications must be treated appropriately in a timely manner to prevent further sequella and complication.

Dr. Morwood believed the patient showed cardiac instability in the form of PVCs during the facial peel and she continued to show cardiac instability after the procedure. In spite of treatment, patient A.H. continued to be hypertensive, shortly after showing cardiac irritability that did respond to Lidocaine. A. H., a patient who showed cardiac arrhythmia, and hypertension which did not respond to treatment, was discharged to a hotel. Upon discharge, the patient required a setting that had the proper monitoring equipment for blood pressure, oxygen saturation and cardiac condition. He felt respondent discharged her in spite of the continuing signs of cardiac instability. After discharge, the QualCare nurse notified respondent of continuing progressive cardiac instability, but he did not see the patient for some hours. Dr. Morwood believed respondent ignored the warning signs and did not take timely action to have the patient transferred to the hospital or have her evaluated by an intensive monitoring team.

Dr. Morwood acknowledged that PVCs are common during a phenol peel and respondent appropriately treated patient A.H.'s episode during the procedure and she responded well. However, he believed that her cardiac instability was not adequately

addressed before she was discharged to the hotel where she remained unstable and respondent delayed addressing her condition. It was his opinion that, even without chest pain, respondent should have transferred A.H. to the hospital immediately.

44. It was Dr. Krugman's opinion that patient H.B. was not a good candidate for liposuction of the knees because she was in her early seventies with a history of swelling in her legs, varicose vein surgery, hypothyroid and taking female hormones, which made her predisposed to getting blood clots in the deep veins of her legs. Dr. Krugman admitted that hormone replacement and hypothyroidism were minor risk factors, but were "additive" in this situation. He believed that Dr. Schwartz' findings of edema and stasis dermatitis, when added to the patient's age and sedentary position after surgery, created risk factors. He explained that edema and stasis dermatitis in a patient over 70 meant the patient's venous system was not good.

Dr. Krugman believed that coupling the liposuction with the facial peel created competing interests; the peel procedure required the patient to be sedentary but the knee liposuction required the patient to ambulate to avoid an embolism. It was Dr. Krugman's opinion that performing knee liposuction on H.B. was a simple departure from the standard of care because of her predisposing risk factors.

45. It was Dr. Krugman's opinion that respondent showed poor judgment and departed from the standard of care in going forward with the knee liposuction after patient H.B. experienced two episodes of PVCs during the facial peel. With her risk factors described in Factual Finding 44, the PVC's made her condition more precarious.

Dr. Krugman concluded respondent's conduct represented an extreme departure from the standard of care because of "the multiplicity of cognitive decisions he made that led to the problems with the patient."

46. It was Dr. Morwood's opinion that patient H.B. suffered post-surgical complications because respondent performed liposuction on diseased legs. He explained that the standard of care requires the physician to be familiar with the criteria that would designate patients who are appropriate or inappropriate for a particular procedure. Dr. Morwood believed H.B. presented with a history and preoperative physical exam that made her inappropriate for lower extremity liposuction. The patient's varicose veins, stasis dermatitis, age and hormone replacement therapy placed her at high risk for pulmonary embolism. It was Dr. Morwood's opinion that it was an extreme departure from the standard of care to perform liposuction on H.B.'s knees because of her high risk history. He believed a clot from the patient's leg traveled to her lungs when she got up after being sedentary.

47. It was Dr. Morwood's opinion that combining the facial peel and knee liposuction procedures did not of itself deviate from the standard of care. The standard of care required the patient be mobilized immediately after a surgical procedure on her legs.

Inactivity increased the chance for venous stasis[13] and thrombus[14] in the legs. However, because the patient required rest for the facial procedure, the standard of care required that something be used on her legs while in bed to minimize the chance of venous thrombosis. Risk can be minimized by short walks, foot pumps, heparin therapy or a sequential compression device.[15]

48. It was Dr. Krugman's opinion that when a patient is difficult to arouse it is a departure from the standard of care to discharge the patient from an ambulatory facility. He explained that a patient can remain in an outpatient surgical clinic for up to 23 hours. If a sedated patient is difficult to arouse the facility should have equipment such as EKG, oxygen, pulse oximeter, intravenous equipment and defibulator. A patient will still be under some sedation when discharged, but not to the point where she cannot be aroused or get out of bed. A patient who cannot take fluid by mouth and is too sedated to get out of bed should not be discharged home. A patient who remains in that condition should be transferred to a hospital. Transfer of such a patient to a hotel room is a departure from the standard of care.

On cross-examination Dr. Krugman agreed that, based on respondent's chart documentation of patient H.B.'s condition at the time of discharge, she looked appropriate for discharge. However, he felt her heavily sedated condition when she arrived at the hotel required explanation. (Based upon the transcript, it appears Dr. Krugman was reviewing respondent's discharge summary. As is noted in Factual Finding 33, there is a discrepancy between respondent's operative notes and the discharge summary as to patient H. B.'s level of alertness. The operative note says she was "arousable" at 1:30 p.m., whereas the discharge summary says she was "oriented and ambulatory" at 1:30 p.m.). There is no specific post procedure observation time required before discharge; it depends on the individual patient.

In his written report of June 1, 2001, Dr. Krugman did not opine that respondent's discharge of H. B. was a departure from the standard of care. At the hearing he testified that it is his opinion that the discharge of patient H.B. from respondent's clinic was a simple departure from the standard of care because she was over-sedated when she arrived at the hotel. She should have been retained at the clinic with monitoring or transferred to a hospital. Dr. Krugman explained that the issue here is not the amount of sedation during surgery, but the level of sedation at discharge.

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[13] Cessation or impairment of venous flow. (*Dorland's Illustrated Medical Dictionary*, 27th Ed.)

[14] An aggregation of blood factors frequently causing vascular obstruction at the point of its formation. (*Id.*)

[15] Complainant did not allege that respondent failed to use appropriate anti-thrombosis therapy.

49. In his written report issued July 25, 2001, Dr. Morwood did not opine that respondent inappropriately discharged patient H.B. from his clinic before she was ready to leave. At the hearing he testified that if H.B. was very sedated when she arrived at the hotel and required maximum assistance to get into bed, it was below the standard of care to discharge her from the clinic. He believed it is extremely uncommon to have the patient alert and able to ambulate, but 15 minutes later appear as described by the QualCare nurse.

Dr. Morwood explained that the standard of care required the patient to be monitored after surgery for at least an hour before discharge from the outpatient clinic. Before discharge, the patient should be able to respond to questions, breath clearly, take a deep breath on command, urinate, and have stable vital signs. After reviewing H.B.'s chart and her vital signs before discharge on cross-examination, Dr. Morwood did not see any evidence of an inappropriate discharge. (Based upon the transcript, it appears, however, Dr. Morwood was reviewing respondent's discharge summary. As is noted in Factual Finding 33, there is a discrepancy between respondent's operative notes and the discharge summary as to patient H.B.'s level of alertness. The operative note says she was "arousable" at 1:30 p.m., whereas the discharge summary says she was "oriented and ambulatory" at 1:30 p.m.)

50. It was Dr. Krugman's opinion that it was a simple departure from the standard of care for respondent to delay calling 911 at 9:00 a.m. on July 26, 2000, because H.B. was "shocky" and her blood pressure was low. Dr. Krugman's June 1, 2001 written report indicated that he erroneously believed the nurse called respondent at 9:00 a.m. and again at 9:15. The evidence is otherwise (Factual Finding 35).

Dr. Morwood offered no opinion about the events of July 26, 2000.

51. Dr. Morwood reviewed all of the available medical records in this case. Based on the records, he could not determine that respondent used Versed in an amount that would induce the patient to a level of general anesthesia.

52. Dr. Morwood offered his opinion that "hotel observation" aftercare such as that provided by QualCare to cosmetic procedure patients is a common practice in California. However, it is his understanding that the nurses have formal monitoring equipment available, such as, a cardiac monitor, automatic blood pressure taking machines, a pulsoximeter, and oxygen saturation monitor.

53. Dr. Morwood offered his opinion that respondent's video advertisement and his brochures seem to be similar to many other infomercials and physician's advertisements in the popular media in California.

54. Complainant presented no evidence in the form of expert testimony to support the charge that respondent was incompetent in his care, treatment or management of the patients A.H. and H.B.

55. Respondent called two expert witnesses to testify at the hearing. Joseph C. Avakoff, M.D. is a board certified surgeon and plastic surgeon. Robert A. Yoho, M.D. is board certified in emergency medicine, dermatologic cosmetic surgery and laser surgery.

Dr. Avakoff obtained his medical degree from the University of California School of Medicine in San Francisco in 1961. After his rotating internship, he completed a residency in General Surgery at Kaiser Hospital in San Francisco in 1966 and later a residency in plastic surgery at University of Texas School of Medicine. In 1985 Dr. Avakoff obtained a J.D. degree from Santa Clara University School of Law and was admitted to the California State Bar in 1987. Dr. Avakoff spent 22 years in the private practice of medicine in Santa Clara County. He retired in 1994. Between 1987 and 1994 Dr. Avakoff performed approximately 100 liposuction procedures but never aspirated more than 1500 cc. He never performed phenol facial peels. Since retirement he has been doing medi-legal consultations for the Medical Board and for the Department of Corporations.

Dr. Yoho received his medical degree from Case Western Reserve University Medical School in 1981. He completed a one-year rotating internship at the University of Cincinnati and a two-year Dermatology Residency at Dartmouth-Hitchcock Medical Center in New Hampshire. In 1985 he completed emergency Medicine Residency Training at LAC/USC Medical Center in Los Angeles and Huntington Memorial Hospital in Pasadena. Dr. Yoho did a preceptorship with respondent, and respondent did a preceptorship in Dr. Yoho's office for liposuction.

From 1984 to 1987 Dr. Yoho was employed by the Huntington Memorial Hospital Emergency Medical Group. He then maintained a general medical practice in Pasadena until 1994. From 1992 to the present he has specialized in cosmetic surgery. His practice includes liposuction, hair transplantation, laser resurfacing, face lifts, laser blepharoplasty, breast implantation, vein treatments and fat transplantation. Dr. Yoho has published several articles related to cosmetic surgery procedures in peer reviewed journals.

56. Dr. Avakoff testified that a patient is ready for discharge from an outpatient facility when she can get out of bed and walk, but the patient will not be as ambulatory as someone who has not gone through the procedure. To discharge after outpatient cosmetic surgery, the standard of practice required the vital signs be stable and the patient be easily arousable to the extent she is able to wake up though she may still be sleepy, converse a bit, get out of bed and go to the bathroom. If the patient experienced PVCs or hypertension during the procedure, she must be monitored until she becomes stable. When the patient is stable, she can be released to home where she would not be monitored.

Dr. Yoho explained the standard of practice regarding discharge of a patient is to observe for one to two hours to see that the vital signs are stable. A certain level of alertness is expected; the patient need not be as alert as before the sedation, but should know where she is, be able to ambulate, urinate and take fluids.

Dr. Yoho testified that phenol peel patients are commonly discharged to home. However, if the patient does not do exactly the right things for the face, scarring can result. It meets the highest standard of care to provide a place where the patient is assisted for a week. It was Dr. Yoho's opinion that the monitoring provided by QualCare was appropriate and the standard of care did not require the patients to be monitored as if in an acute care setting with equipment such as pulse oximeters. He noted that even when a patient is sent to a nursing home for aftercare, there is only one nurse to attend 20 or 30 patients.

57. Dr. Yoho explained that PVCs are common during a phenol peel because the chemical substance irritates the heart and causes arrhythmia. The phenol substance is irritating to the heart muscle. Although the cardiac rhythm imitates that of a heart attack, PVCs that occur during a phenol peel do not have the same "malignant quality" in which the heart is starved for blood and oxygen. The PVCs are taken seriously but sudden death is not a problem. Appropriate treatment is to wait a few minutes for the arrhythmia to subside or to administer Lidocaine. It was Dr. Yoho's opinion that respondent properly managed A.H.'s PVC episode.

Dr. Avakoff reviewed the medical records of patient A.H. It was his opinion that she did not suffer cardiac instability after the facial peel procedure. He explained that PVCs are common during a phenol peel and do not constitute "cardiac instability." Nor did the increased blood pressure necessarily indicate cardiac instability because it can result from pain during the phenol peel. It was Dr. Avakoff's opinion that respondent properly treated the patient's PVCs during the procedure with Lidocaine and the operative notes show the patient returned to normal sinus rhythm.

58. Dr. Yoho explained that elevated blood pressure is typical during a phenol peel because the peel is painful and pain produces hypertension. It was Dr. Yoho's opinion that respondent's use of Anapsine on patient A.H. was an "elegant" way to treat the hypertension caused by pain and the nausea that can result from the narcotic used for sedation. If too much hypertension medicine is used during the peel, the blood pressure can become too low after the procedure. It was Dr. Yoho's opinion that respondent's treatment of A.H.'s high blood pressure was appropriate.

59. It was Dr. Avakoff's opinion that A.H.'s vital signs were stable during the hour and one-half she was monitored after the procedure and before discharge. It was Dr. Avakoff's opinion that respondent's discharge of A.H. did not depart from the standard of care. Her vital signs were stable and she was released to monitoring by QualCare.

It was Dr. Yoho's opinion that respondent's chart entries show that patient A.H. was observed for one and one-half hours and her vital signs were entirely stable before discharge. Based on the records she was appropriate for discharge.

60. Dr. Yoho noted that the charts for patients A.H. and H.B. showed blood pressures that were not dangerous. They were blood pressures that people carry for many years at a time. The panel did not find this testimony persuasive with regards to patients A.H. and H.B. who had just undergone sedation, and a surgical procedure during which they experienced PVC's.

61. It was Dr. Avakoff's opinion that respondent did not depart from the standard of care in his attention to patient A.H. after discharge. He explained that if respondent was told the patient had high blood pressure, was restless, anxious and hyperventilating,[16] but with no chest pain, there could be a number of causes for the symptoms and the situation did not require an immediate 911 call. It was Dr. Avakoff's opinion that respondent's instruction to monitor the patient was appropriate. Once the patient complained of chest pain, it was mandatory to call 911. If respondent learned of the chest pain before reaching the hotel and did not order a call to 911, it would be a simple departure from the standard of care because chest pain can be caused by something other than a heart attack.

It was Dr. Yoho's opinion that respondent did not act inappropriately in the transfer of patient A.H. to the hospital. He explained if the nurse advised respondent the patient had high blood pressure, was restless, anxious and hyperventilating, this was a typical post-phenol peel set of symptoms in a patient who continued to feel some pain and claustrophobia in the tape mask. It would have been significant if respondent had been advised of chest pain. The panel did not find this testimony credible, taking into consideration that Dr. Yoho also testified that the elderly population has more problems. "They are fragile and you've got to watch them like a hawk."

62. Dr. Avakoff reviewed the medical records of patient H.B. and concluded there was no evidence of any significant venous insufficiency of the legs. He testified that varicose veins indicate venous insufficiency only in the area of the varicose vein. He believed that the patient had significant varicose vein surgery in the past and had residual varicose veins and stasis dermatitis, which was common and did not indicate deep venous insufficiency. Dr. Avakoff noted that none of the physicians who examined H.B. at the hospital noted any profound venous insufficiency.

(The Doppler exam of the lower extremities taken at the hospital did show slow venus flow.)

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[16] Respondent's counsel included these symptoms in his hypothetical question to Dr. Avakoff. The evidence did not establish the patient was hyperventilating or had dangerously high blood pressure. The testimony and chart notes indicated the blood pressure was "up a little bit" and the pulse rate was high. The pulse rate became too fast to count at the same time the patient started to feel chest pain.

Dr. Avakoff considered the hormone replacement therapy to be an added but very minor risk factor and not a contraindication for liposuction. He did not think hypothyroidism caused increased thrombolic phenomenon.

It was Dr. Avakoff's opinion that H.B. was an appropriate candidate for the planned knee liposuction because the risk factors were quite minor.

63. Dr. Yoho explained that embolism is a risk for anyone who undergoes surgery. Embolism after hospital surgery is very common, but is quite rare after outpatient procedures. In the 6,000 cases that Dr. Yolo has performed, four patients experienced deep vein thrombosis and none had pulmonary embolism. He discussed the risk factors for pulmonary embolism. The panel did not find this testimony persuasive given Dr. Yoho's testimony that his patient population is younger.

It was Dr. Yoho's opinion that superficial venous disease and hypothyroidism are not risk factors. The risk factors are general anesthesia for more than half an hour; birth control pills but not estrogen replacement; congestive heart failure; broken extremities; prior history of pulmonary thrombosis/embolism; prior history of deep venous thrombosis; hospital bed rest where the patient does not get up; and cancer.

It was Dr. Yoho's opinion that varicose veins are not a risk factor and stasis dermatitis can be purely the result of varicose veins. Edema is not diagnostic for deep vein thrombosis. He would never order a post-lipo patient to be kept sedentary for the first 48 hours. He agreed pulmonary embolism is potentially a risk of being sedentary. He believed although patient H.B. was sedentary while in the hotel, she was getting up to go to the bathroom so she was not completely at bed rest. (The testimony of the QualCare nurses was that the patients were to stay in bed and be quiet.)

It was Dr. Yoho's opinion that patient H.B. had none of the well known risks for embolism. Any patient over 65 is at increased risk for many things, but he considered H.B. to be a "class 2 anesthetic risk" because she was healthy on medications. Patient A. H. was also a "class 2" risk. Typically a cosmetic surgeon only does a Class 1, or Class 2 that might be on blood pressure medication, controlling the blood pressure. He explained that a class 3 risk is a patient with an active medical problem that is not controlled. H.B.'s medical conditions were controlled with medication so in his opinion she was an appropriate candidate for the procedures.

64. It was Dr. Avakoff's opinion that respondent properly addressed the two episodes of PVCs during H.B.'s phenol peel and proceeding with the knee liposuction was not a departure from the standard of care because the small amount of aspirate taken indicated it was a minor liposuction procedure.

It was Dr. Yoho's opinion that respondent did not violate the standard of care by proceeding with the knee liposuction after H.B. experienced PVCs. He opined that for the reasons stated in Factual Finding 63, the PVCs and the manner respondent treated them did not contraindicate the knee liposuction. The amount of aspirate in the knee liposuction indicated a minor procedure that took about ten minutes. He explained that the cardiac irritation effects of the phenol peel are gone in 15 minutes to half an hour after the peel is finished. The panel did not find this explanation credible. Phenol is considered cardiotoxic.

65. It was Dr. Avakoff's opinion that H.B.'s sedation and operative record showed she was appropriate for discharge at 1:45 p.m. She had been monitored for an hour, her vital signs were stable and she was awake. He offered an explanation for the changed condition of the patient at the hotel. He believed the patient could have been apprehensive at the facility, awake and alert but on reaching the hotel and knowing the procedure is over, "just conks out" to rest. The panel did not find this explanation credible.

Dr. Avakoff acknowledged that it would be a violation of the standard of care if respondent discharged the patient when she was difficult to arouse and required maximum assistance. The patient's condition when she left the facility is the issue. The observations recorded in respondent's chart indicated she was appropriate for discharge even to home. It was quite common to use a wheelchair to discharge a patient with knee liposuction.

It was Dr. Yoho's opinion that patient H.B. was appropriately discharged from respondent's facility. She was monitored for an hour after the procedure with vital signs taken every 15 minutes. In his opinion, the patient record showed that her vital signs were stable. Use of a wheelchair for a post procedure patient is routine.

Dr. Yoho noted that the patient's level of consciousness on arrival at the hotel was described as "very sedated." He explained that the narcotics used during the procedures cover the pain and are stressful and fatiguing for the patient. After surgery it is not unusual for the patient to have a waxing and waning level of consciousness.

66. It was Dr. Avakoff's opinion that respondent did not unreasonably delay calling 911 for patient H.B. When respondent was notified of the patient's condition at 9:15 it was reasonable to have the patient watched carefully for a short time. Her symptoms, including blood pressure and respiration, were consistent with a fainting episode and the standard of care did not require an emergency call to 911 when a patient initially appears "woozy." When the patient did not improve and then developed shortness of breath, it was time to call 911.

Dr. Yoho reviewed the sequence of events for patient H.B. on the morning of July 26, 2000. It was his opinion that respondent's response to the patient's condition as relayed to him at 9:15 a.m. was appropriate. Dr. Yoho explained the "medical reasoning" process

commonly used by physicians. The physician first thinks of common causes for the patient's symptoms and later considers the rarer causes. The physician could first think that H.B.'s condition was a vaso-vagal episode – a faint brought on by a bowel movement or pain – in which case the patient would recover after a few minutes. Dr. Yoho explained that a vaso-vagal episode typically includes low heart rate and blood pressure goes down. It was Dr. Yoho's opinion that an experienced physician would first consider a vaso-vagal episode, especially with a patient who had just risen from bed and gone to the bathroom, and an immediate call to 911 was not required. Observation for a few minutes and rechecking vitals signs was an imminently reasonable way to handle the situation. It was Dr. Yoho's opinion that respondent's decision to closely monitor the patient and call him again if she did not improve was within the standard of care. Respondent properly ordered the 911 call when the nurse called him at 9:30 a.m. to say the patient had not improved and had begun to complain of shortness of breath. The panel did not find this testimony persuasive because it only refers to a decrease in blood pressure, not the nurse reporting an unobtainable blood pressure as the nurse reported regarding patient H.B. (see Factual Finding 35.)

67. Based on his review of the medical records, Dr. Yoho determined that respondent used monitored anesthesia, which he described as twilight sleep or moderate sedation. It was not general anesthesia. A.H. and H.B. did not need to be ventilated for respiration, nor did they require cardiac support. They were both arousable from the sedation.

68. The testimony of each of the expert witnesses was weighed and evaluated, taking into consideration their qualifications and experience, attitude and demeanor while testifying, the quality of their answers, and the accuracy and reliability of the information on which they based their opinions. Each was qualified to testify and offer an opinion; none had any apparent bias.

Upon review of the record, the panel found Dr. Morwood to be the most credible, persuasive witness in this case. His testimony was the most evaluative of the medical records in the context of the standard of practice for the treatment and care at issue. His testimony provided a medical based rational for his opinions.

Dr. Yoho testified that the patient population of patients A.H. and H.B.'s age "is tougher in general." They have more problems. His cosmetic surgery patient population is younger. The panel found this testimony to discredit the credibility of Dr. Yoho's expert testimony that respondent met the standard of care in treating patient H.B., age 72, and patient A.H., age 69.

69. Dr. Martello issued a "Memorandum" to the Board's investigator on February 22, 2001. The statement and opinions in her written report are given little weight against the testimony of the expert witnesses who appeared and testified under oath. Dr. Martello's pervasive use of exclamation marks in her comments and opinions raised a

concern about her detachment and objectivity. Her opinions were based on facts not established by the evidence at hearing.

70. Dr. Krugman's written report indicated he assumed all of the allegations were true in the 1996 Accusation and 1998 Supplemental Accusation. By his testimony and statements in his written report, it was clear Dr. Krugman did not understand that respondent stipulated to only a portion of the allegations and charges in the prior disciplinary action. His interpretation of the facts and violations established by the stipulated decision and order was not accurate. Dr. Krugman also considered information in Dr. Martello's report that was either not admissible or not established by the evidence.

Dr. Krugman did not apply an objective standard. He candidly admitted that, in evaluating respondent's conduct as an "extreme departure from the standard of care," he was influenced by the prior discipline imposed on respondent. This was inappropriate for two reasons: Dr. Krugman's interpretation of the nature and effect of the prior discipline was not accurate and he was unduly influenced by an irrelevant factor. The prior discipline should not be a factor in his professional opinion. The conduct at issue must be evaluated of itself in the context of the situation as it occurred. The conduct is either below an existing standard of care as gross or simple negligence or it is not. Respondent's prior actions and the existence of prior discipline are not relevant to the measure. The prior discipline is relevant only for the purpose of determining the appropriate discipline, if any, to impose in the pending case. Dr. Krugman also erroneously believed that several acts of simple negligence, or repeated negligent acts, equate to an extreme departure from the standard of care.

71. In his written report, Dr. Morwood stated he could not determine respondent used general anesthesia. At the hearing, based on the same documentation he used for his written report, he inexplicably changed his mind and opined that patient H.B. was under general anesthesia. This weakens the reliability of that testimony.

72. With regard to the charges relating to patient A.H. as set forth in Factual Finding 30, the evidence was clear and convincing to a reasonable certainty to establish respondent inappropriately discharged the patient from his facility to the QualCare aftercare, failed to timely respond to the initial page to him placed by the nurse caring for A. H. postoperatively, when he did respond he failed to recognize signs and symptoms of the patient's severe cardiac instability, and failed to timely transfer patient to a facility where she could receive appropriate care.

Patient A. H. experienced cardiac instability during the phenol peel procedure. She did not fully respond to treatment, and continued to experience hypertension during the hour and a half period of monitored post operative recovery at respondent's ambulatory surgery center. She was then discharged, while still experiencing hypertension and a rising pulse, to a hotel without adequate monitoring equipment for her condition.

The panel believes the minimum monitoring equipment required for monitoring patient A. H. would have been a cardiac monitor, frequent blood pressure monitoring by a machine, and an oxygen saturation machine to show the level of oxygen saturation in her blood and her pulse.

When the nurse called at 5:30 p.m. to inform respondent of patient A. H.'s worsening condition and seek orders, he failed to respond to the call for some two hours, and failed to see to it that the patient received appropriate emergency care. Appropriate care would have been an emergency consultation with a cardiologist, evaluation by an intensive monitoring team, or immediate transport to a hospital emergency room.

The testimony of this case established that each of these departures is an extreme departure from the standard of care.

The panel did not find persuasive the testimony of Dr. Yoho and Dr. Avakoff who testified that continued monitoring with specialized equipment such as would be provided in an accredited or licensed healthcare facility, was not required because PVC's and hypertension are common in phenol peel patients.

The evidence was clear and convincing to a reasonable certainty to establish respondent was, grossly negligent or repeatedly negligent in his treatment of patient A.H. The evidence was not clear and convincing to a reasonable certainty to establish respondent was incompetent.

73. With regard to the charges relating to patient H.B. as set forth in Factual Finding 38, the evidence was clear and convincing to a reasonable certainty to establish respondent performed knee liposuction on an inappropriate patient, improperly continued cosmetic surgery after the patient suffered two episodes of ventricular arrhythmia during the chemical peel segment of the surgery, then prematurely discharged her to a hotel without medical monitoring equipment, and failed to timely transfer patient H. B. to a hospital for treatment when H.B. fainted and the nurse at the hotel recovery facility was unable to obtain a blood pressure.

The evidence was not clear and convincing to a reasonable certainty to establish respondent excessively sedated patient H.B.

The evidence established that patient H.B. was at high risk for suffering pulmonary embolism due to her history of venous disease, stasis dermatitis, her age and taking female hormones. The risk was further increased by the sedentary recovery period required for the phenol peel procedure. The standard of care requires a physician to screen out patients that have increased risk factors that would make an elective procedure unsafe for them. The evidence established that it was an extreme departure from the standard of care for respondent to perform liposurgery on patient H.B.'s legs.

The evidence established that given patient H.B.'s increased risk factors, and then experiencing two episodes of PVC's during the first procedure, it was an extreme departure from the standard of care to continue on to do the lipo surgery procedure. The evidence established that patient H. B. was discharged from respondent's surgery center while she was still in a state of sedation that did not meet the standard of practice. She was still too sedated. On this issue, the panel notes the discrepancy in respondent's chart notes regarding patient H.B.'s level of consciousness. The operative notes state that patient was "arousable" at 1:30 p.m., whereas, the discharge summary states that at 1:30 p.m. patient was "oriented and ambulates." The nurses notes state that upon being admitted to the hotel patient was very sedated. Too sleepy to sip water. The panel found the nurse notes to be the more credible evidence as to the patient's state of consciousness upon discharge. Based upon the expert testimony at the hearing regarding the standard of care for discharge from an outpatient surgery center, the panel finds this to be a simple departure.

The evidence established that approximately 20 minutes elapsed before patient H.B. was transferred from the hotel to a hospital when H.B. fainted and the nurse noted she was unable to obtain a blood pressure. Respondent testified that fainting and the nurse being unable to get a blood pressure reading is not an emergency to him because these symptoms are fairly common in his patients. He sees it may be once a month. Given the advanced age of many of respondent's patients, the panel found this explanation disturbing. The panel believes waiting 20 minutes to seek emergency treatment for patient H.B. was a departure from the standard of care. Patient H.B. was 72 years old, with venous disease and had been sedentary following a surgical procedure to her lower extremities which is known to create an increased risk for pulmonary embolism. She had experienced two episodes of PVC's during her surgical procedure. Given this history, the panel believes it was an extreme departure from the standard of care to wait 20 minutes to seek an emergency transfer to a hospital after patient H. B. fainted and the nurse was unable to get a blood pressure reading.

The evidence was not clear and convincing to a reasonable certainty to establish respondent was incompetent in his treatment of patient H.B.

74. Except as set forth in the Factual Findings above, the factual allegations of the First Amended Accusation were not established by evidence that was clear and convincing to a reasonable certainty and are deemed surplusage. Expert opinions elicited at the hearing on matters not alleged in the First Amended Accusation are not relevant and cannot support a finding of unprofessional conduct.

75. Complainant requested costs of investigation and prosecution of the case pursuant to section 125.3. Deputy Attorney Douglas MacCartee presented a written declaration that the Attorney General's charges were $19,740.00. Felix S. Rodriguez, Supervising Investigator for the Medical Board, presented a written declaration that the costs of investigation were $7,363.53 and the costs of expert reviewer services were

$2,285.[17] Respondent did not object to the amount of attorney fees charged. He did object to the hourly rate charged by the investigators as unreasonable and noted the investigator's hourly rate of approximately $110 was higher than the $100 hourly rate of the medical experts. The Deputy Attorney General billed at only $112 per hour.

The Administrative Law Judge did not award costs, and the panel is not authorized under the law to award costs on its own.

LEGAL CONCLUSIONS

1. Business and Professions Code section 2234 provides, in pertinent part, that the Board shall take action against any licensee who is charged with unprofessional conduct.

Under section 2234 "unprofessional conduct" is defined to include repeated negligent acts, gross negligence, and incompetence.

"Repeated negligent acts" constituting unprofessional conduct under Business and Professions Code section 2234(c) consists of two or more negligent acts. See, *Zabetian v. Medical Board of California* (2000) 80 Cal.App.4th 462.

"Gross negligence" is a professional error or omission that is egregious. It is defined as the want of even scant care, or an extreme deviation from the standard of practice in the medical community. *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184; *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal. 3d 124.

"Incompetence" generally is defined as a lack of knowledge or ability in the discharging of professional obligations. *See, James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096.

2. The standard of proof in a disciplinary action seeking the suspension or revocation of a physician and surgeon's certificate is clear and convincing evidence." *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.

"Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. "Clear and convincing evidence" is a higher standard of proof than proof by a "preponderance of the evidence." See, *BAJI* 2.62.

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[17] Mr. Rodriquez declaration erroneously listed the total expert reviewer services as $525.00. The error and correct amount were obvious on the face of the declaration.

"Clear and convincing evidence" requires a finding of high probability and must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. See, *In re Michael G.* (1998) 63 Cal.App.4th 700.

As a First Cause for Discipline and Revocation of Probation, complainant alleged gross negligence, repeated negligent acts and incompetence in respondent's care, treatment and management of patients A.H. and H.B. in violation of section 2234, subdivisions (b), (c) and (d). As a Second Cause for Discipline and Revocation of Probation, complainant alleged false or misleading advertising in violation of section 2271. As a Third Cause for Discipline and Revocation of Probation, complainant alleged false or misleading advertising in violation of section 651. As a separate Cause for Revocation of Probation, complainant alleged respondent, (1) operated an outpatient setting using anesthesia in violation of sections 2215 and 2216, and Health and Safety Code sections 1248.1, 1248.15 and 1248.65; (2) violated Temecula Municipal Code; violated sections 651 and 2271 by false and misleading advertising; and (3) violated section 2234 as set forth above.

3. Cause was established to discipline respondent's license or revoke probation pursuant to sections 2227 and 2234, subdivision (b), for unprofessional conduct consisting of gross negligence.

Factual Findings 1 through 12 and 22 through 38 inclusive, 40 through 50 inclusive, 52, 68, 72, 73 and Legal Conclusions 1 and 2 support this conclusion.

4. Cause was established to discipline respondent's license or revoke probation pursuant to sections 2227 and 2234, subdivision (c), for unprofessional conduct consisting of repeated negligent acts.

Factual Findings 1 through 12 and 22 through 38 inclusive, 40-42, 44-45, 48 and 49, and Legal Conclusions 1 and 2 support this conclusion.

5. Cause was not established to discipline respondent's license or revoke probation pursuant to sections 2227 and 2234, subdivision (d), for unprofessional conduct consisting of incompetence.

Factual Findings 1 through 12 and 22 through 75 inclusive, and Legal Conclusions 1 and 2 support this conclusion.

6. Section 2271 provides that any advertising in violation of Section 17500 constitutes unprofessional conduct. Section 17500 defines false advertising and provides in pertinent part:

> "It is unlawful for any person . . . with intent . . . to perform services, professional or otherwise, . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made

> or disseminated before the public in this state . . . any statement, concerning . . . those services . . . or concerning any circumstance or matter of fact connected with the proposed performance . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. . . . Any violation of . . . this section is a misdemeanor punishable by imprisonment in the county jail and not exceeding six months, or by a fine not exceeding . . . ($2,500) or by both that imprisonment and fine."

Respondent's statement that he spent his residency at U.C. Davis was misleading about the extent of his post-graduate education. Respondent's statement was not "false advertising" within section 17500 and does not warrant the criminal sanctions of that section.

Cause was not established to discipline respondent's license or revoke probation pursuant to section 2271.

Factual Findings 1 through 5 and 17 through 21 inclusive, and Legal Conclusions 1 and 2 support this conclusion.

7. The Third Cause for Discipline alleged false and misleading advertising under section 651, which sets forth truth in advertising requirements for health care professionals. The section contains subsections (a) through (k), each containing its own subparagraphs. The First Amended Accusation referenced subsections (a), (b), (e), (f) and (g). Those subsections contain a total of 11 types of statements considered false or misleading under the statute. Complainant did not specify in the charging allegations the particular subsection(s) that applied to each alleged misleading statement contained in paragraph 18 of the First Amended Accusation. Guidance came from complainant's counsel in his closing argument when he referred to subsections (b)(2), (b)(5) and (b)(8) of section 651. Those subsections define false or misleading advertising as follows:

> "(b) A false . . . misleading, or deceptive statement, claim or image includes a statement or claim that does any of the following:
>
> (1) . . .
>
> (2) Is likely to mislead or deceive because of a failure to disclose material facts.
>
> (3) . . . (4) . . .

(5) Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) . . . (7) . . .

(8) Includes any statement, endorsement, or testimonial that is likely to mislead or deceive because of a failure to disclose material facts."

The totality of the evidence established that respondent's statement about his residency was misleading or deceptive under those subsections. Respondent testified that prospective patients frequently call his office to ascertain his credentials and inquire whether he is board certified. This establishes that such information is material to prospective patients, and that had respondent stated he did a one year rotating internship in family practice, rather than saying he did a residency, ordinarily-prudent patients would have been dissuaded from having respondent do their OSR treatment. The context in which the residency statement is made establishes an intent to mislead prospective patients into believing he did a residency which trained him in cosmetic surgery.

Cause was established to discipline respondent's license or revoke probation for violation of section 651.

Factual Findings 1 through 5 and 17 through 19 inclusive, and Legal Conclusions 1, 2 and 7 support this conclusion.

8. Cause was not established to discipline respondent's license or revoke probation for unprofessional conduct within the meaning of Health and Safety Code section 1248.65 for operation of an "outpatient setting" in violation of Health and Safety Code section 1248.1.

Factual Findings 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 39 and 51, and Legal Conclusions 1 and 2 support this conclusion.

9. Cause was established to discipline respondent's license or revoke probation for unprofessional conduct pursuant to section 2234 or the terms of probation, consisting of violation of laws related to the practice of medicine, to wit, the City of Temecula zoning laws.

Factual Findings 1, 2, 3, and 5 through 15 inclusive, and Legal Conclusions 1 and 2 support this conclusion.

10. Except as set forth in the Factual Findings and Legal Conclusions of this Proposed Decision, the allegations and charges of the First Amended Accusation were not proven and are deemed surplusage.

Factual Findings 1 through 75 inclusive, and Legal Conclusions 1 through 9 inclusive support this conclusion.

Respondent has a history of prior discipline. His license to practice medicine is currently revoked, with the revocation stayed, and he has been placed on probation for five years with terms and conditions. The prior discipline is also a result of his failure to meet the standards of practice in performing cosmetic surgery procedures on his patients. The panel finds this to be a significant factor in aggravation.

While respondent has made some improvements, he continues to conduct his cosmetic surgery practice in a manner that puts patients at risk. He has not learned from his mistakes. He has not demonstrated he is willing and able to conform to professional standards of practice in patient selection and discharge from his outpatient surgery center. For these reasons the panel believes a period of suspension is warranted, as well as a restriction on practice, and a practice monitor. An ethics course is also warranted in this case.

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Certificate No. A 36888 issued to Respondent, Kelly James O'Neil, M.D., is revoked. However, the revocation is stayed and Respondent is placed on probation for seven (7) years upon the following terms and conditions.

1. As part of probation, respondent is suspended from the practice of medicine for six (6) months beginning the 16th day after the effective date of this decision.

2. Within 15 days after the effective date of this decision Respondent shall provide the Division, or its designee, proof of service that Respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to Respondent or at any other facility where Respondent engages in the practice of medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to Respondent.

3. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California, and remain in full compliance with any court ordered criminal probation, payments and other orders.

4. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation.

5. Respondent shall comply with the Division's probation surveillance program. Respondent shall, at all times, keep the Division informed of his addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code Section 2021(b).

6. Respondent shall, at all times, maintain a current and renewed physician and surgeon license.

7. Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) days.

8. Respondent shall appear in person for interviews with the Division, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

9. During probation, respondent is prohibited from practicing surgery, cosmetic procedures or treatments, and administering or ordering the administration of any anesthetic agents. At the earliest opportunity, respondent shall inform applicable patients that respondent is unable to perform a treatment or procedure.

10. At least thirty (30) days before the end of the period of suspension imposed by this Order, respondent shall submit to the Division or its designee for its prior approval a plan of practice in which respondent's practice shall be monitored by another physician in respondent's field of practice, who shall provide periodic reports to the Division or its designee.

11. Within 60 days of the effective date of this decision, respondent shall enroll in a course in Ethics approved in advance by the Division or its designee, and shall successfully complete the course during the first year of probation.

12. In the event Respondent should leave California to reside or to practice outside the State or for any reason should Respondent stop practicing medicine in California, Respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which Respondent is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the

Division or its designee shall be considered as time spent in the practice of medicine. A Board ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary order.

13. If Respondent violates probation in any respect, the Division, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against Respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

14. Respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Division of Medical Quality and delivered to the designated probation surveillance monitor no later than January 31 of each calendar year. Failure to pay such costs within 30 days of the due date shall be considered a violation of probation.

15. Following the effective date of this decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may voluntarily tender his certificate to the Board. The Division reserves the right to evaluate Respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, Respondent will no longer be subject to the terms and conditions of probations.

16. Upon successful completion of probation, Respondent's certificate shall be fully restored.

Respondent's medical record from the PACE evaluation contained in pages AGO 591 through 599 inclusive in Exhibit 23 shall be sealed and not available for public view; however, those pages shall be available for review by the Medical Board, its authorized designees and by any reviewing court. It shall be available to a member of the public upon court order.

This decision shall become effective on at 5:00 p.m. on AUG 28, 2003

IT IS SO ORDERED THIS 28 DAY OF AUGUST, 2003.

Steven B. Rubins, M.D.,
Panel B

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
Kelly James O'Neil, M.D.	)	
	)	Case No.: D1-1993-26899
Physician's & Surgeon's	)	OAH No.: L-2002020038
Certificate No.: A 36888	)	
	)	
Respondent	)	

NOTICE OF NON-ADOPTION OF PROPOSED DECISION

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted.** The Medical Board of California, Division of Medical Quality, will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit, including in particular, argument directed to the question of whether the proposed penalty should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact the Transcript Clerk, Office of Administrative Hearings, 320 W. 4th Street, 6th Floor, Los Angeles, CA 90013. The telephone number is (213) 576-7211.

In addition to written argument, oral argument will be scheduled if any party files with the Division within 20 days from the date of this notice a written request for oral argument. If a timely request is filed, the Division will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed penalty should be modified. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Division. The mailing address of the Division is as follows:

Division of Medical Quality
MEDICAL BOARD OF CALIFORNIA
1426 Howe Avenue
Sacramento, CA 95825-3236
(916) 263-2624

Dated: April 10, 2003

Brenda Allen

Brenda Allen, Analyst
Enforcement Legal Unit

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against KELLY JAMES O'NEIL, M.D. 40971 Winchester Road Temecula, CA 92591 Physician's and Surgeon's Certificate No. G A 36888 Respondent.	Case Nos. D1-1993-26899 OAH No. L2002020038

PROPOSED DECISION

Administrative Law Judge Joyce A. Wharton, Office of Administrative Hearings, State of California, heard this matter in San Diego, California on October 21, 22, 23, 24, 25, 28, 29 and 30, 2002.

T. Douglas MacCartee, Deputy Attorney General, represented the complainant.

Albert J. Garcia, Attorney at Law, represented respondent Kelly James O'Neill, M.D., who was present.

The matter was submitted on October 30, 2002.

FACTUAL FINDINGS

1. On January 4, 2002, Ron Joseph (hereinafter "complainant"), acting in his official capacity as the Executive Director of the Medical Board of California (hereinafter "the Board"), filed Accusation No 19-2000-112061 against Kelly James O'Neil, M.D. (hereinafter "respondent"). Complainant charged respondent with unprofessional conduct in connection with his care and treatment of two patients in July 2000. Specifically, complainant alleged gross negligence, repeated acts of negligence and incompetence in

violation of Business and Professions Code,[1] section 2234, subdivisions (b), (c) and (d); and false and misleading advertising in violation of sections 651 and 2271. Complainant also alleged that respondent violated a term of probation in case No. 09-93-26899 and, therefore, the order of probation should be revoked. Complainant filed a First Amended Accusation on October 16, 2002.[2]

Respondent filed a timely Notice of Defense.

2. Respondent is 49 years old. In 1975, he graduated U.C. Davis with a Bachelor of Science degree in Physiology. In 1980, he obtained a medical degree from Tulane Medical School. In 1981, he completed a one-year rotating internship at UC Davis but did not perform a residency. On June 24, 1981, the Board issued physician's and surgeon's certificate No. A 36888. The certificate is renewed and current with an expiration date of January 31, 2003.

Respondent moved to Temecula and opened a private family practice in late August 1981. Respondent soon met a physician who specialized in chemical peels and was about to retire. The physician trained respondent in the peel procedure and respondent incorporated it into his practice. Respondent took courses and attended seminars on peel procedures. In 1987, he gave up his family practice to primarily devote time to the skin peel procedure. In about 1994, he began doing tumescent liposurgery as well. Respondent has continued to limit his practice to chemical peels and liposurgery. He conducts his practice at the O'Neil Skin Center located at 40971 Winchester Road in Temecula. Respondent is not board certified in any specialty.

3. Complainant filed Accusation No. 09-03-26899 against respondent in November 1996, and a Supplemental Accusation in January 1998. The parties resolved the matter by a Stipulation in Settlement and Decision effective September 14, 1998. The stipulation contained the following pertinent language:

> "7. For the purpose of resolving Accusation and First Supplemental Accusation No. 09-93-26899, respondent admits he committed repeated acts of negligence in the care and treatment of patient J.G. as alleged in paragraph 5 of the Accusation, and repeated acts of negligence in the care and treatment of patient V.F. as alleged in paragraph 15 of the First Supplemental Accusation. . . . . The remaining allegations in the Accusation and First Supplemental Accusation are dismissed."[3] (Emphasis added.)

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[1] All statutory references are to the California Business and Professions Code unless stated otherwise.

[2] Respondent did not object to the new allegations made shortly before the date of hearing.

[3] Complainant asserted respondent's stipulated admissions included admitting to placing a false advertisement in the Yellow Pages stating he was board certified in general practice, and admitting he operated an unlicensed health facility. A plain reading of the matters admitted does not support this contention. Respondent admitted only "repeated negligent acts" in the care and treatment of specific patients in violation of section 2234(c).

J.G. was a 72-year-old patient on whom respondent performed a chemical facial peel in March 1993. During the procedure the patient went into respiratory arrest and never regained consciousness. Pursuant to the stipulation, respondent admitted the following: He failed to perform a complete preoperative physical; he failed to order a pre-operative electrocardiogram or chest x-ray which would have determined the extent of the patient's chronic condition; he failed to detect the patient was suffering from chronic congestive heart failure; he failed to record the patient's peripheral edema in his history and physical; he proceeded with the chemical face peel without first obtaining a cardiac clearance from a physician; he failed to properly intubate the patient prior to arrival of paramedics; he failed to establish a properly operating intravenous route; he gave the patient multiple sedatives without a nurse anesthetist or anesthesiologist present.

V.F. was a 37-year-old female, weighing 247 pounds, on whom respondent performed liposuction in September 1996. After surgery the patient developed blisters from the girdle prescribed by respondent. The condition worsened to a life-threatening soft tissue infection. Pursuant to the stipulation, respondent admitted the following: He failed to properly assess the patient for liposuction surgery; the patient was not a proper candidate for the surgery because of her generalized obesity; he administered an excessive amount of tumescent solution; he removed an excessive amount of aspirate from the patient.

The Board revoked respondent's certificate and stayed the order for five years on probationary terms that included: completion of a Physician Assessment and Clinical Evaluation (PACE) program in patient assessment, plastic surgery and anesthesia at UCSD School of Medicine prior to the revocation order being stayed; a practice monitor; practice restrictions that preclude use of general anesthesia and limit the amount of aspirate withdrawn during certain procedures; compliance with all federal, state and local laws and rules governing the practice of medicine in California.

4. In June and July 1998, respondent underwent a comprehensive PACE assessment, which included measurement of medical skills and knowledge, appraisal of physical health and psychological testing. Respondent was found to be in good physical and mental health.

In compliance with terms of his probation, respondent submitted to a psychological assessment on June 1, 1998. William Perry, Ph.D. interviewed respondent and administered numerous tests. He found no cognitive or neurocognitive deficits, nor was there indication of serious psychopathology. In September 1998, respondent attended a weeklong clinical program including Dermatology and Anesthesiology. On September 25, 1998, PACE issued a certificate of completion indicating that respondent successfully completed and met all requirements of the PACE program. The order of revocation was stayed on that date.

As a result of the disciplinary action, respondent instituted changes in his practice. At the initial consultation he applies stricter guidelines to evaluate the patient for the procedure and he refuses more patients at that stage. Patients under 50 must have blood work and patients over 50 must also have an EKG and chest x-ray. All patients must be examined by their primary care physician and provide that physician's authorization for the

chemexfiliation and/or liposurgery. In addition to his initial consultation with the patient, on the morning of the procedure respondent also takes a medical history, performs a physical examination and documents findings in his chart. Respondent adheres to the probationary requirement to limit the amount of aspirate for liposurgery and believes this was a good idea.

As of October 29, 2001, respondent was deemed in compliance with all terms and conditions of his probation. Respondent's practice monitor reported he did not find any problems with respondent's care of patients.

5. At all times relevant to the pending Accusation, respondent conducted his practice at 40971 Winchester Road in Temecula under the name "O'Neil Skin and Lipo Center, Kelly James O'Neil, M.D." Effective October 25, 1999, the facility became accredited by the Accreditation Association for Ambulatory Health Care, Inc. Respondent lost his hospital privileges due to the 1998 disciplinary action. However, he has a standing transfer agreement with the local hospital allowing him to transfer patients to the hospital by means of a 911 call.

As of July 2000, respondent had performed about 6,000 full phenol peels and 2,000 more partial peels. Approximately one-third of his patients were aged 60 or older.

6. Respondent's procedures were performed on an outpatient basis. He gave each patient a written set of instructions titled "O'Neil Skin Rejuvenation After Care Instructions for the First 48 Hours." The instructions advised the patient in pertinent part as follows:

> "1. You must have a **driver** to take you from Dr. O'Neil's office.
>
> 2. You must have **someone help you** so you can rest in bed (only getting up for the restroom) for the next 48 hours.
>
> 3. . . . **Diet**: Full liquid diet through a straw. If nauseated have clear liquids through a straw.
>
> 4. Sleep with your **head elevated at 45 degrees** for the first 24 hours and then position as you are comfortable.
>
> 5. **Apply ice packs to eyelids** for 20 minutes each hour for the first 24 hours. . . .
>
> 6. **Medications:** Keep these at your bedside. . .
>
> . . . Please **do not take** any xanax, ativan, or restoril past midnight on the second day after your treatment, because the doctor would like you to be more active the day your tape comes off.
>
> **Remove the mask** on the morning of the third day and **apply the powder** that was supplied to you. . . .

Notify Dr. O'Neil if your:

Blood pressure is greater than 100 diastolic
If your blood pressure is greater then [sic]180 systolic
If your pulse is greater then [sic] 100
If your tempeture [sic] is greater then [sic] 100 degrees
If you have any questions"[4]

7. Respondent believed that to achieve optimum cosmetic outcome, the 24 to 40 hour period after the procedure was an important, integral part of the skin rejuvenation process. Some, but not all, of the peel procedures required application of a tape mask that was to remain in place for about two days. The tape mask must stay on with minimal movement around the mouth and eyes in order to achieve the best cosmetic outcome for the patient. Respondent wanted the patients to remain quiet and undisturbed for the first 48 hours so they would not touch their faces or disturb the tape mask and thus risk scarring or a poor result. The mask could be removed easily in an emergency.

Respondent explained that he wanted his patients in a controlled aftercare environment, not necessarily for medical reasons, but for a good result of the facial peel so the patient would be happy and he would not have future complaints about the result.

8. In 2000, as part of the skin rejuvenation package, respondent offered his patients aftercare options that included staying two nights in a nearby hotel where they could be monitored and assisted until they removed the mask. Once the mask was removed, the patients could go home or spend from 1 to 9 days at a private "retreat" where healthful meals, recreational activities and relaxation were provided by an attentive staff. The aftercare options were attractive to the patients, especially those who lived far from the clinic or had no one at home to provide care and assistance. Respondent would not perform the procedure on certain patients who lived far away with no one at home to help them unless they agreed to go to the immediate aftercare facility.

Over the years respondent had used several different aftercare facilities or retreats including the local hospital. When his license was placed on probationary status, respondent lost his hospital privileges at Inland Valley Hospital and sought another provider of immediate aftercare. Respondent wanted a location that was close to his office "for transport and to keep an eye on patients." In about 1999 he learned that QualCare, Inc., a nursing registry, was providing post procedure care for cosmetic surgery patients at an upscale hotel in Riverside. Because that location was too far from his office, he contacted the owner of QualCare to see if the service could be provided in Temecula.

9. QualCare Inc., aka QC Enterprises, was a company owned and operated by Jo-Ann Jordan, R.N. Ms. Jordan and a friend started the business, which operated for an unknown period of time before it was incorporated as a closely held corporation in May 1999. Ms. Jordan described QualCare as a nursing registry that provided care on an as

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[4] Additional instructions were included for liposurgery patients.

needed basis in various settings. The major part of QualCare's business was to provide care to discharged outpatients in a setting similar to that at home.

Ms. Jordan hired registered nurses who worked for QualCare as independent contractors. She required that the nurses also work in hospitals so they would have the necessary and up-to-date skills. QualCare scheduled and paid the nurses. The nurses wore scrubs and used latex gloves, had a stethoscope and blood pressure measuring equipment, but did not provide oximeters or EKG equipment. The nurses did not give injections or intravenous treatment, nor did they dispense drugs. They assisted with suppositories and the patients' regular oral medications. The patient's physician would send someone to administer any injection that was required. The nurse was expected to use her professional judgment to call 911 if an emergency arose.

Ms. Jordan was familiar with other companies that provided aftercare to cosmetic surgery patients in hotel settings in southern California. Jordan testified that she contacted the appropriate state and local agencies about providing aftercare services in a hotel setting and was not advised of any illegality. Ms. Jordan testified that, before she met respondent, QualCare had provided aftercare services for a Loma Linda plastic surgeon. QualCare arranged for the patients to stay in rooms at the Mission Inn, a very upscale hotel in Riverside. QualCare provided one nurse to care for three patients. If a patient persisted in trying to remove the bandages, an unlicensed "sitter" would be provided for one-on-one attention to do nothing but watch the patient.

10. In 1999, at least one year after QualCare started doing business, Ms. Jordan learned that respondent was looking for aftercare services for his skin peel patients. She met with respondent and he discussed his expectations for aftercare. Based on her experience at the Mission Inn, she believed QualCare could fashion a program to meet respondent's needs. The patient was to remain quiet and recline at a 45-degree angle; ice was to be applied to the face and the patient must avoid smoking. The setting was to be upscale, with a phone available for personal calls and a microwave for heating broth. Ms. Jordan described the service QualCare was to provide as "a supportive environment in lieu of going home".

Ms. Jordan and her partner used respondent's guidelines and incorporated what they felt was needed for aftercare. Ms. Jordan and respondent agreed that the Embassy Suites Hotel in Temecula would be an appropriate setting. Ms. Jordan approached the Embassy Suites and discussed with the manager the nature of her operation, what the nurses would be doing and the type of rooms needed. Embassy Suites agreed to rent to QualCare a block of adjoining rooms. The hotel also accommodated QualCare by providing unlimited ice, linens and pillows. There was no evidence of any complaints by the management or owner of Embassy Suites nor any indication they were concerned about the legality of QualCare's use of the hotel property for aftercare. QualCare entered an arrangement with respondent to provide aftercare to his facial peel patients. QualCare operated out of Embassy Suites for approximately 18 months.

The patients paid QualCare for its services. As part of the skin rejuvenation "package," the patient wrote a check to respondent for his services and a separate check to

QualCare. Both checks were delivered to respondent's office approximately a week before the procedure and QualCare would pick up its checks. Respondent did not receive any portion of the payment made to QualCare.

11. QualCare continued to solicit business from other physicians but was not successful. After 1999, respondent was its only client. There was no arrangement or agreement between respondent and QualCare whereby it would serve only his practice.

12. The evidence did not establish that respondent "effectively controlled" QualCare as alleged in the First Amended Accusation. Respondent took no part in the formation or incorporation of QualCare and had no ownership or financial interest in it. He had no role in hiring, scheduling or paying the nurses. Respondent provided QualCare nurses the same instructions given to the patients for aftercare and his nurses demonstrated how to remove the tape mask. QualCare nurses called respondent, as the treating physician, if a patient was having a problem and they followed his instructions for aftercare. None of this equates to "effective control" over QualCare and its business.

13. In the First Amended Accusation, complainant alleged respondent violated the terms of probation because he failed to obey state and local laws. The pleading itself is ambiguous. Complainant's counsel explained the charges were based on complainant's belief that respondent operated, managed, conducted or maintained an "outpatient setting" at the Embassy Suites in violation of Health and Safety Code section 1248.1 and Temecula Municipal Code section 17.24.

The evidence did not establish that use of the hotel for limited aftercare as provided by QualCare constituted an "outpatient setting." Health and Safety Code section 1248(c) defines outpatient setting for the purpose of section 1248.1 as follows:

> ". . . any facility, . . . center, office or other setting that is not part of a general acute care facility and where anesthesia[5] . . . is used in compliance with the community standard of practice, in doses that, when administered have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes.
>
> "Outpatient setting" does not include, among other settings, any settings where anxiolytics[6] and analgesics[7] are administered . . . in doses that do not have the probability of placing the patient at risk for loss of life preserving reflexes." (Emphasis added.)

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[5] "Anesthesia" is defined as "loss of feeling or sensation, especially to loss of sensation of pain as it is induced to permit performance of surgery or other painful procedures." (*Dorlands Illustrated Medical Dictionary*, 27th Ed.)

[6] "Anxiolytic" is defined as ". . . reducing anxiety." *Id.*

[7] "Analgesic" is defined as "agent that alleviates pain without causing loss of consciousness. *Id.*

Neither respondent nor the QualCare nurses administered anesthesia to patients during their stay at the hotel.

14. A city of Temecula code enforcement officer issued a "Notice of Violation Correction Notice," described on its face as a "warning," to "Dr. O'Neil Qual Care." The notice cited a violation of Temecula Municipal Code section 17.24, which dealt with parking violations. The notice was not accurate and no citation was ever issued against respondent. Thus, the issuance of the notice did not establish that respondent violated any zoning law.

15. The parties entered the following stipulation with regard to the Temecula Municipal Code:

> "At all times relevant herein the city of Temecula, California had a zoning general plan and ordinance which precluded the Embassy Suites Hotel from operation of any business use other than its own operation as a hotel. Under the ordinance it is illegal for anyone, who has not applied for and received a conditional use permit, to engage [within the premises of Embassy Suites Hotel] in the operation of a Post Surgical Care Facility or any other health care operation whereby medical patients or the infirm are cared for by a medical professional for a fee."

The evidence established there was no violation of Temecula Municipal Code section 17.24 because that section related to parking violations. Rather than present the actual ordinance for the administrative law judge's review, the parties entered the above stipulation. The administrative law judge is not bound by parties' incorrect interpretation of the meaning and effect of an ordinance.

Even if the parties' stipulation is accurate, the evidence did not establish a violation of any Temecula zoning ordinance by respondent. Respondent did not own or control the Embassy Suites property, nor did he own or control QualCare, which was operating its business on the property. The primary responsibility for the proper use of the hotel rooms rested with the management and owners of the hotel, who are bound to know the applicable zoning law as much, if not more than a customer. Assuming, *arguendo*, and based solely on the parties' stipulation, that patient aftercare violated an ordinance, the party liable for sanctions would be either the hotel or QualCare, the entity operating the business and making the arrangements to use the hotel. Embassy Suites was fully aware of the intended use of its hotel rooms and consented to it. There was no reason for respondent to suspect QualCare or Embassy Suites would operate in contravention of a zoning law.

16. The First Amended Accusation alleged as a violation of law that respondent "continued his operation of an uncertified outpatient setting." Complainant presented no evidence that respondent ever operated an uncertified outpatient setting or that he did so after the stipulated decision in 1998. Complainant argued that the following allegation in the 1996 Accusation was admitted by respondent's stipulation and was proof of his past operation of an uncertified setting:

"On or about May 19, 1993, respondent received a cease and desist order from the San Bernardino District Office of the State Department of Health Services as concerned his operating an unlicensed health facility . . . where he would house post chemical peel patients for further recuperation." (Emphasis added.)

The issuance and receipt of a cease and desist order does not establish that the underlying ground for the order was true or was in fact a violation of law. In light of complainant's erroneous application of Health and Safety Code section 1248.1 in this proceeding, it is not reasonable to assume a correct interpretation of the law was made in the prior Accusation. Further, respondent admitted only "repeated acts of negligence in the care and treatment of patient J.G., as alleged in paragraph 5 of the Accusation." There was nothing in the above-cited allegation or the admission to suggest the above allegation involved the care and treatment of patient J.G. in March 1993.

The evidence did not establish that respondent operated an uncertified outpatient setting in violation of any law.

17. For several years respondent has made available to prospective patients a video. The video at issue in this hearing is Exhibit H. Respondent testified the video was made as an "infomercial" to be shown on television approximately seven years ago. The intent was to promote the chemical peel process that he developed over many years and became his special area of practice. The evidence indicated Exhibit H was made in about 1994.[8] There was no evidence the video was, in fact, broadcast on television.

Respondent testified he felt Exhibit H was too commercialized to give to patients, so he made another similar version to distribute to patients for information. The evidence indicated a video was available to patients at respondent's office and was presented at promotional seminars but that video was not presented as evidence at the hearing. The evidence was not conclusive that Exhibit H was the same video presented to individual patients and at seminars. Respondent testified that Exhibit H was given to the Medical Board during its investigation in the prior disciplinary action and no objection was made at that time to its content.

The Exhibit H video contained approximately 22 before and after photos of patients who underwent the O'Neil Skin Rejuvenation procedure. Approximately 22 patients gave testimonials about their reasons for having the procedure and their satisfaction with the results. The video clearly stated the O'Neil Skin Center was not a dermatology clinic, it was a center specializing in non-surgical skin rejuvenation techniques that removed wrinkles and improved skin complexion. Contrary to complainant's contention at the hearing, none of the statements in the video implied that respondent performed a residency in plastic surgery or any other particular specialty. None of the statements suggested that respondent specialized in plastic surgery. The statements on the video clearly informed the viewer that respondent

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[8] Alice T is one of respondent's chemical peel patients who appeared in the video and stated her age as 72. She testified at the hearing and stated her current age as 80. This suggests the video was made 8 years ago, in about 1994.

limited his practice to non-surgical cosmetic treatment of the skin and patients wanting to improve sagging neck or eye areas were referred to Dr. Richard Amonic, a plastic and reconstructive surgeon in Santa Monica.

18. The First Amended Accusation alleged respondent engaged in false or misleading advertising within the meaning of sections 651 and 2271 because he "used an advertising video which creates the impression that he completed a post graduate residency and to [sic] post-graduate training at the University of California, Davis."

In one portion of the Exhibit H video, when describing his background and experience, respondent stated: "I graduated from Tulane Medical School and spent my residency at U.C. Davis in Sacramento." This statement implied respondent either completed or performed part of a residency. Respondent completed a one-year rotating internship at U.C. Davis but did not perform a residency.

Respondent admitted his statement in the video could be misleading about his participation in a "residency" program. It was clear from respondent's testimony that he does not make a clear distinction between the terms "residency" and "internship."[9] His current resume listed "rotating internship 1981," yet he testified he did a first year of "residency" in a family practice program. Respondent believed an internship was the first year of a residency program and a first year resident was called an intern. It could not be determined whether respondent's use of the word "residency" in the video was the product of intent or ignorance. Neither party presented expert testimony about the common use and meaning of "residency" in the medical community or whether its meaning in the context of post graduate training has changed in recent years.

Although respondent's statement about his "residency" was not true, in the context of the entire video it was not a material statement or one that would induce a person to undergo the skin rejuvenation process. The evidence did not establish respondent made the Exhibit H video available to the public after September 15, 1998, the effective date of the Stipulated Decision.

19. The First Amended Accusation alleged respondent engaged in false or misleading advertising within the meanings of sections 651 and 2271 because he "uses videos, brochures, and other advertising media to represent that his practice is safe and has low complication rates. In fact respondent is on probation for treatment of patients resulting in death and serious complications." The Accusation did not specify statements or language it found objectionable. As evidence of the false statements complainant presented the Exhibit H video, a brochure and an information sheet.

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[9] Dorland's Medical Dictionary defines intern, "a medical graduate serving and residing in a hospital preparatory to being licensed to practice medicine;" a resident is defined as, "a graduate and licensed physician receiving training in a specialty in a hospital."

Respondent made the following statements on the Exhibit H video regarding his skin rejuvenation procedures:

> [Regarding the aftercare program provided at the retreat facility and the results of the O.S.R. [10] treatment] ". . . I believe it is the reason my complication rate is so low."
>
> "Safety and results are my main concern."
>
> "There are risks involved as in any procedure but this procedure is inherently safer than cosmetic surgery, dermabrasion or skin peeling. I have performed thousands of these procedures over fourteen years and we provide every possible precaution at the O'Neil Skin Center to insure your success. The reason for our excellent safety record is simple, I provide more aftercare than other doctors, I've also designed a safer system for skin rejuvenation than other doctors, a multilayer system with a moderate strength solution. Some doctors use a harsh solution. I have designed a much gentler formula."

The brochure contained the following statements:

> "*Safety*
> The O.S.R. program offers the most extensive aftercare program of any cosmetic treatment on the market today. The patients heal and recuperate in privacy and seclusion. This enhances the safety of the procedure and insure [sic] uniform results. Other doctors may try to suggest that their skin peel program is "easier" or "safer" because you are sent directly home after the procedure, but wouldn't it be safer to have experienced professionals monitoring and caring for you at this time?"

The information sheet, titled "O'Neil Skin Rejuvenation Versus Conventional Skin Peels" and dated "3/00," stated in pertinent part:

> "At the O'Neil Skin Rejuvenation Center we specialize in cosmetic treatment of the skin. Various types of skin peels are offered as well as the O'Neil Skin Rejuvenation program. By concentrating on one area of expertise, Dr. O'Neil has elevated skin rejuvenation to a different plane. With over 8500 cases behind him, we feel our skin treatments are second to none in quality, safety and results. . . .
>
> The O'Neil Skin Center stands for quality, comfort, and safety."

20. The references to safety in the brochure, information sheet and video were made only in regard to respondent's skin rejuvenation procedure. Over the past 15 years, respondent has performed thousands of face peel procedures. Respondent is on probation for

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[10] O'Neil Skin Rejuvenation.

one death that occurred during a chemical peel and one instance of a serious skin infection that developed after liposurgery. In addition, there has been one instance of post-procedure heart attack in a patient with no cardiac history and one instance of post-procedure pulmonary embolism. The evidence in the pending case did not establish that the latter two resulted from respondent's negligence or lack of safety measures.

Neither the brochure or information sheet made any representation about complication rates. Complainant presented no evidence about complication rates for the types of procedures performed by respondent. Respondent testified he keeps a record of the statistics and his complication rates are below the published statistics. Neither party presented evidence of published statistics. Complainant presented no evidence to establish respondent's actual complication rate was higher than the acceptable complication rates within the medical community.

Complainant presented no law or standard of practice that required respondent to disclose prior discipline in his advertising or informational materials. Complainant presented no law or standard of practice that required respondent, absent inquiry, to inform his patients of adverse incidents that occurred during or after procedures. Upon inquiry by patients, respondent tells them he had one patient death in the office in 1993 and one patient had a heart attack. There was no evidence respondent ever misrepresented his probationary status. The fact that respondent's license is on probation does not of itself establish that his current practice is unsafe.

Respondent made the Exhibit H video before the prior disciplinary action was filed and before he treated one of the patients whose treatment was at issue. The evidence did not establish that the statements from the video referenced in Factual Finding 19 constituted false or misleading advertising within the meaning sections 651 or 2271.

The evidence established that after the 1998 Stipulation in Settlement, respondent changed his pre-operative evaluation procedures and he successfully completed the PACE program in Dermatology and Anesthesiology. There was no evidence respondent was not competent to safely perform the limited procedures of his practice since 1998, nor was there evidence that the O'Neil Skin Center outpatient facility lacked any required safety features.

21. The First Amended Accusation alleged respondent engaged in false or misleading advertising in violation of sections 651 and 2271 because he took pre-operative photographs in different lighting than post-operative photos, and took pre-operative photos without makeup, but post-operative photos feature patients with makeup.

The only evidence of photos is contained in Exhibits O and P, original brochures containing black and white photos, and Exhibit H, the videotape. Complainant presented no credible evidence about the manner in which respondent took any before and after photos. Complainant's expert witnesses, Mark Krugman, M.D. and David T. Morwood, M.D., offered their opinions but to a great extent they were speculating; they had no expertise in photography nor did they know the actual circumstances in which the photos were taken.

In most, it does not appear the lighting before and after was significantly different. In some, it does not appear that make-up was used at all in the after photo. In some photos, lipstick or eye makeup was used in both before and after photos. In others, it appears that eye make-up or lipstick was applied for the after photo, but it is also obvious that the improvement in facial skin is the result of something other than cosmetics and lighting.

The only evidence about the manner in which the photos were taken established they were taken in respondent's office in ambient lighting. The before photos were taken shortly before the procedure. The after photos were taken when patients returned for post-procedure checkups. Respondent explained that the lighting might appear different because he takes the pictures against a wall at different times of the day. Patients are more likely to wear makeup when they come in for a checkup but the makeup will not cover wrinkles. Respondent testified he never touched up photos or tried to misrepresent results; he did not need to use makeup to exaggerate the benefits of the O.S.R. treatment because the results and the patients speak for themselves.

Five of respondent's skin rejuvenation patients, including A.H. and H.B., testified at the hearing. Direct observation of their skin revealed that the "after" photos very likely did not exaggerate the results of the O.S.R. treatment.

The evidence was not sufficiently clear and convincing to establish that the photographs used in respondent's promotional and informational materials constituted false or misleading advertising.

22. The First Amended Accusation alleged respondent engaged in false or misleading advertising in violation of sections 651 and 2271 because he sent a letter to prospective patients falsely claiming that his was the only medical office in southern California that specialized in cosmetic skin rejuvenation. The letter stated:

> "We are, to our knowledge, the only medical office in Southern California that specializes in cosmetic skin rejuvenation. While other physicians may do laser peels, TCA peels, or phenol peels, few, if any, concentrate their practice exclusively on skin rejuvenation."

It is important that the statement contained the qualifying "to our knowledge." Complainant presented no evidence of any other medical office in Southern California that concentrated its practice exclusively on non surgical cosmetic skin rejuvenation. It is notable that none of the expert witnesses called by the parties concentrated their practice on cosmetic skin rejuvenation to the same extent as respondent. The evidence was not sufficient to establish that respondent's statement constituted a violation of sections 651 and 2271.

23. The First Amended Accusation charged respondent with gross negligence, incompetence and repeated negligent acts in his treatment of patient A.H. in July 2000.

In 1998, at age 69, patient A.H. first consulted respondent. A.H. was impressed by the beautiful skin of her hairdresser, who had been treated by respondent. A.H. attended a

seminar given by respondent in Escondido and watched two videos, one at the seminar and one given to her by a friend. The seminar video may have been identical or similar to Exhibit H. Respondent's statement about his medical school and residency did not impress her. Based on the information obtained from the seminar and video, A.H. felt respondent was highly competent in the skin rejuvenation process.

On the intake sheet, A.H. listed previous surgeries including two face-lifts and back surgery. She noted her only medical problems as osteoporosis and previous morphine addiction related to back pain. The patient did not have a facial procedure at that time. She returned to respondent in 2000 and scheduled an O'Neil Skin Rejuvenation procedure, including aftercare by QualCare and the retreat. She agreed to the aftercare program because she thought it was better than going home and caring for herself or having a friend help her. She felt no pressure to go to the aftercare program. She was not aware she would spend the first two days at the hotel.

Pursuant to respondent's routine procedure, an EKG and x-ray were done on June 15, and a complete blood count was performed on June 18, 2000. The lab results were normal and the x-ray found no acute cardiopulmonary disease. The EKG noted "Sinus Bradycardia, otherwise normal ECG." Respondent required the patient be examined by her primary care physician and obtain an approval for the procedure. On July 14, 2000, the patient was examined by Jerome Brodkin, M.D., her primary care physician. Dr. Brodkin completed an authorization form that noted the patient's only medical problem as "Back, Lower." The patient's physical examination was normal and there were no abnormal findings on her EKG or chest x-ray. Dr. Brodkin approved the patient for the phenol peel procedure.

24. Patient A.H. arrived at respondent's outpatient center by 7:30 a.m. on July 18, 2000. Upon arrival, the patient signed the QualCare Patient Consent Form, which stated:

> "I do hereby give permission to QualCare nurses and associates to render care as prescribed by the physician during post procedural care in a non-hospital setting. In an emergency situation, I am aware that 911 will be called and I will be transported to the nearest hospital. . . ."

25. Shortly before the procedure, respondent took a history and performed a physical exam of A.H. He noted his findings in the patient's chart: there was no history of heart, liver or renal problems; no history of myocardial infarction, congestive heart failure, angina, shortness of breath, cerebral vascular accident or stroke; he found no abnormalities in the physical exam. He noted "EKG – Sinus Bradycardia."[11]

26. The patient was in the operating room at 9:30 a.m.; her blood pressure was noted as 140/70 and her pulse rate about 60. The first anesthesia was administered at 9:45 a.m. At 10:30 the patient became restless and experienced premature ventricular contractions (PVC); her blood pressure was noted as 160/90 with a pulse of about 100.

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[11] "Bradycardia" is "slowness of the heartbeat, as evidenced by slowing of the pulse rate to less than 60." (*Dorland's Illustrated Medical Dictionary*, 27th Edition.)

Respondent administered Lidocaine and by 10:37 the patient was in normal sinus rhythm. At 11:35 the patient's blood pressure rose to 182/100 with a pulse of 90. Respondent administered Inapsine. The blood pressure rose over the next ten minutes to 192/100. By 11:00 the blood pressure was decreasing and the last dose of fentanyl was administered. At noon the last dose of Versed was administered and the procedure was finished. The patient's blood pressure was 170/80 and the pulse was about 80.

Postoperatively the patient's vital signs were monitored for an hour and one-half during which the blood pressure ranged from 164/70 to 170/80, with the pulse in the high 80s. From 12:30 to 1:30 the patient's level of consciousness was noted as "awake." The Doctor's Discharge Summary noted the patient was "oriented & ambulates, vital signs stable" at 1:30 p.m. Blood pressure was 172/80, pulse 88 and respiration 20. The patient was experiencing face pain. Respondent gave the patient Ativan for anxiety and authorized her to be discharged from his facility. The patient was discharged wearing the tape mask.

27. There was no evidence that any of the information in respondent's chart, as noted in Factual Findings 23 through 26, was false or inaccurate.

28. Someone from respondent's office drove patient A. H. to the Embassy Suites Hotel. She arrived with the aftercare instruction sheet and her medications. The QualCare nurse on duty noted the patient was awake and alert, her blood pressure was 156/99 and pulse of 107. The nurse's notes described the patient as restless, anxious and taking water. By 3:00 p.m. the patient was either awake or sleeping normally, her blood pressure was 143/80 and pulse was 119. At 5:30 p.m. the nurse noted the patient had a fever, blood pressure was 131/81 and pulse had risen to 124. The nurse paged respondent for orders.

Respondent testified he was in his office performing a procedure when the nurse called. He did not wear a pager while working on a patient and he did not recall staff notifying him of a call. Complainant presented no evidence to establish the time respondent received the page or was informed of the nurse's call.

29. Shortly before 7:00 p.m. Eliane Heller, R.N. came on for the next shift. Nurse Heller testified at the hearing. Based on her attitude, demeanor and the quality of her testimony, she was found to be a candid and credible witness.

The day nurse advised Nurse Heller of the patient's elevated pulse and that respondent had been called. He had not yet returned the page. Nurse Heller took the patient's vital signs and noted the temperature was 98.2, blood pressure 130/100 and pulse 126. The patient was awake and alert and asked the nurse to assist her into the bathroom. While in the bathroom, the nurse noticed the patient disimpacting herself and advised the patient to stop. The nurse washed the patient's hands and performed the disimpaction. The patient said she felt better and walked back to bed.

Between 7:00 – 7:30 p.m. respondent called for the first time after having been paged at 5:30 p.m. Respondent testified he was still in the operating room with a patient when he spoke to the nurse. Nurse Heller testified she told respondent the patient was in bed and

resting, and respondent instructed her to keep watching the patient and he would call back in half an hour. Nurse Heller recalled that after respondent's call, the patient sat up, complained of back pain and said it was time for her morphine. The nurse checked the patient's Oramorph bottle and gave the patient the prescribed dose. The medication record indicated this was done at 7:30 p.m. The patient reclined again and felt calmer. Nurse Heller testified that respondent called again, she told him the patient was resting and he said to give Ativan for anxiety. She did not do so because the patient had recently taken Oramorph. There was no evidence to pinpoint the time of this conversation. The QualCare record noted at 8:00 p.m. that the nurse gave the patient MSM and Famiver per bottle instructions and the pulse was 124. No blood pressure was recorded.

Respondent testified the nurse advised him the patient was restless with a rapid heart rate but not complaining of chest pain and not short of breath. Respondent testified he instructed the nurse to give pain medication and wait an hour or so to let him know how she was doing. Respondent explained he did not consider the rapid heart rate to require sending the patient to the hospital because her other vital signs were stable and pain could cause the rising pulse. The evidence did not establish the time of this conversation.

Nurse Heller testified the patient rested awhile and was "OK." She sat up again and became restless, requiring the nurse's full attention. Because there were two other patients in her care, the nurse called Jo-Ann Jordan to come and assist her. Jordan arrived, sat with the patient and talked to her about relaxation methods. There was no evidence of the time Jordan arrived. Nurse Heller returned and took the patient's pulse, which was elevated and too fast to count. Heller testified she looked at Jordan, shook her head to indicate it was not good and, at that point, Jordan said, "Now she is complaining of chest pains." Heller testified she went to the next room and called 911; she then called respondent and told him she had called 911 because the patient had chest pains. Nurse Heller testified repeatedly that respondent arrived either shortly before or at the same time as the paramedics. She testified repeatedly that she did not tell respondent the patient had chest pains until after she had called 911.

Respondent testified that after the second phone conversation with the nurse he decided to see the patient because her blood pressure was a bit high and she was not responding to the pain medication. When he arrived both Jordan and Heller were present. The nurse told him the patient started to complain of chest pain. Respondent listened to her heart and lungs with a stethoscope and asked about the chest pain. A.H. said she had had chest pain but did not have it at that moment. Respondent told the nurse to call 911; he did not recall if she said she already had placed the call. The paramedics arrived within a few minutes.

30. The totality of the evidence about the events in Factual Finding 29 was inconsistent and confusing; it failed to establish the exact timing of the sequence of events.

The QualCare chart entry showed a pulse of 140 and respiration rate of 10 at about 8:45 p.m. But Nurse Heller wrote the following ambiguous note in the QualCare chart:

"2130 – Guest remains restless. Dr. O'Neil here & Jo Ann RN. C/O chest pain. Skin is cold & clammy. HR 140/min. Pt is transported via ambulance to the hospital."

On July 19, 2000, respondent wrote a note in his chart summarizing the events and noted:

"Pt noted to have elevated HB [approximately] 120-130 at [approximately] 6:30 pm [illegible] 118 after straining at stool. . . . Pt complained of some facial discomfort [secondary] peel and was given her Oramorph pain meds. This failed to reduce HR. She later developed some chest pain (ache, apex x [illegible], came and went several times, radiating to shoulder). I saw her at Embassy Suite hotel [approximately] 8:30 pm. No ch. Pain at that time . . . but HR 130-140. Paramedics called and pt. transferred. . ."

On August 31, 2000, Nurse Heller was interviewed by a Medical Board investigator. In her report dated October 25, 2001, the investigator related the nurse's statement as follows:

"Ms. Heller took Ms. [H"s] blood pressure and it was high, also Ms. [H.] was restless, anxious, and hyperventilating. Very shortly after this, Dr. O'Neil called Ms. Heller and she informed him of Ms. [H's] current status and asked him to come over and see the patient. Dr. O'Neil agreed to come over. While waiting for Dr. O'Neil, Ms. [H.] complained to Ms. Heller of chest pain, so Ms. Heller called 9-1-1. Dr. O'Neil arrived at the same time as the fire Department and within (30) minutes of the request for him to come."

On about September 21, 2000, respondent sent the Medical Board a summary of the A.H. treatment in which he stated, "The nurses called me the next morning. . . . She later began complaining of chest pain and I saw her at about 8:30 p.m. and had her transferred to Inland Valley Medical Center. . ."[12]

On December 12, 2000, respondent was interviewed at his office by a Board investigator. The investigator's report, dated October 25, 2001, contained the following:

"Dr. O'Neill stated that in the case of Ms. [H], he didn't know she was experiencing chest pain until he arrived at the hotel and that as soon as he learned she was having chest pain, he immediately called 911. Dr. O'Neil said that he was performing surgery when he was initially called by the nurses regarding Ms. Huter."

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[12] This note indicates respondent is not an accurate or reliable historian. There was no basis for his statement, "the nurses called me the next morning." In light of contradicting evidence, his time estimate of 8:30 p.m. is not reliable.

The First Amended Accusation alleged, "While respondent was on his way, A.H. complained of chest pain and the nurse called 911. Respondent arrived at the Embassy Suites about the same time as the paramedics."

Nurses Heller and Jordan were present during the critical time period before the 911 call. Both testified at the hearing and were available to complainant for a full inquiry about the timing of events. They were credible witnesses with no apparent reason to lie under oath. Neither testified that respondent was actually present and observing the patient before the 911 was made. Both testified convincingly that respondent arrived either shortly before or at the same time as the paramedics. The only piece of uncontradicted evidence was the paramedic record establishing the 911 call received at 9:18 p.m. and arrival of the paramedics at 9:21 p.m. Thus, respondent must have arrived at the hotel about 9:18, not at "approximately 8:30."

31. The patient was taken to the hospital where she was diagnosed as having a "non-Q wave myocardial infarction." Dr. Frederick Wood examined the patient at the hospital and took a medical history. His report contained the following pertinent information:

> ". . . She has had no previous history of coronary events. . . . Cardiac risk factors are negative for hypertension, diabetes mellitus, hypercholesterolemia, previous coronary events.
>
> REVIEW OF SYSTEMS: CARDIAC: No previous history of angina, myocardial infarction, and not previous chest pressure, tightness or squeezing with exertion. Negative for a history of heart enlargement, history of congestive heart failure, paroxysmal nocturnal dyspnea, orthopnea, dyspnea on exertion or pedal edema. Negative history of abnormal heart rhythm or palpitations. . . ."

The patient made a full recovery and testified at the hearing. She was satisfied with the cosmetic result of the O.S.R. procedure.

32. The First Amended Accusation alleged the following conduct by respondent in his treatment of A. H. constituted gross negligence, incompetence and/or repeated negligent acts:

> A. He inappropriately discharged A.H. to the hotel despite having treated her for cardiac instability and hypertension during the chemical peel.
>
> B. He failed to respond to the initial page placed by the nurse.
>
> C. He failed to recognize signs and symptoms of severe cardiac instability at the hotel and improperly delayed the nurse in calling 911.

33. The First Amended Accusation charged respondent with gross negligence, incompetence and repeated negligent acts in his treatment of patient H.B. in July 2000.

Patient H.B. was 72 when she consulted respondent on June 26, 2000 in response to a newspaper advertisement. She was interested in skin rejuvenation, spider vein therapy, and liposuction for her knees. H.B. was 5 feet, 4 ½ inches tall and weighed 135 pounds. She did not list any medical problems on the intake sheet and noted she had a partial face-lift in 1995. H.B. did not immediately decide to have the procedures. Respondent gave her a video. H.B. testified the video she watched was not Exhibit H.

H.B decided to have the OSR procedure and liposuction on both knees. She scheduled the surgery and aftercare by QualCare followed by the retreat at Casa Royal. She understood she was going to the hotel first and then the retreat. She understood respondent required her to go to the hotel for QualCare monitoring but she was not required to go to the retreat. She felt she would be watched and cared for and, if anything happened, she would get attention and be close to a hospital.

34. On about July 17, 2000, H.B. was examined by her primary care physician David W. Schwartz, M.D. Dr. Schwartz ordered lab tests and reviewed the patient's EKG taken on May 1, 2000. The EKG noted Sinus Bradycardia. Dr. Schwartz noted H.B.'s current medical problems included osteoarthritis of knees, menopause, varicose veins for which she had previously had surgery, cataracts, hypothyroidism and a family history of heart disease. The patient's physical examination was normal but examination of the extremities revealed varicose veins, stasis dermatitis[13] and trace edema. Dr. Schwartz noted the patient's EKG taken May 1, 2000 was within normal limits and her chest x-ray was pending. The radiology report dated July 17, 2000 noted an impression of "possible COPD"[14] and "no evidence of active cardiopulmonary disease."

On July 17, 2000, Dr. Schwartz signed the O'Neil Clinic Physical Form and cleared the patient for "Chemexfiliation of Face and Neck and/or Liposurgery."

35. Patient H.B. arrived at respondent's outpatient clinic early in the morning of July 24, 2000. At 7:50 a.m. she signed the patient consent form for aftercare by QualCare. Respondent performed a physical examination and noted that the extremities were without edema or cyanosis. He noted the patient's medical history as indicated on Dr. Schwartz's authorization form. Respondent testified he did not see significant varicose veins, edema or stasis dermatitis when he examined the patient.

The patient was taken to the surgical room at about 9:30. The Sedation Record form noted the patient had heart disease and fainting/dizziness. The first doses of Versed and

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[13] Stasis dermatitis is defined in Dorland's Medical Dictionary as, "a chronic eczematous dermatitis, which initially involves the inner aspect of the lower leg just above the internal malleolus and which later may entirely or partially involve the lower leg, marked by edema, pigmentation, and commonly ulceration; it is due to venous insufficiency."

[14] Chronic Obstructive Pulmonary Disease. There was no evidence the patient had COPD.

Fentanyl were administered at 9:45 a.m. The patient's blood pressure was approximately 100/70. The chemical peel procedure began at 10:15. At 10:45 the patient had premature ventricular contractions and her blood pressure was 150/90. Respondent administered lidocaine for the PVCs. The operative notes stated that by 11:15 "PVC's better." At 11:45 the patient had more PVCs and again respondent administered lidocaine. Respondent completed the chemical peel and performed the liposuction of the knees. The last dose of Fentanyl was given at 12:15 and the last dose of Versed at 12:30. At 12:45 the face was taped and "supports" were put on. The operative notes showed the patient was monitored until 1:45 p.m.; her blood pressure remained steady at 120-130/70. At 1:30 her level of consciousness was noted as "arousable" and at 1:45 it was "awake." The sedation record indicated the patient was monitored until shortly after 1:45 p.m.

The Doctor's Discharge Summary stated that at 1:30 the patient was "oriented and ambulates," vital signs stable, blood pressure 120/80 and pulse 76. The patient was driven to the Embassy Suites shortly before 2:00 p.m.

36. There was no evidence that any information in respondent's chart, as noted in Factual Findings 33 through 35, was false or inaccurate.

37. Patient H.B. was received into the hotel by QualCare at 2:00 p.m. Sonja Forrest, R.N., was the nurse on duty. At the hearing she testified she did not recall the patient's arrival or putting her into bed. She explained that, unless something went wrong, it does not stay in her mind. Nurse Forrest made the following chart entry after the patient arrived:

> "1400 Elderly female admitted from Dr. Oneil's office vial w/c. very sedated. Max. assist required to bed. Denied need to void. Too sleepy to sip H2O. To sleep immediately. Ice to eyes. VS stable. BP 182/81."

Nurse Forrest testified that had she believed H.B. was not in a condition to be discharged to the QualCare setting she would have informed respondent's office. Respondent testified that QualCare could determine a patient was not ready for hotel care and send them back to respondent's facility for further monitoring. Nurse Forrest felt it was appropriate to discharge H.B. to a setting where a nurse could monitor her vital signs, assist her to the bathroom and assist with medications if the patient requested them.

The nurse's notes show that at 3:00 p.m. the patient was sleeping and difficult to arouse; vital signs recorded at 4:00 p.m. show blood pressure 149/83, pulse 90 and the patient sleeping and easily aroused; and the nurse took the patient's pulse for one minute and noted "No pvc's felt."

By 7:00 p.m. the patient was still "mildly sedated" but she was drinking water and got up to go to the bathroom with maximum assistance[15] of the nurse. Throughout the night the

[15] Neither party addressed the question of whether it was common for a knee liposuction patient to require extra assistance when walking within 24 hours of the procedure.

patient slept, was easily aroused, drank liquids and went to the bathroom with maximum assistance of the nurse. Her blood pressure remained stable at 121-132/69-72.

At 9:00 a.m. on July 25, 2000, the patient was awake and alert, blood pressure was 130/74, she was taking liquid nourishment and going to the bathroom with moderate assistance from the nurse. She became restless and anxious in the afternoon and took 1 mg of Ativan. At 8:00 p.m. she again became restless; her blood pressure was 153/86. She took 1 m.g. of Ativan. The patient slept through the night, waking to drink water or go to the bathroom. At 4:30 a.m. she experienced pain and was given Darvocet.

Nurse Forrest testified she did not recall the patient was sleeping a lot. The patient was supposed to stay in bed and be quiet.

38. The patient was awake and alert at 5:00 a.m. on July 26, 2000. At 6:00 a.m. the night nurse removed the tape mask from the patient's face and applied the powder. The patient went back to sleep. At about 7:00 a.m. Nurse Forrest came on duty and relieved the night nurse. At 8:45 she awakened the patient to apply a second coat of powder. The patient was able to get out of bed by herself, and drank water and juice. At about 9:05 a.m. she went to the bathroom by herself. At about 9:10 a.m., upon returning from the bathroom, she complained of dizziness, became unsteady and "lethargic acting" and fell into bed assisted by the nurse. Her lips and eyelids were ashen; she was perspiring, skin clammy, and complained of chills. The nurse noted her blood pressure as "70/?" with pulse of "60-weak." The patient denied chest pain or shortness of breath. Her lungs were clear with a stethoscope. The nurse placed the patient in a position to elevate her feet above her head in order to raise the blood pressure. The nurse did not immediately call 911 because she did not believe the condition was life threatening.

At 9:15 the nurse called respondent and advised him of the patient's condition. Respondent instructed her to continue the position, monitor vital signs and call him again if the patient did not improve. At 9:30 the nurse called respondent and informed him the blood pressure continued to be "60-70/?," the pulse weak in the 70's, color ashen, and the patient now complained of shortness of breath. Respondent and the nurse agreed that 911 should be called. The nurse called 911 at 9:35 p.m. The EMT records show the 911 call was received at 9:38 a.m. and the paramedics arrived at 9:43 a.m. They administered oxygen and took the patient to Rancho Springs Medical Center.

39. Respondent's chart contained the following entry for July 26, 2000:

> "9:30 am Qualcare nurse called. Pt fainted after going to BR and standing. Pt alert and stable in bed. HR 60. BP unobtainable. They [illegible] called back 10 minute later. Pt. Now SOB. HR 60. BP unobtainable. PT in bed with legs elevated, told to call 911 and pt transferred to Rancho Springs ER."

40. On July 26, 2000, patient H.B. was admitted to Rancho Springs Medical Center. The emergency evaluation record noted the patient had difficulty breathing with near syncope but had no chest pain. She denied any history of pulmonary or cardiac problems.

The physical examination revealed no rashes, no numbness or weakness in the extremities and no peripheral edema. The EKG showed a single PVC. The initial assessment was a post-surgical complication of pulmonary embolus.

Anoop K. Maheshwari, M.D., examined the patient in the hospital. His history noted the patient took diuretics once a week for pedal edema. His physical examination of the extremities found "no cyanosis, clubbing or edema. No calf pain tenderness is present." A venous Doppler exam of the lower extremities showed slow venus flow and no evidence of deep vein thrombosis.

H.B. was discharged from the hospital on July 28, 2000, much improved and in stable condition. Dr. Schwartz' discharge diagnosis for H.B. was bilateral pulmonary emboli with respiratory distress.

41. The First Amended Accusation alleged the following conduct by respondent in his treatment of H.B. constituted gross negligence, incompetence and/or repeated negligent acts:

A. He improperly performed lower extremity liposuction on the patient because her preoperative workup showed lower extremity venous insufficiency making her an inappropriate patient for the procedure.

B. He excessively sedated the patient and prematurely discharged her from his facility.

C. He improperly continued the cosmetic surgery on the patient after she suffered two episodes of ventricular arrhythmia during the chemical peel procedure.

D. He failed to timely have the patient transferred to the hospital when she suffered postoperative complications at the hotel.

42. Complainant presented no credible evidence to support the allegation that respondent used general anesthesia on his patients.

43. Complainant called two expert witnesses to testify at the hearing and presented the written report of a physician consultant. Mark Krugman, M.D. and David T. Morwood, M.D. are both board certified plastic surgeons.

Dr. Krugman obtained his medical degree from the University of Maryland Medical School in 1964. He completed a rotating internship at Mount Sinai Hospital in New York City in 1965. At the same hospital he completed a residency in General Surgery in 1966 and a residency in Otolaryngology in 1969. After two years of service in the Air Force, Dr. Krugman completed a plastic surgery residency at U.C. Irvine in 1976. He became board certified in plastic surgery in 1977. Dr. Krugman's curriculum vitae showed that he is very

well qualified as a plastic surgeon. His education and professional experience as a plastic surgeon and otolaryngologist are extensive.

Since 1976, Dr. Krugman has maintained a private practice in southern California, specializing in plastic surgery and otolaryngology. He operates a licensed outpatient clinic. He performs laser resurfacing procedures but does not perform phenol peels of the face. Dr. Krugman has no objection to the skin rejuvenation procedure used by respondent. On his resume, Dr. Krugman listed a Chemical Peel Workshop in 1991, an Update on Skin Peeling in 1992, and attendance at conferences on chemical peels in 1992 and 1993.

Dr. Morwood obtained his medical degree from the College of Medicine, University of Vermont, in 1983. He performed his internship and general surgery residency at Beth Israel Medical Center in New York. In 1987, he completed a plastic surgery residency at Mount Sinai Hospital in New York. In 1993, he was board certified in plastic surgery and received a Certification of Added Qualifications in Surgery of the Hand in 1994.

Dr. Morwood maintains a private practice in plastic surgery, specializing in breast, hand, face and reconstructive surgery for children, face lifts, lasers, peels, fractures and injuries. Dr. Morwood has performed some liposuction and has done 20 phenol peels in his career.

A written report by Jeannette Y. Martello, M.D., J.D. was admitted into evidence by stipulation in which the parties agreed it could be received "as if she had testified to these matters under oath." Dr. Martello obtained her medical degree from UCLA School of Medicine in 1988. In 1989 she completed a surgical internship at Massachusetts General Hospital in Boston. She then attended two years of law school at Boalt Hall. While in law school she worked as an emergency room physician at Kaiser Santa Theresa in San Jose. From 1991 to 1995 she performed a Plastic Surgery Integrated Residency at University of Kentucky Medical Center. In 1996 she completed one year as Plastic Surgery Chief Resident at the same facility. During this time she moonlighted at various emergency rooms throughout Kentucky. She returned to law school and obtained her J.D. degree in 1997. In June 1998 she completed a one-year hand surgery fellowship at Kleinert & Kutz Institute of Hand Surgery in Lousiville, Kentucky, and in January 1999 completed a six-month term as Hand Transplant Fellow at the same institute. Since March 1999 Dr. Martello has engaged in the private practice of Plastic Surgery and Hand Surgery in Pasadena and has served as Medical Consultant for the Medical Board of California. She became board certified in plastic surgery in September 2001. Dr. Martello's resume did not indicate that she performs phenol peels or liposuction.

44. On June 1, 2001 Dr. Krugman issued a written report in which he stated his opinions about respondent's treatment of patients A.H. and H.B. He found three instances in which respondent's actions with regard to H.B. constituted a "departure from the standard of care" and one instance of a "departure from the standard of care" with A.H. On about June 8, 2001 the Board's investigator called Dr. Krugman to clarify whether or not he meant simple or extreme departures. Dr. Krugman told the investigator that all of the departures he found were simple departures.

Dr. Krugman testified that he found repeated "simple departures" from the standard of care but, after speaking with the board's investigator and the Deputy Attorney General, he believed that a number of simple departures aggregate to an "extreme departure" from the standard. Dr. Krugman testified that his opinions, including his conclusion of an extreme departure, were influenced by the fact respondent had been disciplined in the past and was on probation. He believed that while on probation respondent should have been on his best behavior.

45. With regard to patient A. H., it was Dr. Krugman's opinion that respondent departed from the standard of care when he failed to call 911 in a timely manner. Dr. Krugman assumed the patient had been complaining of chest pain for 30 to 60 minutes, with respondent present or aware of the complaint, and there was a 50-minute delay before the 911 call. The evidence did not establish those facts.

Dr. Krugman testified that respondent's delay in calling 911 was the only fault he found in the treatment of patient A.H. He would change his opinion if the 911 call was made while respondent was en route to the hotel and not told of the chest pain until he arrived. Knowledge of the chest pain complaint was the crucial issue and respondent could not be faulted if he was not aware.

46. It was Dr. Morwood's opinion that respondent committed extreme departures from the standard of care in his treatment of patient A.H. The standard of care requires a physician to be familiar with possible side effects and potential complications from a treatment. Any side effects or complications must be treated appropriately in a timely manner to prevent further sequela and complication.

Dr. Morwood believed the patient showed cardiac instability in the form of PVCs during the facial peel and she continued to show cardiac instability after the procedure with ongoing PVCs and high blood pressure. The patient required a setting that had the proper monitoring equipment for blood pressure, oxygen saturation and cardiac condition. He felt respondent discharged her in spite of the continuing signs of cardiac instability. After discharge, the QualCare nurse notified respondent of continuing progressive cardiac instability, but he did not see the patient for several hours. Dr. Morwood believed respondent ignored the warning signs and did not take timely action to have the patient transferred to the hospital or have her evaluated by an intensive monitoring team. Dr. Morwood's opinion was based on his belief the patient had a history of cardiac problems; had experienced shortness of breath at the hotel; the nurse could not obtain a blood pressure; and, after being informed of unstable vital signs at 5:30 p.m., respondent delayed calling 911 for several hours. The evidence established none of these facts.

47. On cross-examination, Dr. Morwood admitted it was not unusual for a patient to experience high blood pressure during and after a phenol peel. He also acknowledged the medical records do not show the patient had any PVCs after the procedure.

Dr. Morwood acknowledged that PVCs are common during a phenol peel and respondent appropriately treated patient A.H.'s episode during the procedure and she responded well. However, he believed that her cardiac instability was not adequately addressed before she was discharged to the hotel where she remained unstable and respondent delayed addressing her condition. It was his opinion that, even without chest pain, respondent should have transferred A.H. to the hospital immediately.

Dr. Morwood based his opinion on his mistaken belief that A.H had postoperative PVCs, had a history of cardiac problems, and was experiencing shortness of breath. The evidence did not establish these facts.

48. It was Dr. Krugman's opinion that patient H.B. was not a good candidate for liposuction of the knees because she was in her early seventies with a history of swelling in her legs, varicose vein surgery, hypothyroid and taking female hormones, which made her predisposed to getting blood clots in the deep veins of her legs. Dr. Krugman admitted that hormone replacement and hypothyroidism were minor risk factors, but were "additive" in this situation. He believed that Dr. Schwartz' findings of edema and stasis dermatitis, when added to the patient's age and sedentary position after surgery, created risk factors. He explained that edema and stasis dermatitis in a patient over 70 meant the patient's venous system was not good.

Dr. Krugman believed that coupling the liposuction with the facial peel created competing interests; the peel procedure required the patient to be sedentary but the knee liposuction required the patient to ambulate to avoid an embolism. It was Dr. Krugman's opinion that performing knee liposuction on H.B. was a simple departure from the standard of care because of her predisposing risk factors.

49. It was Dr. Krugman's opinion that respondent showed poor judgment and departed from the standard of care in going forward with the knee liposuction after patient H.B. experienced two episodes of PVCs during the facial peel. With her risk factors described in Factual Finding 48, the PVC's made her condition more precarious. Dr. Krugman explained that PVCs are a normal occurrence during facial peels but the patient was an "old lady" without a good cardiovascular system.

Dr. Krugman concluded respondent's conduct represented an extreme departure from the standard of care because of "the multiplicity of cognitive decisions he made that led to the problems with the patient."

50. It was Dr. Morwood's opinion that patient H.B. suffered post-surgical complications because respondent performed liposuction on diseased legs. He explained that the standard of care requires the physician to be familiar with the criteria that would designate patients who are appropriate or inappropriate for a particular procedure. Dr. Morwood believed H.B. presented with a history and preoperative physical exam that made her inappropriate for lower extremity liposuction. The patient's varicose veins, stasis dermatitis, age and hormone replacement therapy placed her at high risk for pulmonary embolism. It was Dr. Morwood's opinion that it was an extreme departure from the standard

of care to perform liposuction on H.B.'s knees because of her high risk history. He believed a clot from the patient's leg traveled to her lungs when she got up after being sedentary.

On cross-examination, Dr. Morwood acknowledged that varicose veins do not necessarily indicate deep vein insufficiency and edema has many causes.

51. It was Dr. Morwood's opinion that combining the facial peel and knee liposuction procedures did not of itself deviate from the standard of care. The standard of care required the patient be mobilized immediately after a surgical procedure on her legs. Inactivity increased the chance for venous stasis[16] and thrombus[17] in the legs. However, because the patient required rest for the facial procedure, the standard of care required that something be used on her legs while in bed to minimize the chance of venous thrombosis. Risk can be minimized by short walks, foot pumps, heparin therapy or a sequential compression device.[18]

52. It was Dr. Krugman's opinion that when a patient is difficult to arouse it is a departure from the standard of care to discharge the patient from an ambulatory facility. He explained that a patient can remain in an outpatient surgical clinic for up to 23 hours. If a sedated patient is difficult to arouse the facility should have equipment such as EKG, oxygen, pulse oximeter, intravenous equipment and defibulator. A patient will still be under some sedation when discharged, but not to the point where she cannot be aroused or get out of bed. A patient who cannot take fluid by mouth and is too sedated to get out of bed should not be discharged home. A patient who remains in that condition should be transferred to a hospital. Transfer of such a patient to a hotel room is a departure from the standard of care.

On cross-examination Dr. Krugman agreed that, based on respondent's chart documentation of patient H.B.'s condition at the time of discharge, she looked appropriate for discharge. However, he felt her heavily sedated condition when she arrived at the hotel required explanation. In his experience, elderly patients may not continue to improve after sedation. They have ups and downs after sedation and may initially look fine but can quickly deteriorate. There is no specific post procedure observation time required before discharge; it depends on the individual patient.

It was Dr. Krugman's opinion that the discharge of patient H.B. from respondent's clinic was a simple departure from the standard of care because she was over-sedated when she arrived at the hotel. She should have been retained at the clinic with monitoring or transferred to a hospital. Dr. Krugman explained that the issue here is not the amount of sedation during surgery, but the level of sedation at discharge. In his written report of June 1, 2001, Dr. Krugman did not opine that respondent's discharge of H.B. was a departure from the standard of care.

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16 Cessation or impairment of venous flow. (*Dorland's Illustrated Medical Dictionary*, 27th Ed.)

17 An aggregation of blood factors frequently causing vascular obstruction at the point of its formation. (*Id.*)

18 Complainant did not allege that respondent failed to use appropriate anti-thrombosis therapy.

53. In his written report issued July 25, 2001, Dr. Morwood did not opine that respondent inappropriately discharged patient H.B. from his clinic before she was ready to leave. At the hearing he testified that if H.B. was very sedated when she arrived at the hotel and required maximum assistance to get into bed, it was below the standard of care to discharge her from the clinic. He believed it is extremely uncommon to have the patient alert and able to ambulate, but 15 minutes later appear as described by the QualCare nurse.

Dr. Morwood explained that the standard of care required the patient to be monitored after surgery for at least an hour before discharge from the outpatient clinic. Before discharge, the patient should be able to respond to questions, breath clearly, take a deep breath on command, urinate, and have stable vital signs. After reviewing H.B.'s chart and her vital signs before discharge, Dr. Morwood did not see any evidence of an inappropriate discharge.

54. It was Dr. Krugman's opinion that it was a simple departure from the standard of care for respondent to delay calling 911 at 9:00 a.m. on July 26, 2000, because H.B. was "shocky" and her blood pressure was low. Dr. Krugman's June 1, 2001 written report indicated that he erroneously believed the nurse called respondent at 9:00 a.m. and again at 9:15. The evidence is otherwise (Factual Finding 38).

Dr. Morwood offered no opinion about the events of July 26, 2000.

55. Dr. Morwood reviewed all of the available medical records in this case. Based on the records, he could not determine that respondent used Versed in an amount that would induce the patient to a level of general anesthesia.

56. Dr. Morwood offered his opinion that "hotel observation" aftercare such as that provided by QualCare to cosmetic procedure patients is a common practice in California. However, it is his understanding that the nurses have formal monitoring equipment available.

57. Dr. Morwood offered his opinion that respondent's video advertisement and his brochures seem to be similar to many other infomercials and physician's advertisements in the popular media in California.

58. Complainant presented no evidence in the form of expert testimony to support the charge that respondent was incompetent in his care, treatment or management of the patients A.H. and H.B.

59. Respondent called two expert witnesses to testify at the hearing. Joseph C. Avakoff, M.D. is a board certified surgeon and plastic surgeon. Robert A. Yoho, M.D. is board certified in emergency medicine, dermatologic cosmetic surgery and laser surgery.

Dr. Avakoff obtained his medical degree from the University of California School of Medicine in San Francisco in 1961. After his rotating internship, he completed a residency in General Surgery at Kaiser Hospital in San Francisco in 1966 and later a residency in plastic surgery at University of Texas School of Medicine. In 1985 Dr. Avakoff obtained a

J.D. degree from Santa Clara University School of Law and was admitted to the California State Bar in 1987. Dr. Avakoff spent 22 years in the private practice of medicine in Santa Clara County. He retired in 1994. Between 1987 and 1994 Dr. Avakoff performed approximately 100 liposuction procedures but never aspirated more than 1500 cc. He never performed phenol facial peels. Since retirement he has been doing medi-legal consultations for the Medical Board and for the Department of Corporations.

Dr. Yoho received his medical degree from Case Western Reserve University Medical School in 1981. He completed a one-year rotating internship at the University of Cincinnati and a two-year Dermatology Residency at Dartmouth-Hitchcock Medical Center in New Hampshire. In 1985 he completed emergency Medicine Residency Training at LAC/USC Medical Center in Los Angeles and Huntington Memorial Hospital in Pasadena.

From 1984 to 1987 Dr. Yoho was employed by the Huntington Memorial Hospital Emergency Medical Group. He then maintained a general medical practice in Pasadena until 1994. From 1992 to the present he has specialized in cosmetic surgery. His practice includes liposuction, hair transplantation, laser resurfacing, face lifts, laser blepharoplasty, breast implantation, vein treatments and fat transplantation. Dr. Yoho has published several articles related to cosmetic surgery procedures in peer reviewed journals.

60. Dr. Avakoff testified that a patient is ready for discharge from an outpatient facility when she can get out of bed and walk, but the patient will not be as ambulatory as someone who has not gone through the procedure. To discharge after outpatient cosmetic surgery, the standard of practice required the vital signs be stable and the patient be easily arousable to the extent she is able to wake up though she may still be sleepy, converse a bit, get out of bed and go to the bathroom. If the patient experienced PVCs or hypertension during the procedure, she must be monitored until she becomes stable. When the patient is stable, she can be released to home where she would not be monitored.

Dr. Yoho explained the standard of practice regarding discharge of a patient is to observe for one to two hours to see that the vital signs are stable. A certain level of alertness is expected; the patient need not be as alert as before the sedation, but should know where she is, be able to ambulate, urinate and take fluids.

Dr. Yoho testified that phenol peel patients are commonly discharged to home. However, if the patient does not do exactly the right things for the face, scarring can result. It meets the highest standard of care to provide a place where the patient is assisted for a week. It was Dr. Yoho's opinion that the monitoring provided by QualCare was appropriate and the standard of care did not require the patients to be monitored as if in an acute care setting with equipment such as pulse oximeters. He noted that even when a patient is sent to a nursing home for aftercare, there is only one nurse to attend 20 or 30 patients.

61. Dr. Yoho explained that PVCs are common during a phenol peel because the chemical substance irritates the heart and causes arrhythmia. Although the cardiac rhythm imitates that of a heart attack, PVCs that occur during a phenol peel do not have the same "malignant quality" in which the heart is starved for blood and oxygen. The PVCs are taken

seriously but sudden death is not a problem. Appropriate treatment is to wait a few minutes for the arrhythmia to subside or to administer Lidocaine. It was Dr. Yoho's opinion that respondent properly managed A.H.'s PVC episode.

Dr. Avakoff reviewed the medical records of patient A.H. It was his opinion that she did not suffer cardiac instability after the facial peel procedure. He explained that PVCs are common during a phenol peel and do not constitute "cardiac instability." Nor did the increased blood pressure necessarily indicate cardiac instability because it can result from pain during the phenol peel. It was Dr. Avakoff's opinion that respondent properly treated the patient's PVCs during the procedure with Lidocaine and the operative notes show the patient returned to normal sinus rhythm.

62. Dr. Yoho explained that elevated blood pressure is typical during a phenol peel because the peel is painful and pain produces hypertension. It was Dr. Yoho's opinion that respondent's use of Anapsine on patient A.H. was an "elegant" way to treat the hypertension caused by pain and the nausea that can result from the narcotic used for sedation. If too much hypertension medicine is used during the peel, the blood pressure can become too low after the procedure. It was Dr. Yoho's opinion that respondent's treatment of A.H.'s high blood pressure was appropriate.

63. It was Dr. Avakoff's opinion that A.H.'s vital signs were stable during the hour and one-half she was monitored after the procedure and before discharge. It was Dr. Avakoff's opinion that respondent's discharge of A.H. did not depart from the standard of care. Her vital signs were stable and she was released to monitoring by QualCare.

It was Dr. Yoho's opinion that respondent's chart entries show that patient A.H. was observed for one and one-half hours and her vital signs were entirely stable before discharge. Based on the records she was appropriate for discharge.

64. Dr. Yoho noted that the charts for patients A.H. and H.B. showed blood pressures that were not dangerous. They were blood pressures that people carry for many years at a time.

65. It was Dr. Avakoff's opinion that respondent did not depart from the standard of care in his attention to patient A.H. after discharge. He explained that if respondent was told the patient had high blood pressure, was restless, anxious and hyperventilating,[19] but with no chest pain, there could be a number of causes for the symptoms and the situation did not require an immediate 911 call. It was Dr. Avakoff's opinion that respondent's instruction to monitor the patient was appropriate. Once the patient complained of chest pain, it was mandatory to call 911. If respondent learned of the chest pain before reaching the hotel and

[19] Respondent's counsel included these symptoms in his hypothetical question to Dr. Avakoff. The evidence did not establish the patient was hyperventilating or had dangerously high blood pressure. The testimony and chart notes indicated the blood pressure was "up a little bit" and the pulse rate was high. The pulse rate became too fast to count at the same time the patient started to feel chest pain.

did not order a call to 911, it would be a simple departure from the standard of care because chest pain can be caused by something other than a heart attack.

It was Dr. Yoho's opinion that respondent did not act inappropriately in the transfer of patient A.H. to the hospital. He explained if the nurse advised respondent the patient had high blood pressure, was restless, anxious and hyperventilating, this was a typical post-phenol peel set of symptoms in a patient who continued to feel some pain and claustrophobia in the tape mask. It would have been significant if respondent had been advised of chest pain.

66. Dr. Avakoff reviewed the medical records of patient H.B. and concluded there was no evidence of any significant venous insufficiency of the legs. He testified that varicose veins indicate venous insufficiency only in the area of the varicose vein. He believed that the patient had significant varicose vein surgery in the past and had residual varicose veins and stasis dermatitis, which was common and did not indicate deep venous insufficiency. Dr. Avakoff noted that none of the physicians who examined H.B. at the hospital noted any profound venous insufficiency.

Dr. Avakoff considered the hormone replacement therapy to be an added but very minor risk factor and not a contraindication for liposuction. He did not think hypothyroidism caused increased thrombolic phenomenon.

It was Dr. Avakoff's opinion that H.B. was an appropriate candidate for the planned knee liposuction because the risk factors were quite minor.

67. Dr. Yoho explained that embolism is a risk for anyone who undergoes surgery. Embolism after hospital surgery is very common, but is quite rare after outpatient procedures. In the 6,000 cases that Dr. Yolo has performed, four patients experienced deep vein thrombosis and none had pulmonary embolism. He discussed the risk factors for pulmonary embolism.

It was Dr. Yoho's opinion that superficial venous disease and hypothyroidism are not risk factors. The risk factors are general anesthesia for more than half an hour; birth control pills but not estrogen replacement; congestive heart failure; broken extremities; prior history of pulmonary thrombosis/embolism; prior history of deep venous thrombosis; hospital bed rest where the patient does not get up; and cancer.

It was Dr. Yoho's opinion that varicose veins are not a risk factor and stasis dermatitis can be purely the result of varicose veins. Edema is not diagnostic for deep vein thrombosis. Although patient H.B. was sedentary while in the hotel, she was getting up to go to the bathroom so she was not completely at bed rest.

It was Dr. Yoho's opinion that patient H.B. had none of the well known risks for embolism. Any patient over 65 is at increased risk for many things, but he considered H.B. to be a "class 2 risk" because she was healthy on medications. He explained that a class 3 risk is a patient with an active medical problem that is not controlled. H.B.'s medical

conditions were controlled with medication so she was an appropriate candidate for the procedures.

68. It was Dr. Avakoff's opinion that respondent properly addressed the two episodes of PVCs during H.B.'s phenol peel and proceeding with the knee liposuction was not a departure from the standard of care because the small amount of aspirate taken indicated it was a minor liposuction procedure.

It was Dr. Yoho's opinion that respondent did not violate the standard of care by proceeding with the knee liposuction after H.B. experienced PVCs. For the reasons stated in Factual Finding 66, the PVCs and the manner respondent treated them did not contraindicate the knee liposuction. He explained that the cardiac irritation effects of the phenol peel are gone in 15 minutes to half an hour after the peel is finished. The amount of aspirate in the knee liposuction indicated a minor procedure that took about ten minutes.

69. It was Dr. Avakoff's opinion that H.B.'s sedation and operative record showed she was appropriate for discharge at 1:45 p.m. She had been monitored for an hour, her vital signs were stable and she was awake. He offered an explanation for the changed condition of the patient at the hotel. He believed the patient could have been apprehensive at the facility, awake and alert but on reaching the hotel and knowing the procedure is over, "just conks out" to rest.

Dr. Avakoff acknowledged that it would be a violation of the standard of care if respondent discharged the patient when she was difficult to arouse and required maximum assistance. The patient's condition when she left the facility is the issue. The observations recorded in respondent's chart indicated she was appropriate for discharge even to home. It was quite common to use a wheelchair to discharge a patient with knee liposuction.

It was Dr. Yoho's opinion that patient H.B. was appropriately discharged from respondent's facility. She was monitored for an hour after the procedure with vital signs taken every 15 minutes. The patient record showed that her vital signs were stable. Use of a wheelchair for a post procedure patient is routine.

Dr. Yoho noted that the patient's level of consciousness on arrival at the hotel was described as "very sedated." He explained that the narcotics used during the procedures cover the pain and are stressful and fatiguing for the patient. After surgery it is not unusual for the patient to have a waxing and waning level of consciousness.

70. It was Dr. Avakoff's opinion that respondent did not unreasonably delay calling 911 for patient H.B. When respondent was notified of the patient's condition at 9:15 it was reasonable to have the patient watched carefully for a short time. Her symptoms, including blood pressure and respiration, were consistent with a fainting episode and the standard of care did not require an emergency call to 911 when a patient initially appears "woozy." When the patient did not improve and then developed shortness of breath, it was time to call 911.

Dr. Yoho reviewed the sequence of events for patient H:B. on the morning of July 26, 2000. It was his opinion that respondent's response to the patient's condition as relayed to him at 9:15 a.m. was appropriate. Dr. Yoho explained the "medical reasoning" process commonly used by physicians. The physician first thinks of common causes for the patient's symptoms and later considers the rarer causes. The physician could first think that H.B.'s condition was a vaso-vagal episode – a faint brought on by a bowel movement or pain – in which case the patient would recover after a few minutes. Dr. Yoho explained that a vaso-vagal episode typically includes low heart rate and blood pressure goes down. It was Dr. Yoho's opinion that an experienced physician would first consider a vaso-vagal episode, especially with a patient who had just risen from bed and gone to the bathroom, and an immediate call to 911 was not required. Observation for a few minutes and rechecking vitals signs was an imminently reasonable way to handle the situation. It was Dr. Yoho's opinion that respondent's decision to closely monitor the patient and call him again if she did not improve was within the standard of care. Respondent properly ordered the 911 call when the nurse called him at 9:30 a.m. to say the patient had not improved and had begun to complain of shortness of breath.

71. Based on his review of the medical records, Dr. Yoho determined that respondent used monitored anesthesia, which he described as twilight sleep or moderate sedation. It was not general anesthesia. A.H. and H.B. did not need to be ventilated for respiration, nor did they require cardiac support. They were both arousable from the sedation.

72. The testimony of each of the expert witnesses was weighed and evaluated, taking into consideration their qualifications and experience, attitude and demeanor while testifying, the quality of their answers, and the accuracy and reliability of the information on which they based their opinions. Each was qualified to testify and offer an opinion; none had any apparent bias.

Dr. Martello issued a "Memorandum" to the Board's investigator on February 22, 2001. The statement and opinions in her written report are given little weight against the testimony of the expert witnesses who appeared and testified under oath. Dr. Martello's pervasive use of exclamation marks in her comments and opinions raised a concern about her detachment and objectivity. Her opinions were based on facts not established by the evidence at hearing. Dr. Martello's comments and opinions were not deemed conclusive because her final recommendation was to send the A.H. and H.B. cases to an expert plastic surgery reviewer.

Dr. Krugman's written report indicated he assumed all of the allegations were true in the 1996 Accusation and 1998 Supplemental Accusation. By his testimony and statements in his written report, it was clear Dr. Krugman did not understand that respondent stipulated to only a portion of the allegations and charges in the prior disciplinary action. His interpretation of the facts and violations established by the stipulated decision and order was not accurate. Dr. Krugman also considered information in Dr. Martello's report that was either not admissible or not established by the evidence.

Dr. Krugman did not apply an objective standard. He candidly admitted that, in evaluating respondent's conduct as an "extreme departure from the standard of care," he was influenced by the prior discipline imposed on respondent. This was inappropriate for two reasons: Dr. Krugman's interpretation of the nature and effect of the prior discipline was not accurate and he was unduly influenced by an irrelevant factor. The prior discipline should not be a factor in his professional opinion. The conduct at issue must be evaluated of itself in the context of the situation as it occurred. The conduct is either below an existing standard of care as gross or simple negligence or it is not. Respondent's prior actions and the existence of prior discipline are not relevant to the measure. The prior discipline is relevant only for the purpose of determining the appropriate discipline, if any, to impose in the pending case. Dr. Krugman also erroneously believed that several acts of simple negligence, or repeated negligent acts, equate to an extreme departure from the standard of care.

In his written report, Dr. Morwood stated he could not determine respondent used general anesthesia. At the hearing, based on the same documentation he used for his written report, he inexplicably changed his mind and opined that patient H.B. was under general anesthesia. This weakens the reliability of his testimony.

The opinions of Dr. Krugman and Dr. Morwood regarding respondent's treatment of A.H. were not consistent. Dr. Krugman faulted respondent only for a delay in calling 911 and found this to be a simple departure from the standard of care. Dr. Krugman did not opine that A.H. was inappropriately discharged from respondent's facility. Dr. Morwood found the patient's discharge and the purported delay in calling 911 to constitute extreme departures from the standard of care. Both Dr. Krugman and Dr. Morwood based their opinions on assumed crucial facts that were not established by the evidence.

Their opinions regarding respondent's treatment of H.B. were not consistent. Dr. Krugman found it a simple departure to combine the knee liposuction and the facial peel. Dr. Morwood found that combining the procedures did not of itself depart from the standard of care, but he faulted respondent for not taking sufficient steps to minimize the chance of venous thrombosis, even though this was not alleged as a basis for discipline. Dr. Krugman found respondent's discharge of patient H.B. from his outpatient clinic to be a simple departure from the standard of care. In his written report, Dr. Morwood did not criticize the discharge; on direct examination he found it to be an extreme departure from the standard of care; but on cross-examination, after reviewing H.B.'s chart and her vital signs before discharge, testified that he did not see evidence of an inappropriate discharge.

It is complainant's burden to present evidence that is clear and convincing to a reasonable certainty. That standard is not met when the expert witnesses rely on facts not proven and matters not relevant; nor is it met if complainant's own experts reach different conclusions on most of the major charges after reviewing the same material.

The testimony of Dr. Yoho was more persuasive and outweighed the inconsistent opinions presented by complainant. He had substantial experience as both cosmetic surgeon and a physician handling emergency situations; his answers were responsive, clear, candid, logical and comprehensible. His opinions and explanations seemed to be formulated in the

context of the real world of practice. The opinions and testimony of Dr. Avakoff and Dr. Yoho were complementary and not inconsistent.

73. With regard to the charges relating to patient A.H. as set forth in Factual Finding 32, the evidence was not clear and convincing to a reasonable certainty to establish respondent inappropriately discharged the patient from his facility to the QualCare aftercare, failed to recognize the sign and symptoms of severe cardiac instability or improperly delayed the nurse in calling 911.

Complainant did not present sufficient evidence to establish that respondent's delay of almost two hours in responding to the nurse's page constituted negligence or an extreme departure from the standard of care. The only evidence on the issue was respondent's testimony that he was performing a procedure on a patient at the time of the page, he was not wearing the pager and did not recall how he was informed of the nurse's call or the time he first returned the call. He was still in the middle of a procedure when he spoke to the QualCare nurse. No expert testimony was presented to establish the response the standard of care required of a physician in such a situation.

The evidence was not clear and convincing to a reasonable certainty to establish respondent was incompetent, grossly negligent or repeatedly negligent in his treatment of patient A.H.

74. With regard to the charges relating to patient H.B. as set forth in Factual Finding 41, the evidence was not clear and convincing to a reasonable certainty to establish respondent performed knee liposuction on an inappropriate patient, excessively sedated H.B., improperly continued the surgery after PVC episodes, or failed to timely call 911 on July 26, 2000.

The evidence raised a question about whether H.B. was discharged from respondent's facility before she was ready. Complainant relied on the nurse's note describing the patient when she arrived at the hotel. However, the nurse did not recall the patient's arrival or that there was a problem with her condition. She did not contact respondent's office to advise that the patient was not ready for the aftercare setting, which she had the authority to do. Neither party contradicted the accuracy of respondent's chart notes documenting the patient's postoperative condition. The nurses in respondent's outpatient clinic who monitored the patient after the procedures were the most relevant witnesses to the patient's actual condition at discharge; however, the Board's investigators did not interview them nor did complainant present them as witnesses at the hearing. The testimony of complainant's experts established that, based on respondent's chart, the patient seemed appropriate for discharge but her arrival condition as described by the QualCare notes required some explanation. It is complainant's burden to establish the necessary facts on which to base an expert opinion; a questionable circumstance is not enough to establish unprofessional conduct by incompetence, gross negligence or negligence.

The evidence was not clear and convincing to a reasonable certainty to establish respondent was incompetent, grossly negligent or repeatedly negligent in his treatment of patient H.B.

75. Except as set forth in the Factual Findings above, the factual allegations of the First Amended Accusation were not established by evidence that was clear and convincing to a reasonable certainty and are deemed surplusage. Expert opinions elicited at the hearing on matters not alleged in the First Amended Accusation are not relevant and cannot support a finding of unprofessional conduct.

76. Complainant requested costs of investigation and prosecution of the case pursuant to section 125.3. Deputy Attorney Douglas MacCartee presented a written declaration that the Attorney General's charges were $19,740.00. Felix S. Rodriguez, Supervising Investigator for the Medical Board, presented a written declaration that the costs of investigation were $7,363.53 and the costs of expert reviewer services were $2,285.[20] Respondent did not object to the amount of attorney fees charged. He did object to the hourly rate charged by the investigators as unreasonable and noted the investigator's hourly rate of approximately $110 was higher than the $100 hourly rate of the medical experts. The Deputy Attorney General billed at only $112 per hour.

Complainant's proof of costs did not constitute *prima facie* evidence of the reasonable costs within the meaning of section 125.3(c) because the declarations are not "a certified copy of the actual costs" nor do they purport to give an estimate because actual costs are not available.

Pursuant to the Legal Conclusions below, complainant did not establish that respondent violated the Medical Practice Act. There is no cause to award costs pursuant to section 125.3.

77. Zeal to revoke respondent's probation and thereby his license caused a loss of focus on the real issue in this case – whether respondent takes adequate steps to assure patients are in a condition to be discharged from his outpatient facility to home or some other non-acute setting. The quality of the evidence was not sufficient to support any of the numerous charges, at least two of which were frivolous. Nevertheless, the concern for respondent's discharge practices remains viable. Respondent continues subject to the Division's scrutiny while on probation and any ongoing concerns about his practice can be addressed by the probationary terms regarding annual pre-approved educational programs, monitoring of his practice and interviews with the Division.

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[20] Mr. Rodriquez declaration erroneously listed the total expert reviewer services as $525.00. The error and correct amount were obvious on the face of the declaration.

LEGAL CONCLUSIONS

1. Business and Professions Code section 2234 provides, in pertinent part, that the Board shall take action against any licensee who is charged with unprofessional conduct. Unprofessional conduct is that which breaches the rules or ethical code of the medical profession and which demonstrates an unfitness to practice medicine. *Shea v. Board of Medical Examiners,* (1978) 81 Cal.App.3d 654.

The standard of proof in an administrative hearing to revoke or suspend a doctor's license is clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence. *Ettinger* v. *Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853. The burden rests with complainant to offer proof that is clear, explicit and unequivocal — so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478; *In re Michael G.* (1998) 63 Cal.App.4th 700. The standard is not met if the totality of the evidence serves only to raise concern, conjecture or speculation. The complainant bears the burden of presenting sufficient evidence to, first, establish the relevant standard of care and, second, prove respondent's conduct that fell below that standard. When the complainant fails to meet this initial burden, the respondent need not present evidence to refute the unproven charges.

An error in the exercise of professional medical judgment or an unsuccessful result of treatment does not necessarily constitute negligence. Negligence may be found only if the error in judgment or lack of success is due to a failure to perform any of the duties required of reputable members of the profession practicing in similar circumstances. *Norden v. Hartman* (1955) 134 Cal.App.2d 333, 337; *Black v. Caruso* (1960) 187 Cal.App.2d 195. "Repeated negligent acts" within the meaning of section 2234(c) consists of two or more negligent acts. See, *Zabetian v. Medical Board of California* (2000) 80 Cal.App.4th 462. "Gross negligence" is a professional error or omission that is egregious. It is defined as the want of even scant care, or an extreme deviation from the standard of practice in the medical community. *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184; *Franz v. Board of MedicalQuality Assurance*(1982) 31 Cal. 3d 124.

"Incompetence" is defined as lack of knowledge or skills in discharging professional obligations. It is distinguished from negligence in that one may be competent or capable of performing a given duty, but negligent in performing that duty. A single act of negligence is not equivalent to incompetence. While a single negligent act under certain circumstances may reveal a general lack of ability to perform licensed duties, thereby supporting a finding of incompetence, a single honest failing in performing those duties, without more, does not constitute incompetence justifying statutory sanctions. See, *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040.

As a First Cause for Discipline and Revocation of Probation, complainant alleged gross negligence, repeated negligent acts and incompetence in respondent's care, treatment and management of patients A.H. and H.B. in violation of section 2234, subdivisions (b), (c) and (d). As a Second Cause for Discipline and Revocation of Probation, complainant alleged

false or misleading advertising in violation of section 2271. As a Third Cause for Discipline and Revocation of Probation, complainant alleged false or misleading advertising in violation of section 651. As a separate Cause for Revocation of Probation, complainant alleged respondent, (1) operated an outpatient setting using anesthesia in violation of sections 2215 and 2216, and Health and Safety Code sections 1248.1, 1248.15 and 1248.65; (2) violated Temecula Municipal Code; violated sections 651 and 2271 by false and misleading advertising; and (3) violated section 2234 as set forth above.

2. Cause was not established to discipline respondent's license or revoke probation pursuant to sections 2227 and 2234, subdivision (b), for unprofessional conduct consisting of gross negligence.

Factual Findings 1 through 9 and 23 through 75 inclusive, and Legal Conclusion 1 support this conclusion.

3. Cause was not established to discipline respondent's license or revoke probation pursuant to sections 2227 and 2234, subdivision (c), for unprofessional conduct consisting of repeated negligent acts.

Factual Findings 1 through 9 and 23 through 75 inclusive, and Legal Conclusion 1 support this conclusion.

4. Cause was not established to discipline respondent's license or revoke probation pursuant to sections 2227 and 2234, subdivision (d), for unprofessional conduct consisting of incompetence.

Factual Findings 1 through 9 and 23 through 75 inclusive, and Legal Conclusion 1 support this conclusion.

5. Section 2271 provides that any advertising in violation of Section 17500 constitutes unprofessional conduct. Section 17500 defines false advertising and provides in pertinent part:

> "It is unlawful for any person . . . with intent . . . to perform services, professional or otherwise, . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state . . . any statement, concerning . . . those services . . . or concerning any circumstance or matter of fact connected with the proposed performance . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. . . . Any violation of . . . this section is a misdemeanor punishable by imprisonment in the county jail and not exceeding six months, or by a fine not exceeding . . . ($2,500) or by both that imprisonment and fine."

Respondent's statement that he spent his residency at U.C. Davis was misleading about the extent of his post-graduate education, but the evidence did not establish whether it resulted from intent to mislead or from respondent's ignorance of the difference between an internship and a residency. In any event, it was not a statement concerning the O.S.R procedure or the type of statement that would induce a patient to undergo the advertised services. The evidence indicated respondent's patients gave much thought and consideration to having the procedure and were persuaded by his reputation in the community, his experience with the procedure and results they observed. Respondent's statement was not "false advertising" within section 17500 and certainly does not warrant the criminal sanctions of that section.

Cause was not established to discipline respondent's license or revoke probation pursuant to section 2271.

Factual Findings 1 through 5 and 17 through 21 inclusive, and Legal Conclusion 1 support this conclusion.

6. The Third Cause for Discipline alleged false and misleading advertising under section 651, which sets forth truth in advertising requirements for health care professionals. The section contains subsections (a) through (k), each containing its own subparagraphs. The First Amended Accusation referenced subsections (a), (b), (e), (f) and (g). Those subsections contain a total of 11 types of statements considered false or misleading under the statute. Complainant did not specify in the charging allegations the particular subsection(s) that applied to each alleged misleading statement contained in paragraph 18 of the First Amended Accusation. It is not the role of the administrative law judge to guess complainant's intent or to define the charges after the hearing; this would not allow respondent opportunity to address or defend the specific charges. The only guidance came from complainant's counsel in his closing argument when he referred to subsections (b)(2), (b)(5) and (b)(8) of section 651. Those subsections define false or misleading advertising as follows:

> "(b) A false . . . misleading, or deceptive statement, claim or image includes a statement or claim that does any of the following:
>
> (1) . . .
>
> (2) Is likely to mislead or deceive because of a failure to disclose material facts.
>
> (3) . . . (4) . . .
>
> (5) Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.
>
> (6) . . . (7) . . .

(8) Includes any statement, endorsement, or testimonial that is likely to mislead or deceive because of a failure to disclose material facts."

The totality of the evidence did not establish that respondent's statement about his residency was misleading or deceptive under those subsections. There was no indication that, had respondent stated he did a one year rotating internship rather than a residency, ordinarily prudent patients would have been dissuaded from having the OSR treatment.

Cause was not established to discipline respondent's license or revoke probation for violation of section 651.

Factual Findings 1 through 5 and 17 through 21 inclusive, and Legal Conclusions 1 and 5 support this conclusion.

7. Cause was not established to discipline respondent's license or revoke probation for unprofessional conduct within the meaning of Health and Safety Code section 1248.65 for operation of an "outpatient setting" in violation of Health and Safety Code section 1248.1.

Factual Findings 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 42 and 55, and Legal Conclusion 1 support this conclusion.

8. Cause was not established to discipline respondent's license or revoke probation for unprofessional conduct pursuant to section 2234 or the terms of probation, consisting of violation of laws related to the practice of medicine, to wit, the City of Temecula zoning laws.

Factual Findings 1, 2, 5 through 15 inclusive, and Legal Conclusion 1 support this conclusion.

9. Except as set forth in the Factual Findings and Legal Conclusions of this Proposed Decision, the allegations and charges of the First Amended Accusation were not proven and are deemed surplusage.

Factual Findings 1 through 75 inclusive, and Legal Conclusions 1 through 9 inclusive support this conclusion.

10. Cause was not established to award costs to complainant pursuant to section 123.5.

Factual Findings 1 through 76 inclusive and Legal Conclusions 1 through 9 inclusive support this conclusion.

ORDER

The Accusation and First Amended Accusation are dismissed.

Respondent's medical record from the PACE evaluation contained in pages AGO 591 through 599 inclusive in Exhibit 23 shall be sealed and not available for public view; however, those pages shall be available for review by the Medical Board, its authorized designees and by any reviewing court. It shall be available to a member of the public upon court order.

DATED: March 13, 2003

JOYCE A. WHARTON
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT G

State of California Department of Consumer Affairs

MEDICAL BOARD OF CALIFORNIA
EXECUTIVE OFFICE
1434 Howe Avenue, Suite 92
Sacramento, CA 95825-3236
(916) 263-2389 Fax: (916) 263-2387
www.caldocinfo.ca.gov

June 15, 2005

Kelly James O'Neil, M.D.
40971 Winchester Boulevard
Temecula, CA 92591

Re: Physician's and Surgeon's Certificate Number A-36888
Case Number D1-1993-26899

PUBLIC REPRIMAND

In July 2000, you performed cosmetic surgery on two female patients. Both patients developed postoperative complications after being transferred pursuant to your arrangements to a hotel for a two-day recovery stay and both patients required emergency hospitalization. This conduct constitutes grounds for discipline for which you were required to take and successfully pass the Physician Assessment and Clinical Education Program.

Pursuant to the authority contained in Business and Professions Code sections 495 and 2227, the Division of Medical Quality of the Medical Board of California issues this Public Reprimand with the expectation that you have addressed the causes for the violation and that the conduct underlying the violation will not be repeated.

Ronald L. Morton, M.D.
President
Division of Medical Quality

EXHIBIT H

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
Kelly J. O'Neil, M.D.	)	File No. 19-2003-147439
Physician's and Surgeon's Certificate No. A 36888	)	
Respondent	)	

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted as the Decision and Order of the Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on September 3, 2007.

IT IS SO ORDERED August 3, 2007.

MEDICAL BOARD OF CALIFORNIA

By: _____
Barbara Yaroslavsky,
Chair
Panel B
Division of Medical Quality

EDMUND G. BROWN JR., Attorney General
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Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: KELLY J. O'NEIL, M.D. 40971 Winchester Road Temecula, CA 922591 Physician's and Surgeon's Certificate No. A 36888 Respondent.	Case No. 19-2003-147439 OAH No. **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceedings that the following matters are true:

PARTIES

1. David T. Thornton (Complainant) is the Executive Director of the Medical Board of California. He brought this action solely in his official capacity and is represented in this matter by Edmund G. Brown Jr., Attorney General of the State of California, by Barry D. Ladendorf, Deputy Attorney General.

2. Respondent KELLY J. O'NEIL, M.D. (Respondent) is represented in this proceeding by attorney Albert J. Garcia, Esq., whose address is 1995 University Avenue, Suite

265, Berkeley, CA 94704.

3. On or about June 24, 1981, the Medical Board of California issued Physician's and Surgeon's Certificate No. A 36888 to KELLY J. O'NEIL, M.D. (Respondent). The Certificate was in full force and effect at all times relevant to the charges brought in Accusation No. 19-2003-147439 and will expire on January 31, 2007, unless renewed.

JURISDICTION

4. Accusation No. 19-2003-147439 was filed before the Division of Medical Quality (Division) for the Medical Board of California, Department of Consumer Affairs, and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on June 9, 2006. Respondent timely filed his Notice of Defense contesting the Accusation. A copy of Accusation No. 19-2003-147439 is attached as exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

5. Respondent has carefully read, discussed with counsel, and fully understands the charges and allegations in Accusation No. 19-2003-147439. Respondent has also carefully read, discussed with counsel, and fully understands the effects of this Stipulated Settlement and Disciplinary Order.

6. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

7. Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

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CULPABILITY

8. Respondent neither admits nor denies he violated Business and Professions Code[1/] section 2234, subdivision (c) in his care and treatment of patient, M.G., in that, he did not explain to M.G.'s treating physician that he was going to use phenol in the chemical exfoliation procedure, and respondent neither admits nor denies he violated section 2266 in that his medical records were not adequate or accurate. All other charges in the accusation not specifically admitted to are hereby dismissed.

9. For the purpose of resolving this accusation and to avoid the uncertainty of further proceedings, respondent agrees that his Physician's and Surgeon's Certificate may be disciplined as set forth in the Disciplinary Order below.

CONTINGENCY

10. This stipulation shall be subject to approval by the Division of Medical Quality. Respondent understands and agrees that counsel for Complainant and the staff of the Medical Board of California may communicate directly with the Division regarding this stipulation and settlement, without notice to or participation by Respondent or his counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Division considers and acts upon it. If the Division fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Division shall not be disqualified from further action by having considered this matter.

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OTHER MATTERS

1. . All references are to the Business and Professions Code unless stated otherwise.

11. The parties understand and agree that facsimile copies of this Stipulated Settlement and Disciplinary Order, including facsimile signatures thereto, shall have the same force and effect as the originals.

DISCIPLINARY ORDER

In consideration of the foregoing admissions and stipulations, the parties agree that the Division may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. A 36888 issued to Respondent KELLY J. O'NEIL, M.D. (Respondent) is revoked. However, the revocation is stayed and Respondent is placed on probation for 35 months on the following terms and conditions.

1. EDUCATION COURSE Within 60 calendar days of the effective date of this Decision, and on an annual basis thereafter, respondent shall submit to the Division or its designee for its prior approval educational program(s) or course(s) which shall not be less than 40 hours per year, for each year of probation. The educational program(s) or course(s) shall be aimed at correcting any areas of deficient practice or knowledge and shall include Category I certified, limited to classroom, conference or seminar settings. Respondent may, however, meet this educational requirement by successfully completing course work that includes self-study videos, audios or on-line courses. The self-study courses shall not exceed 30 hours toward the satisfaction of the requirements set forth in this paragraph. The educational program(s) or course(s) shall be at respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure. Following the completion of each course, the Division or its designee may administer an examination to test respondent's knowledge of the course. Respondent shall provide proof of attendance for 65 hours of continuing medical education of which 40 hours were in satisfaction of this condition.

2. MEDICAL RECORD KEEPING COURSE Within 60 calendar days of the effective date of this decision, respondent shall enroll in a course in medical record keeping, at respondent's expense, approved in advance by the Division or its designee. Failure to

successfully complete the course during the first 6 months of probation is a violation of probation.

A medical record keeping course taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Division or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Division or its designee had the course been taken after the effective date of this Decision.

Respondent shall submit a certification of successful completion to the Division or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

3. CLINICAL TRAINING PROGRAM Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a clinical training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine ("Program").

The Program shall consist of a Comprehensive Assessment program comprised of a two-day assessment of respondent's physical and mental health; basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment pertaining to respondent's specialty or sub-specialty, and at minimum, a 40 hour program of clinical education in the area of practice in which respondent was alleged to be deficient and which takes into account data obtained from the assessment, Decision(s), Accusation(s), and any other information that the Division or its designee deems relevant. Respondent shall pay all expenses associated with the clinical training program.

Based on respondent's performance and test results in the assessment and clinical education, the Program will advise the Division or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, treatment for any medical condition, treatment for any psychological condition, or anything else affecting respondent's practice of medicine. Respondent shall comply with Program recommendations.

At the completion of any additional educational or clinical training, respondent

shall submit to and pass an examination. The Program's determination whether or not respondent passed the examination or successfully completed the Program shall be binding.

Respondent shall complete the Program not later than six months after respondent's initial enrollment unless the Division or its designee agrees in writing to a later time for completion.

Failure to participate in and complete successfully all phases of the clinical training program outlined above is a violation of probation.

If respondent fails to complete the clinical training program within the designated time period, respondent shall cease the practice of medicine within 72 hours after being notified by the Division or its designee that respondent failed to complete the clinical training program.

4. MONITORING - PRACTICE Within 30 calendar days of the effective date of this Decision, respondent shall submit to the Division or its designee for prior approval as a practice monitor, the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Division, including, but not limited to, any form of bartering, shall be in respondent's field of practice, and must agree to serve as respondent's monitor. Respondent shall pay all monitoring costs.

The Division or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement.

Within 60 calendar days of the effective date of this Decision, and continuing throughout probation, respondent's practice shall be monitored by the approved monitor.

Respondent shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours, and shall retain the records for the entire term of probation.

The monitor(s) shall submit a quarterly written report to the Division or its designee which includes an evaluation of respondent's performance, indicating whether respondent's practices are within the standards of practice of medicine or billing, or both, and whether respondent is practicing medicine safely, billing appropriately or both.

It shall be the sole responsibility of respondent to ensure that the monitor submits the quarterly written reports to the Division or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Division or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If respondent fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, respondent shall be suspended from the practice of medicine until a replacement monitor is approved and prepared to assume immediate monitoring responsibility. Respondent shall cease the practice of medicine within 3 calendar days after being so notified by the Division or designee.

In lieu of a monitor, respondent may participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at respondent's expense during the term of probation.

Failure to maintain all records, or to make all appropriate records available for immediate inspection and copying on the premises, or to comply with this condition as outlined above is a violation of probation.

5. INFORMATION LETTER Respondent agrees that prior to performing

any medical procedure, that requires IV sedation or general anesthesia, he shall obtain written clearance and approval for the procedure from the patient's personal physician or another examining physician. The request for clearance and approval shall include the following:

A. The complete name of the medical procedure to be performed and the known risks, if any, that are unique to the procedure.

B. Any and all medications to be used and the potential side effects of the medications that may occur for the given procedure. This does not include the anesthetic agents.

C. If phenol is to be used in the procedure, the letter must clearly state the potential side effects of said chemical, and in particular that it is cardiotoxic and can cause cardiac arrhythmias.

D. A list of any laboratory tests, radiological studies, EKG tests, respondent believes should be performed to insure the patient's safety. The letter shall also state that the tests must be preformed and evaluated by the examining physician prior to clearing the patient for the procedure.

E. Respondent's contact telephone number will be set forth in bold in the letter with directions that the examining physician call respondent if there are any questions regarding the information requested or the medical procedure (s) to be performed or the potential side effects and risks as described above.

6. NOTIFICATION Prior to engaging in the practice of medicine, the respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Division or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

7. SUPERVISION OF PHYSICIAN ASSISTANTS During probation, respondent is prohibited from supervising physician assistants.

8. OBEY ALL LAWS Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California, and remain in full compliance with any court ordered criminal probation, payments and other orders.

9. QUARTERLY DECLARATIONS Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

10. PROBATION UNIT COMPLIANCE Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021 subdivision (b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Division, or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than 30 calendar days.

11. INTERVIEW WITH THE DIVISION, OR ITS DESIGNEE Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Division or its designee, upon request at various intervals, and either with or without prior notice throughout the term of probation.

12. RESIDING OR PRACTICING OUT-OF-STATE In the event respondent should leave the State of California to reside or to practice, respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-

practice is defined as any period of time exceeding 30 calendar days in which respondent is not engaging in any activities defined in Sections 2051 and 2052.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California total two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

13. FAILURE TO PRACTICE MEDICINE - CALIFORNIA RESIDENT

In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes

of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

14. COMPLETION OF PROBATION Respondent shall comply with all financial obligations (e.g., cost recovery, restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

15. VIOLATION OF PROBATION Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

16. LICENSE SURRENDER Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license. The Division reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Division or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of respondent's license shall be deemed disciplinary action. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

17. PROBATION MONITORING COSTS Respondent shall pay the costs

associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

ACCEPTANCE

I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Albert J. Garcia, Esq.. I understand the stipulation and the effect it will have on my Physician's and Surgeon's Certificate. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Division of Medical Quality, Medical Board of California.

DATED: 3/14/07.

KELLY J. O'NEIL, M.D. (Respondent)
Respondent

I have read and fully discussed with Respondent KELLY J. O'NEIL, M.D. the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its form and content.

DATED: 3/13/07.

ALBERT J. GARCIA, ESQ.
Attorney for Respondent

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ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Division of Medical Quality, Medical Board of California of the Department of Consumer Affairs.

DATED: April 9, 2007

EDMUND G. BROWN JR, Attorney General
of the State of California

THOMAS S. LAZAR
Supervising Deputy Attorney General

BARRY D. LADENDORF
Deputy Attorney General

Attorneys for Complainant

DOJ Matter ID: SD2005701900
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Exhibit A

Accusation No. 19-2003-147439

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO June 9 2006
BY [signature] ANALYST

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Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: KELLY JAMES O'NEIL, M.D. 40971 Winchester Boulevard Temecula, CA 92591 Physicians's and Surgeon's Certificate No. A 36888, Respondent.	Case No. 19-2003-147439 **ACCUSATION**

Complainant alleges:

PARTIES

1. David T. Thornton (Complainant) brings this Accusation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs and not otherwise.

2. On or about June 24, 1981, the Medical Board of California issued Physician's and Surgeon's Certificate No. A 36888 to KELLY J. O'NEIL, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on January 31, 2007, unless renewed.

JURISDICTION

3. This Accusation is brought before the Division of Medical Quality (Division) for the Medical Board of California, Department of Consumer Affairs, under the

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authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code states:

"(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the division, may, in accordance with the provisions of this chapter:

"(1) Have his or her license revoked upon order of the division.

"(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the division.

"(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the division.

"(4) Be publicly reprimanded by the division.

"(5) Have any other action taken in relation to discipline as part of an order of probation, as the division or an administrative law judge may deem proper.

"(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the division and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1."

5. Section 2234 of the Code states:

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

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"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

"(b) Gross negligence.

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

"(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

"(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

"(d) Incompetence.

"(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

"(f) Any action or conduct which would have warranted the denial of a certificate.

"(g). . . ."

6. Section 2266 of the Code states: "The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct."

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FIRST CAUSE FOR DISCIPLINE

(Gross Negligence)

Patient M.G.

7. Respondent is subject to disciplinary action under Code sections 2220, 2227, and 2234 as defined by 2234 (b) in that he was grossly negligent in connection with his care, treatment and management of patient M.G.

8. On or about, January 13, 2003, MG had a consultation in respondent's medical offices regarding a chemoexfoliation of her face and neck. Her procedure was scheduled to be performed by respondent on February 11, 2003. She paid a deposit of $1,500.00. She was cleared for surgery by her primary physician.

9. On or about February 11, 2003, respondent performed a chemical peel/exfoliation, under sedation, on patient M.G., using a phenol peel and trichloracetic acid solution. According to the respondent the procedure went forward without any apparent complications. Following the chemoexfoliation, M.G. completed her recovery at Glen Oaks Resort, a nearby spa.. Respondent was aware there were no attending medical personnel at the resort to provide medical care to M.G.

10. At the time of the procedure, M.G. was a 71 year old white female. According to the medical records, her medical problems included hypertension, bronchial asthma, COPD, depression and osteoporosis, and she was taking the following medications: Lotensin, verapamil, albuterol, accolade, Flovent, Plavix, Celebrex, Paxal and Protonix. Respondent's physical examination has no vital signs listed but shows the patient's head, eyes, ears, nose, throat, heart and extremities as normal. The examination of her lungs revealed some expiratory wheezes. A pre-operative EKG performed on January 31, 2003, showed a borderline sinus bradycardia, first-degree AV block, and non-specific ST-T wave changes. Other pre-operative laboratory studies showed the following abnormalities: low sodium, chloride and hemoglobin; and high creatinine, calcium and triglycerides.

11. On or about February 14, 2003, respondent received a call from the Glen Oaks Resort stating that M.G. was weak, had low blood pressure and a low or weak pulse.

Respondent did not visit the patient but told the resort personnel to transfer her to an emergency room for evaluation. Respondent later learned M.G. had been transported to Rancho Springs Medical Center.

12. On or about February 15, 2003, M.G. was seen in the emergency room of Rancho Springs Medical Center. Her chief complaints were shortness of breath, wheezing, dyspnea on exertion, indigestion and heartburn. A chest x-ray revealed a small right pleural effusion. The EKG showed sinus bradycardia and a left bundle branch block. She was admitted to the hospital and treated for electrolyte imbalance, adrenal corticoid insufficiency and chemical burn. M.G. initially improved, but on February 16, 2003, she suffered a left middle cerebral artery occlusion (stroke). She developed further complications including aspiration pneumonia and died on February 24, 2003. Respondent, who does not have privileges at any hospital or medical facility, was not involved in treating M.G. after she left his medical office.

13. Respondent is grossly negligent by reason of, but not limited to the following:

A. Respondent did not critically assess the patient's numerous risk factors, including the patient's abnormal laboratory and physical findings, prior to this elective procedure.

B. Respondent's own physical examination failed to confirm and/ or missed entirely the physical findings that were documented with respect to her heart and lungs. This calls into question the thoroughness of his pre-operative physical examination.

C. Respondent failed to explain to M.G.'s personal physician, who cleared her for surgery, the nature of phenol used in a chemical exfoliation procedure to assist in the physician's determination of M.G.'s suitability for the procedure.

D. Respondent failed to understand the risk of using phenol, a cardiotoxic preparation, on an elderly patient with demonstrated heart disease.

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E. Respondent knew or should have known of M.G.'s long term use of corticosteroids and that she would likely suffer adrenal suppression and would need supplemental steroids during and after her phenol peel.

F. Respondent failed to see M.G. twenty-four to forty-eight hours after her procedure so that he could evaluate her cardio-pulmonary status and assess her chemical burns, caused by the phenol peel, to determine whether additional treatment or therapy would be required.

G. Respondent's medical records, including his operative report, are neither accurate nor adequate, in that, the operative report fails, among other things, to identify the patient, details of the procedure performed, the findings, and the results of the procedure.

SECOND CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

14. Respondent is subject to further disciplinary action under code sections 2220, 2227 and 2234 as defined by Code section 2234 (c) in that he engaged in repeated negligent acts in his care, treatment and management of patient M.G. as set forth in paragraphs 7-13 (and sub-parts A through G) above which are incorporated herein by reference as though fully set forth.

THIRD CAUSE OF ACTION

(Incompetence)

15. Respondent is subject to further disciplinary action under code sections 2220, 2227 and 2234 as defined by Code section 2234 (d) in that he was incompetent in his care, treatment and management of patient M.G. as set forth in paragraphs 7-13 (and sub-parts A through G) above which are incorporated herein by reference as though fully set forth.

FOURTH CAUSE OF ACTION

(Failure to Maintain Accurate and Adequate Medical Records)

16. Respondent is subject to further disciplinary action under Code section 2220, 2227 and 2234 as defined by Code section 2266, in that, he failed to maintain adequate and

accurate medical records in connection with his care, treatment and management of patient M.G. as set forth in paragraph 13 (G) above which is incorporated herein by reference as though fully set forth.

FIFTH CAUSE OF ACTION

(Failure to Maintain Accurate and Adequate Medical Records)

Patient S.E.

17. Respondent is subject to further disciplinary action under Code section 2220, 2227 and 2234 as defined by Code section 2266, in that, he failed to maintain accurate and adequate medical records regarding the care and treatment of patient, S.E. The circumstances are set forth below:

18. On or about July 2, 2002, respondent performed a chemical peel on patient S.E. There were no apparent complications during the procedure. She later developed multiple small areas of hypertrophic scarring that were treated by respondent.

19. On or about June 24, 2004, respondent performed a platysmaplasty/sling operation on patient S.E. There were no apparent complications during the procedure. There are no subsequent post-operative notes until the patient returned on or about July 12, 2004 complaining of "new scars" coming back.

20. Respondent's medical records, when handwritten, are illegible and fail to identify who authored the notes. Respondent's typewritten or preprinted records are not individualized as to specific content (i.e., the operative report of the chemical peel, performed on July 2, 2002, does not adequately describe the procedure performed.)

DISCIPLINE CONSIDERATIONS

21. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that on or about November 8, 1996, an Accusation was filed against respondent and on or about January 6, 1998, a Supplemental Accusation was filed. On or about September 14, 1998, a Decision became effective which read, in part: Revoked, Stayed, Prior Condition, Five Years Probation with Terms and Conditions.

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22. On or about January 4, 2002, another accusation was filed against respondent and on or about October 16, 2002 a First Amended Accusation was filed. On or about September 29, 2003, a Decision became effective which read, in part: Revoked, Stayed, Seven Years Probation with Terms and Conditions; including Six Months of Actual Suspension Beginning the Sixteenth Day After the Effective Date of this Decision. On or about September 25, 2003, a Petition for Writ of Mandate was filed, and on or about February 6, 2004 a Judicial Stay Order on Conditions One and Nine was issued by the Superior Court. On or about April 29, 2004, the Stay Order was vacated. On or about September 10, 2004, a Decision became effective which read, in part: Revoked, Stayed One Year, with Precedent Condition. Upon successful completion of the condition precedent, the stayed revocation shall become permanent and a Public Letter of Reprimand will be issued. The aforementioned decisions are now final and are incorporated by reference as if fully set forth.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Division of Medical Quality issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate No. A 36888, issued to KELLY J. O'NEIL, M.D.;

2. Revoking, suspending or denying approval of KELLY J. O'NEIL, M.D.'s authority to supervise physician's assistants, pursuant to section 3527 of the Code;

3. If placed on probation, KELLY J. O'NEIL be ordered to pay the costs of probation monitoring; and,

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4. Taking such other and further action as deemed necessary and proper.

DATED: June 9, 2006

DAVID T. THORNTON
Executive Director
Medical Board of California
State of California

Complainant

SD2005701900

80074029.wpd

EXHIBIT I

Jean R. Uranga
URANGA & URANGA
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P.O. Box 1678
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Telephone: (208) 342-8931
Facsimile: (208) 384-5686
Idaho State Bar No. 1763

Attorneys for the Board

BEFORE THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:	
KELLY J. O'NEIL, M.D.,	Case No. 6101
Applicant.	**STIPULATION AND ORDER**

COMES NOW the Idaho State Board of Medicine, hereinafter referred to as the Board, and Kelly J. O'Neil, M.D., hereinafter referred to as Applicant, and stipulate and agree as follows:

I

Applicant has applied for an Idaho license to practice medicine and surgery to be issued by the Idaho State Board of Medicine, which application was received by the Board on December 21, 2007. Said application is subject to the provisions of Title 54, Chapter 18, Idaho Code, commonly known as the Medical Practice Act.

II

The Board has received information that Applicant has several

malpractice cases and the California State Board issued a disciplinary Order against Applicant. In addition, Applicant incorrectly answered various questions on the application.

III

The acts and practices of Applicant, as alleged in Paragraph II above, would provide grounds to deny the application pursuant to Idaho Code §§54-1808, 54-1814 and 54-1811.

IV

The Board believes it has sufficient evidence to deny Applicant's application based upon these allegations, but rather than pursuing a formal investigation and hearing, the parties are voluntarily entering into this Stipulation and Order for the purpose of informally responding to the concerns of the Board and for the purpose of providing an acceptable procedure for dealing with the alleged problems.

V

Applicant knowingly and voluntarily waives any right to a formal hearing, to present evidence, to cross-examine witnesses, to reconsideration and appeal, and to other rights accorded him pursuant to the Administrative Procedure Act and the Medical Practice Act which he might otherwise possess with respect to this Stipulation.

VI

In order to respond to these allegations, Applicant hereby stipulates and agrees that:

(a) Within ninety (90) days of the date of this Stipulation and Order, Applicant shall reimburse the Board $100.00 for its investigative costs and attorney's fees incurred herein.

(b) Within ninety (90) days of the date of this Stipulation and Order, Applicant shall pay a $1,000 fine.

(c) Applicant shall be issued a restricted license to practice medicine in the State of Idaho which shall be subject to and conditioned by full compliance with the terms and conditions set forth in this Stipulation and Order. Failure to comply with any of the terms and conditions set forth in this Stipulation and Order shall result in immediate suspension of Applicant's license pending further proceedings.

(d) Applicant shall only perform chemical peels and liposuction in the State of Idaho.

(e) Applicant shall notify the Board prior to any practice in the State of Idaho.

(f) If Applicant changes employment or applies for or obtains privileges at any hospital, Applicant shall provide all employers and partners and the Administrator and Chief of Staff at each future hospital where he applies for or obtains privileges with a copy of this Stipulation and Order at the time of the application for employment or privileges, or within ten (10) days of the application.

Applicant shall provide the Board with written proof of compliance with this paragraph by providing the Board with a carbon copy of the notice or letter when it is provided to any employer or hospital.

(g) Applicant shall obey all federal, state and local laws, and all rules governing the practice of medicine in Idaho.

(h) In the event that Applicant should leave Idaho for three (3) continuous months, or reside or practice outside the State, Applicant must notify the Board in writing of the dates of departure and return. Periods of time spent outside of Idaho will not apply to the reduction of this period under the Stipulation and Order, unless Applicant, during such period of practice outside the State of Idaho, in addition to informing the Idaho Board of Medicine of Applicant's absence from the State and location of work, also makes the Board of Medicine in the State in which he is practicing aware of this Order, and Applicant continues to meet all other terms of this Order during the time spent practicing out of the state.

VII

The above described terms, limitations and conditions may be amended or terminated in writing at any time upon the agreement of both parties. However, this Stipulation and Order shall remain in force for a minimum of five (5) years prior to any request for

termination of this Stipulation and Order.

VIII

If Applicant fails to comply with the terms and conditions of the restricted license, Applicant's restricted license shall immediately be suspended pending further proceedings. Any such further enforcement proceedings for noncompliance will be conducted pursuant to the Administrative Procedure Act, Title 67, Chapter 52, Idaho Code, the Idaho Medical Practice Act and the Rules of Practice and Procedure of the Board.

IX

Applicant agrees to execute the Release, attached hereto as Exhibit A, releasing the Idaho State Board of Medicine, the Committee on Professional Discipline, their members, employees, agents, officers, representatives, attorneys, consultants and witnesses, jointly and severally, from any and all liability arising from their participation or involvement in the Board's investigation of Applicant and in the prosecution of this disciplinary proceeding.

X

This Stipulation and Order shall be considered a public record as that term is used in the Idaho Code. This Stipulation and Order shall become effective upon the last date of signature below.

XI

Applicant further agrees to execute the Release, attached hereto as Exhibit B, authorizing any person or entity having

information relevant to Applicant's compliance with the provisions of this Stipulation and Order to release such information to the Board.

DATED This 14 day of April, 2008.

IDAHO STATE BOARD OF MEDICINE

STEPHEN MARANO, M.D.
Chairman

DATED This 14 day of April, 2008.

KELLY J. O'NEIL, M.D.

ORDER

Pursuant to Idaho Code §§54-1808, 54-1811 and 54-1814, the Board hereby accepts the terms and conditions of the foregoing Stipulation and it is hereby ordered that Applicant comply with said terms and conditions. Based upon the foregoing, further formal proceedings will be waived.

DATED This 14 day of April, 2008.

IDAHO STATE BOARD OF MEDICINE

STEPHEN MARANO, M.D.
Chairman

RELEASE AGREEMENT

In consideration of the informal resolution of the pending disciplinary action by the Idaho State Board of Medicine, which is hereby acknowledged, the undersigned, KELLY J. O'NEIL, M.D., being of lawful age, does hereby release, acquit and forever discharge the Idaho State Board of Medicine, the Committee on Professional Discipline of the Idaho State Board of Medicine, and their members, employees, agents, officers, representatives, attorneys, consultants and witnesses, jointly and severally, from any and all known and unknown, foreseen and unforeseen, claims, actions, causes of action, demands, rights, injuries, damages, costs, loss of service, expense and compensation whatsoever which the undersigned now has or which may hereafter accrue on account of or in any way growing out of or resulting or which may result from the Board's investigation and disciplinary proceedings regarding Dr. O'Neil.

It is understood and agreed that this settlement is the compromise of a disputed claim, and that the settlement made is not to be construed as an admission of liability on the part of the parties hereby released, and that said releasees deny liability therefor and intend merely to avoid litigation and buy their peace.

The undersigned hereby declares and represents that in making this release it is understood and agreed that the undersigned relies wholly upon undersigned's judgment, belief and knowledge of the nature, extent, effect and duration of any damages and liability therefor and is made without reliance upon any statement or representation of the parties released or their representatives or by anyone employed by them.

The undersigned further declares and represents that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this release and the Stipulation and Order contain the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

KELLY J. O'NEIL, M.D.

EXHIBIT A

STATE OF CALIFORNIA)
:ss
County of Riverside)

On this 14 day of April, 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared KELLY J. O'NEIL, M.D., known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR CALIFORNIA
Residing at: Temecula, CA
My Commission Expires: July 15, 2009

See Attached California
All-Purpose Acknowledgment

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Riverside }

On 4-14-2008 (Date) before me, Jennifer Bushey, Public Notary (Here Insert Name and Title of the Officer),
personally appeared Kelly J. O'Neil, M.D. (Name(s) of Signer(s)),

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Signature of Notary Public)

JENNIFER BUSHEY
Commission # 1501545
Notary Public - California
Orange County
My Comm. Expires Jul 18, 2008

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

AUTHORIZATION FOR RELEASE OF INFORMATION

I hereby authorize and direct any hospital, physician or other person who has any information regarding my compliance with the Stipulation and Order of the Idaho State Board of Medicine, at any time to release any and all medical records, reports and/or information to the Idaho State Board of Medicine, to Jean R. Uranga, attorney for the Idaho State Board of Medicine, or to such other representative of the Idaho State Board of Medicine as may be designated, for examination and for copying thereof, upon request for such records, reports or information.

I further authorize any hospital, physician or other person who has such information to consult with or discuss such information with any of the above entities or persons.

I further consent that a photocopy of this Authorization may be used in lieu of the original hereof.

DATED This 14 day of April, 2008.

KELLY J. O'NEIL, M.D.

STATE OF CALIFORNIA)
:ss
County of Riverside)

On this 14 day of April, 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared KELLY J. O'NEIL, M.D., known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

See Attached California All-Purpose Acknowledgment

NOTARY PUBLIC FOR CALIFORNIA
Residing at: Temecula, CA
My Commission Expires: July 18, 2008

EXHIBIT B

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Riverside }

On 4-19-2008 (Date) before me, Jennifer Bushey, Public Notary (Here Insert Name and Title of the Officer),

personally appeared Kelly J. O'Neil (Name(s) of Signer(s))

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Signature of Notary Public)

JENNIFER BUSHEY
Commission # 1501545
Notary Public - California
Orange County
My Comm. Expires Jul 18, 2008

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
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EXHIBIT J

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
KELLY JAMES O'NEIL, M.D.	)	File No. 16-2008-191964
Physician's and Surgeon's Certificate No. A 36888	)	
Respondent	)	

DECISION

The attached **Proposed Decision** is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on **June 4, 2009**.

IT IS SO ORDERED **May 5, 2009**.

MEDICAL BOARD OF CALIFORNIA

By: _____
Barbara Yaroslavsky
Chair, Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation against:	
KELLY JAMES O'NEIL, M.D.,	Case No. 16-2008-191964
Physician's and Surgeon's Certificate No. A 36888,	OAH No. 2008120029
Respondent.	

PROPOSED DECISION

Administrative Law Judge Greer D. Knopf, State of California, Office of Administrative Hearings, heard this matter in San Diego, California, on February 23, 2009.

Susan Fitzgerald, Deputy Attorney General, represented complainant Barbara Johnston, Executive Director, Medical Board of California, Department of Consumer Affairs.

Albert J. Garcia, Attorney at Law, represented respondent Kelly James O'Neill, M.D. who was present at the hearing.

The record remained open to enable respondent to submit an additional exhibit to be received as part of the procedural history of the case. The record was closed and the matter was submitted on March 6, 2009.

FACTUAL FINDINGS

1. Accusation number 16-2008-191964, dated November 13, 2008, was filed by complainant, Barbara Johnston (complainant), in her official capacity as Executive Director, Medical Board of California, Department of Consumer Affairs, State of California against respondent Kelly James O'Neil, M.D. (respondent). Thereafter, complainant filed the First Amended Accusation dated February 9, 2009. Respondent filed a Notice of Defense dated November 17, 2008 requesting a hearing in this matter. The proceeding herein followed.

2. Respondent holds Physician and Surgeon's Certificate number A 36888 issued by the Medical Board of California (the California Board) initially on June 24, 1981. Respondent's license is due to expire on January 31, 2011, unless renewed. Respondent has a license disciplinary history as follows:

A. In September 1998, respondent was disciplined by the California Board (the 1998 discipline) for repeated acts of negligence in the care of two patients. He was placed on five years probation with standard terms and conditions and also ordered to restrict his practice, take educational courses, and be monitored by a practice monitor for the duration of his probation. At that time, respondent also held a license to practice medicine in the state of Idaho, and in November 1998, the medical board in Idaho (the Idaho Board) took action to impose discipline on respondent in Idaho based on the 1998 California discipline. Eventually, respondent allowed the Idaho medical license he held in 1998 to lapse.

B. In late 2002, the California Board began another disciplinary action against respondent. This disciplinary action filed by the California Board proceeded to hearing and an Administrative Law Judge issued a Proposed Decision. The California Board did not adopt the Proposed Decision and issued a Decision after Non-Adoption effective September 29, 2003 (September 2003 Decision after Non-Adoption). Respondent appealed the September 2003 Decision after Non-Adoption and during the appeal process the parties entered into a Stipulated Settlement and Disciplinary Order dated July 20, 2004, adopted and ordered on August 11, 2004, and made effective on September 10, 2004 (the September 2004 Decision). As a result, the California Board ordered respondent to complete the Physician Assessment and Clinical Education Program (PACE) at the University of California, San Diego School of Medicine and issued respondent a letter of reprimand.

C. In 2007, the California Board began its third disciplinary action against respondent. The Board's allegations against respondent included gross negligence (Bus. & Prof. Code, § 2234, subd. (b)), repeated acts of negligence (Bus. & Prof. Code, § 2234, subd. (c)), incompetence, and failure to maintain adequate medical records (Bus. & Prof. Code, § 2266) concerning the care and treatment of two patients. The parties ultimately entered into a Stipulated Settlement and Decision, effective September 2007 (the 2007 Decision), revoking respondent's license, staying the revocation and placing respondent on probation for 35 months. As part of the settlement agreement, the parties agreed that: "Respondent neither admits nor denies he violated Business and Professions Code section 2234 subdivision (c) in his care and treatment of patient M.G. . . . and respondent neither admits nor denies he violated section 2266. . . . All other charges in the accusation not specifically admitted are hereby dismissed." Respondent remains on probation until August 2010.

3. Sometime in late 2006, respondent decided he wanted to apply for licensure to practice medicine in Idaho, Washington, and Indiana. He was considering retiring in one of these states and wanted to pursue licensure so he could continue with some sort of a medical practice after retirement. Respondent was raised in Idaho and his extended family still lives

there so he ultimately decided he wanted to focus on moving to Idaho. Respondent asked his office manager to start the application process for him. Respondent's office manager, Valerie Arnaiv (Arnaiv), knew that there would be a great deal of paperwork involved in making these various applications out of state and she researched and found a service named Physician's Licensing Service (PLS) operating in Utah. PLS prepares and submits all the paperwork for busy practitioners to the various jurisdictions for medical licensure across the country. Arnaiv retained PLS on respondent's behalf to prepare and submit respondent's applications to the three medical boards in Idaho, Washington, and Indiana.

4. Ultimately, PLS prepared the Idaho, Washington, and Indiana applications for respondent. In order to prepare the three applications, PLS first had respondent fill out a questionnaire (PLS questionnaire) providing the information needed to initiate the process in each state. The PLS questionnaire asked for a variety of professional background information and specifically asked the following questions, among others: "1. Have you been named in a malpractice case regardless of the outcome? . . . . 3. Have you had any licenses disciplined? . . . ." The PLS questionnaire instructed respondent to answer the questions "yes" or "no" and to provide an explanation for any answer in the affirmative. Respondent answered "yes" to both questions number 1 and number 3. For question number 1, respondent answered that yes he had been named in a malpractice case and then wrote in that he had been named in six such cases. Respondent also answered "yes" to question number 3 indicating that he had licenses disciplined in the past. He did not provide any explanation of that affirmative answer, but assumed that his office manager would attach a copy of the previous disciplinary actions to the PLS questionnaire. There is no evidence that respondent signed any portion of the PLS questionnaire under penalty of perjury or otherwise. Respondent did sign an Authorization and Release so that PLS could obtain any records deemed necessary for "evaluating his professional, ethical and physical qualifications for medical licensure."

5. PLS took the information submitted by respondent and completed each of the three applications to be submitted to Idaho, Washington, and Indiana for licensure. The Idaho application was not available to download online so it could not be filled out on a computer. As a result, the individual on staff at PLS who filled out the Idaho application for respondent did so by hand. Whichever PLS staff member that filled out the Idaho application for respondent made a mistake in answering questions 3 and 5 on that application. Question 3 asked:

> "Have you ever been investigated by any licensing board, agency, or professional association in connection with medical incompetency, practice act violations, unprofessional conduct or unethical conduct?"

Question 5 further asked:

> "Have you ever been subject to informal or formal proceeding by any licensing board, agency or professional association to revoke, suspend, restrict or limit a professional license?"

Both questions were answered "No" on respondent's application. These answers were untrue and were contrary to the information that respondent supplied to PLS during the application process. On December 9, 2006, respondent signed the Idaho application and returned it to PLS for submission to the Idaho State Board of Medicine (the Idaho Board).

6. PLS also completed the applications that respondent was to submit to Washington for medical licensure. The same mistake was made by PLS on the Washington application as the mistake made on the Idaho application in answering questions about prior discipline. The Washington application asked in question 8:

> "Have you ever had any license, certificate, registration or other privilege to practice a health care profession denied, revoked, suspended, or restricted by a state, federal, or foreign authority, or have you ever surrendered such credential to avoid or in connection with action by such authority?"

The Washington application question 11 asked:

> "Have you ever been the subject of any informal or formal disciplinary action related to the practice of medicine?"

Both questions were answered "No" on respondent's Washington application. These answers were untrue and were contrary to information that respondent supplied to PLS during the application process. On December 6, 2006, respondent signed the Washington application and returned it to PLS for submission to the Washington State Department of Health, Medical Quality Assurance Commission (the Washington Commission).

7. PLS also completed the application that respondent was to submit to Indiana for medical licensure. The same mistake was made by PLS on the Indiana application as the mistake made on the Idaho and Washington applications in answering questions about prior discipline. The Indiana application asked in question 1:

> "Has disciplinary action ever been taken regarding any health license, certificate, registration or permit you hold or have held?"

The Indiana application further asked in question 4:

> "Have you ever been the subject of an investigation by a regulatory agency concerning your license?"

Both questions were answered "No" on respondent's Indiana application. These answers were untrue and were contrary to the information that respondent supplied to PLS during the application process. On December 7, 2006, respondent signed the Indiana application and returned it to PLS for submission to the Medical Licensing Board of Indiana (the Indiana Board).

8. On November 20, 2006, PLS sent the completed Idaho and Indiana applications to respondent with two separate cover letters instructing respondent to "review the application for accuracy" and return it with additional items and fees to PLS. On November 28, 2006, PLS sent respondent the completed Washington application with the same cover letter instructing respondent to "review the application for accuracy" and then return it to PLS with the necessary supporting documentation and fees. Respondent therefore had a stack of these applications and the accompanying paperwork to review and sign in early December 2006. He testified that he tried to get to this paperwork whenever he could in between a busy schedule of appointments. Ultimately, respondent behaved carelessly and neglected to read the applications but he went ahead and signed each of the Idaho, Washington, and Indiana applications under penalty of perjury wherein he certified the applications as true and correct. The information in all three applications was, in fact, untrue since they each failed to disclose that respondent had previously been disciplined by the California Board.

9. Respondent's behavior in failing to read and carefully review his applications was careless and arrogant. Respondent's attitude about the applications seems to be that he should not have to be bothered with the unimportant details of this trivial process. Given the fact that respondent has been the subject of three prior disciplinary actions by the California Board and one by the Idaho Board, he should have been all the more alert to any potential problems in his practice. He certainly should have been exercising reasonable care to avoid supplying incorrect information on medical board applications. It is clear from his attitude that respondent does not appreciate the importance of ensuring accuracy on all such documentation. Nevertheless, the evidence presented at the hearing did establish that respondent's failure to report his prior discipline on the medical board applications was a result of carelessness on his part rather than an attempt to be deceptive. Respondent did have the responsibility to accurately disclose all prior discipline on his applications under penalty of perjury, but his actions do not rise to the level of dishonesty. He should learn from this episode to be far more careful with important paperwork, and he certainly should not rely on others when he is the one attesting under oath to the truth of its contents.

10. The Idaho Board acted on respondent's Idaho application by giving respondent a hearing before the entire board wherein the parties appear to have entered into a stipulation allowing respondent to be issued a restricted Idaho medical license. A Stipulation and Order dated April 14, 2008 (the Idaho Order) between respondent and the Idaho Board found that respondent had been previously disciplined by the California Board and that respondent had "incorrectly answered various questions on the application." The Idaho Order further found that the actions of respondent would provide grounds to deny his application for licensure under Idaho law. The Idaho Board ordered respondent to pay investigative costs and attorney fees as well as a fine. The Idaho Board further granted respondent a restricted medical license subject to certain terms and conditions including, among others, that: "Applicant [respondent] shall only perform chemical peels and liposuction in the State of Idaho." The Idaho Order remains in effect for five years and constitutes a disciplinary order of the Idaho Board due to respondent's incorrect answers on his Idaho application. This discipline was not based on the fact that respondent had been disciplined in California, but on the fact that respondent had failed to disclose that prior discipline.

11. Respondent submitted identical letters of explanation dated December 3, 2007 to Idaho, Washington, and Indiana (the December 2007 letter). Respondent sent the December 2007 letter to those state medical licensing authorities to explain his 2007 discipline that had been imposed by the California Board. In the letter, respondent provided his version of the incidents leading to the 2007 California disciplinary action. Respondent's version of events was somewhat self-serving and failed to acknowledge full responsibility for all of the actions for which respondent was charged.

However, the 2007 disciplinary action was imposed on respondent as the result of a settlement stipulation that was left vague when it came to what, if any, admissions respondent was making in this stipulation. The only references to specific charges made in the stipulation are to the charge of repeated acts of negligence (Bus. & Prof. Code, § 2234, subd. (c)), and the charge of inadequate medical record keeping (Bus. & Prof. Code, § 2266). However, unlike in the prior stipulations, the parties had entered into, this time respondent did not specifically admit these charges. The stipulation states that respondent did not admit or deny that he violated Business and Professions Code section 2234, subdivision (c) concerning the care and treatment of patient M.G. and he did not admit or deny that he violated Business and Professions Code section 2266 concerning the adequacy of medical records. This was the only culpability statement made in the stipulated settlement regarding any of the specific charges and this was the basis for the agreed to disciplinary order. This lack of admission or denial of specific charges may have been deemed sufficient by the parties to support the stipulated discipline, but it is not sufficient to expect respondent to later describe the factual basis of his discipline as the actual charges that were alleged in the accusation. Respondent never actually admitted those charges. Sometimes that is the nature of a settlement. Based on what the parties agreed to in the stipulated settlement, respondent never admitted or denied the charges. He was therefore justified in giving his version of the facts when he reported the episode to the other medical boards. Respondent did not misrepresent the 2007 disciplinary action of the California Board in his December 2007 letter since there is no official version on record of what actually happened.

LEGAL CONCLUSIONS

1. Cause exists to discipline respondent's physician's and surgeon's certificate pursuant to Business and Professions Code section 2305 in that respondent is guilty of unprofessional conduct in that he was disciplined by the Idaho Board when he was issued a restricted medical license in the State of Idaho due to his failure to correctly disclose information on his Idaho application, as set forth in Findings 2-5and 8-10.

2. Cause exists to discipline respondent's physician's and surgeon's certificate pursuant to Business and Professions Code section 141 in that respondent was disciplined by the Idaho Board for acts that are substantially related to the practice of medicine. The Idaho Board disciplined respondent when he was issued a restricted medical license in the State of Idaho due to his failure to correctly disclose information on his Idaho application, as set forth in Findings 2-5 and 8-10.

3. Cause was not established to discipline respondent's physician's and surgeon's certificate pursuant to Business and Professions Code section 2234 in that complainant failed to establish by clear and convincing evidence that respondent committed an act of dishonesty when he sent the December 2007 letters of explanation to the Idaho, Washington and Indiana licensing boards, as set forth in Findings 2-11.

4. Cause was not established to discipline respondent's physician's and surgeon's certificate pursuant to Business and Professions Code section 2234 in that complainant failed to establish by clear and convincing evidence that respondent committed an act of dishonesty when he submitted applications to the Idaho, Washington, and Indiana licensing boards that carelessly failed to disclose respondent's prior discipline, as set forth in Findings 2-10.

5. Respondent submitted sufficient evidence of mitigating and extenuating circumstances surrounding his failure to accurately disclose his prior discipline in his applications he submitted to Idaho and his discipline in the State of Idaho. Therefore, it would not be against the public interest to allow respondent to continue to practice medicine under strict terms and conditions of probation.

ORDER

Respondent Kelly James O'Neil's physician's and surgeon's certificate number A 36888, issued by the Medical Board of California, that is already revoked with said revocation stayed shall be revoked, with said revocation stayed. Respondent is placed on a separate term of probation, based on the action herein, for three years upon the following terms and conditions:

1. Notification

Prior to engaging in the practice of medicine the respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

2. Supervision of Physician Assistants

During probation, respondent is prohibited from supervising physician assistants.

3. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

4. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

5. Probation Unit Compliance

Respondent shall comply with the Board's probation unit. Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Board or its designee.

Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

6. Interview with the Board or its Designee

Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Board or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.

7. Residing or Practicing Out-of-State

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Board or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

8. Failure to Practice Medicine - California Resident

In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Board or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Board or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

9. Completion of Probation

Respondent shall comply with all financial obligations (e.g., cost recovery, restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

10. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

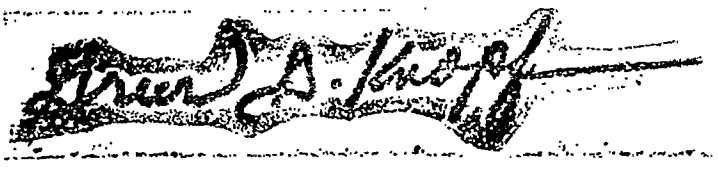
11. License Surrender

Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license. The Board reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Board or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of respondent's license shall be deemed disciplinary action. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

12. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

DATED: 3/30/09



GREER D. KNOPF
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 13-cr-00-193 JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. EVA MELISSA SUGAR,
2. JERRY LYNN ROBERTS, and
3. GREGORY NATHAN LAURENCE

Defendants.

INDICTMENT
18 U.S.C. § 371
26 U.S.C. § 7212(a)
18 U.S.C. § 2
26 U.S.C. § 7203
18 U.S.C. § 1503

The Grand Jury charges:

COUNT 1
EVA MELISSSA SUGAR
(18 U.S.C. § 371 - Conspiracy to Defraud the United States)

THE CONSPIRACY

1. From on or about sometime in 1999, the exact date being unknown to the Grand Jury, and continuing through on or about April 2008, in the State and District of Colorado, defendant SUGAR did unlawfully, voluntarily, intentionally, and knowingly conspire, combine, confederate, and agree together and with J.L., M.D.B., J.D., and

other individuals both known and unknown to the Grand Jury to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service ("IRS") of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue, namely income, employment, and other federal taxes.

THE PERSONS

At various times relevant to this Indictment:

2. J.L. was a resident of Georgia who operated Financial Fortress Associates, or a variation of that name (hereinafter "FFA"), an organization that promoted and advised its clients on schemes to avoid the payment of income and other federal taxes.

3. Defendant EVA MELISSA SUGAR, also known as Melissa Sugar, was a resident of Aurora, Colorado, and was self-employed as an attorney specializing in tax and other legal matters in Denver, Colorado. SUGAR worked with FFA clients to execute the schemes FFA promoted.

4. M.D.B. was a resident of Florida and worked as a promoter for FFA.

5. J.D. was a resident of Georgia and worked with FFA to execute the FFA schemes.

MANNER AND MEANS OF THE CONSPIRACY

6. The conspiracy was carried out using the following manner and means, which created interdependency among the conspirators:

a. J.L. and M.D.B, with others, operated FFA. FFA promoted Pure Trust Organizations ("PTO") and "private banking" using so-called Banking Unincorporated Business Organizations ("BUBO") as vehicles to conceal business and personal income and asset ownership and, thereby, to avoid paying income, employment, and other federal taxes to the IRS. FFA held seminars and workshops around the country to promote its schemes, which individuals paid to attend. SUGAR occasionally attended and spoke at FFA seminars. At those seminars, FFA's promoters explained the schemes and provided referrals to their co-conspirators, including SUGAR, who charged fees to execute the schemes for FFA clients.

b. As part of the FFA schemes, SUGAR or others established one or more Unincorporated Business Organization(s) ("UBO") for each client and applied for an IRS-issued Employee Identification Number ("EIN") for those UBOs. Each UBO was named as a "management" company, i.e. "X Management." For each UBO, SUGAR opened a corresponding bank account for a "BUBO" with the same name as the UBO. The bank account for each BUBO was set up to accept deposits by at least one named fictitious entity, which the co-conspirators generally described as a "trust" or PTO. FFA conspirators, including J.D., set up these trusts for the FFA clients.

c. FFA clients used the fictitious trust entities as companies "doing business as" the management company for which the BUBO bank account was established. The entities, however, existed in name only. Generally, the FFA client either (1) caused receipts from a legitimate business to be paid to one of the fictitious

entities, diverting the income to the BUBO bank account and thereby understating the business's gross receipts, or (2) made payments to one of the fictitious entities and deducted the payments as expenses for the FFA client's legitimate business, thereby decreasing the business's income.

d. SUGAR and the FFA client then caused funds from the BUBO account to be (1) paid directly back to the FFA client, (2) used to pay the FFA clients' personal expenses, (3) used for personal purchases, such as for cars or vacation homes, or (4) transferred offshore or to a warehouse bank set up to disguise the ownership and source of the funds.

e. Another variation of FFA's program involved placing assets into the names of the fictitious entities that used the bank account to conceal the proceeds of the sale of those assets. As noted, conspirators frequently established the entities as "trusts," with one of the promoters, such as J.L. or M.D.B., named as trustee. When the FFA client sold the assets, the buyer would issue a check to the trust, which then deposited the check into the BUBO bank account. The FFA client would then use the funds as discussed in subparagraph 6(d) above.

f. SUGAR provided various services to her clients, which as described, included establishing UBOs, applying for EINs for the UBOs, and opening associated BUBO bank accounts that her clients used to conceal assets and income and to avoid paying taxes to the IRS. SUGAR generally was the trustee for the UBOs and had signatory authority for the bank accounts. If her client also wanted signatory

authority for the BUBO bank accounts, SUGAR would list the client as an "administrative assistant," "Managing Director," or some other officer or employee of the fictitious trust entity or UBO/BUBO.

g. Often, however, to prevent the client's name from association with the BUBO account, SUGAR and the client would identify a third party, such as a family member, as the administrative assistant or other position for the fictitious trust entity or UBO/BUBO. That person would be given signatory authority for the BUBO bank account. These individuals exercised no authority or control over the UBO/BUBO, the fictitious trust entity, or the assets thereof. So that they could use the BUBO bank account without involvement by the third party, SUGAR and her clients had signature stamps created for these individuals.

h. With the BUBO bank accounts established, SUGAR then conducted transactions for her clients using those accounts, including for example, signing blank checks or authorizing wire transactions for her clients' use as described in subparagraph 6(d), endorsing checks for deposit, and withdrawing cash.

i. SUGAR charged her clients fees for her services, including annual maintenance fees and fees on a per-service basis, such as for signing checks or authorizing a wire transfer.

j. The FFA client and owner of the UBO/BUBO would not file federal tax returns for the UBO/BUBO or the fictitious entities, despite legal filing requirements. Indeed, because the UBOs did not file federal income tax returns and all of the bank

accounts established for the BUBOs were non-interest-bearing accounts, the IRS was unaware of the use and operation of the BUBO accounts and entities. Only the request and receipt of the EIN would indicate to the Government that the UBO/BUBO ever existed.

OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY

7. In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed in the District of Colorado and elsewhere:

a. On or about November 23, 1999, SUGAR applied to the IRS for EINs in the names of Streamside Management, Northside Management, Maple Leaf Management, Oxford Management, Cascade Management, Management Unlimited, Eastside Management, and Avon Management.

b. On or about on February 9, 2001, SUGAR opened a bank account at Compass Bank, formerly known as FirsTier Bank, in the name of Streamside Management, with SUGAR and ROBERTS'S then minor son as signatories.

c. On or about August 15, 2002, at the request of her client, L.S., SUGAR wrote out and signed a check from a Bank of Denver account for Garnet Management to Bexar Technologies in the amount of $21,000.

d. On or about September 23, 2002, SUGAR sent an e-mail to her client, Gregory Laurence, instructing him that SUGAR alone must sign all endorsements on checks deposited into and all checks written from Laurence's BUBO bank accounts, unless Laurence or his wife were willing to provide their identification and social security

numbers to the bank.

e. On or about March 26, 2004, SUGAR transferred the bank account for Triumph Management from Liberty Savings Bank to Compass Bank.

f. On or about between June 16, 2006, and June 23, 2006, SUGAR signed 504 blank checks for Best for Hearing Limited Partnership, an UBO she established for client E.B.

g. On or about May 14, 2007, SUGAR authorized the wire transfer of $213,500 from the Compass Bank account for Aquarius Management for her client J.K.

h. On or about May 25, 2007, SUGAR caused $1,091,348.48 to be wired from Northside Management's Compass Bank account to Surety Title Agency for her client J.S.'s purchase of a vacation home.

i. On or about July 5, 2007, SUGAR transferred $200 from Best for Hearing Limited's Compass Bank account to her own bank account as payment for services rendered in relation to that entity for her client E.B.

j. On or about January 15, 2008, SUGAR deposited or caused to be deposited into her personal account a Postal Money Order for $457 from Reef Management.

k. On or about November 7, 2007, SUGAR wrote and cashed seven checks from the BUBO accounts at Compass Bank for her client Gregory Laurence.

l. On or about April 24, 2008, SUGAR cashed a negotiable instrument for $13,776 from the Compass Bank account for Palm Tree Management.

The foregoing was in violation of Title 18, United State Code, Section 371.

COUNT 2
EVA MELISSA SUGAR AND JERRY ROBERTS
(26 U.S.C. § 7212(a) and 18 U.S.C. § 2 – Corrupt Endeavor to Obstruct or Impede Due Administration of the Internal Revenue Laws and Aiding and Abetting)

8. The Grand Jury realleges and incorporates paragraph three herein.

9. At all times relevant to the indictment, ROBERTS was a resident of Florida. ROBERTS worked for Roberts Enterprises, a family-owned fundraising business.

10. Beginning on or about November 23,1999, and continuing through on or about April 2008, in the State and District of Colorado and elsewhere, the defendants SUGAR and ROBERTS, aiding and abetting each other, did corruptly endeavor to obstruct and impede the due administration of the Internal Revenue laws by the following means, among others:

a. ROBERTS paid SUGAR to set up UBOs, associated BUBO bank accounts, and nominee fictitious trust accounts as depositors for the bank accounts. Specifically, SUGAR established Streamside Management, Triumph Management, and Universal Management, each with an associated bank account and several associated fictitious trust entities.

b. SUGAR and ROBERTS identified other individuals, including ROBERTS'S family members, as "managers," "administrative assistants," or other positions for the various management companies and trust entities. These individuals exercised no control over the entities or the assets held in the associated bank

accounts. For example, when SUGAR and ROBERTS first opened the BUBO bank accounts, ROBERTS caused his then minor son to be identified as the Administrative Assistant for the fictitious trust entities associated with each management company. ROBERTS'S son also had signatory authority at various times for each of the three management companies. ROBERTS used his son to cash checks drawn from the BUBO bank accounts.

c. SUGAR and ROBERTS caused signature stamps to be created for the third-party signatories on the BUBO bank accounts and authorized facsimile signatures for those individuals.

d. SUGAR also identified herself as the "Managing Director" for the fictitious trust entities with signatory authority for each of the BUBO bank accounts. SUGAR and the third parties were the only individuals with signatory authority for the bank accounts ROBERTS ultimately controlled.

e. ROBERTS used the fictitious trust entities and management companies, along with SUGAR's services, to disguise income paid to him by Roberts Enterprises.

f. ROBERTS used the funds in the BUBO bank accounts to pay for personal expenses, such as credit card payments, mortgage payments, utility and telephone bills, and for cash.

g. During the time period at issue, from November 1999 through April 2008: (i) ROBERTS did not file individual federal income tax returns for calendar years

2000 through 2007; (ii) neither ROBERTS nor SUGAR filed Forms 1065 for Streamside Management, Triumph Management, or Universal Management; and (iii) ROBERTS and SUGAR did not file federal tax returns for any of the fictitious entities.

The foregoing was in violation of Title 26, United State Code, Section 7212(a).

COUNT 3
EVA MELISSA SUGAR
(26 U.S.C. § 7203 – Failure to File Tax Return)

11. During the calendar year 2007, defendant SUGAR, who was a resident of Aurora, Colorado, was self-employed as an attorney in Denver, Colorado. During that year, SUGAR earned income in excess of $8,750, which income required that SUGAR file a federal income tax return on or before April 15, 2008, to any proper officer of the Internal Revenue Service. Defendant SUGAR, well knowing and believing all of the foregoing, knowingly failed to file any return on that income.

The foregoing was in violation of 26, United States Code, Section 7203.

COUNT 4
JERRY ROBERTS
(18 U.S.C. § 1503 – Obstruction of Justice)

12. Beginning on or about May 2, 2008, and continuing thereafter up to and including on or about July 22, 2008, in the State and District of Colorado and elsewhere, ROBERTS corruptly endeavored to influence, obstruct, and impede the due administration of justice, in that, after contact by Internal Revenue Service criminal investigators and the service of Grand Jury subpoenas relating to Streamside Management, Triumph Management, Universal Management, and Roberts Enterprises,

ROBERTS committed the following acts.

a. ROBERTS signed and sent or caused to be sent to one or more Special Agents of the IRS a letter that stated "COMPLIANCE HEREWITH IS MANDATORY." The letter enclosed a "Public Service Questionnaire," which demanded the Special Agent's personal information. The questionnaire stated that failure to advise ROBERTS before releasing information regarding him to any person may subject the Special Agents to civil or criminal action.

b. ROBERTS signed and sent or caused to be sent to one or more IRS Special Agents a "Notice of Default" claiming the Special Agent had failed to complete the "Public Service Questionnaire" and asserting, among other things, that that failure to respond will result in the Special Agent's agreement to "Commercial Dishonor," that "a Default" be entered against the Special Agent, and to "being a participant in Fraud." The letter also asserted that failure of a foreign agent to mail a certified copy of a "Foreign Agents Registration Statement" with photo identification to ROBERTS "may result in a claim not to exceed One Million Dollars."

c. ROBERTS signed an "Affidavit of Public Notice" and recorded or caused to be recorded with the Polk County Clerk of the Court documents including (i) copies of the "Public Service Questionnaire" and "Notice of Default" mentioned in subparagraphs 12(a) and (b), and (ii) "Disclosure Statements" for IRS Special Agents stating that failure to complete a "Public Servant's Questionnaire" and provide "verified Proof of Claim" would be accepted as the Special Agents' "agreement that a Default be

entered against you for Two Hundred Thousands [sic] Dollar and no cent[USD]."

d. ROBERTS mailed or caused to be mailed to one or more IRS Special Agents the recorded documents identified in subparagraph 12(c).

The foregoing was in violation of Title 18, United States Code, Section 1503.

COUNT 5
EVA MELISSA SUGAR AND GREGORY LAURENCE
(26 U.S.C. § 7212(a) and 18 U.S.C. § 2 – Corrupt Endeavor to Obstruct or Impede Due Administration of the Internal Revenue Laws and Aiding and Abetting)

13. The Grand Jury realleges and incorporates paragraph three herein.

14. At all times relevant to the indictment, Gregory LAURENCE was a resident of Tennessee. LAURENCE was a doctor who operated two businesses, Germantown Aesthetics, LP ("GA") and Germantown Family Care & Obstetrics, LP ("GFCO").

15. Beginning on or about January 4, 2002, and continuing through on or about October 2008, in the State and District of Colorado and elsewhere, the defendants SUGAR and LAURENCE, aiding and abetting each other, did corruptly endeavor to obstruct and impede the due administration of the Internal Revenue laws by the following means, among others:

a. LAURENCE paid SUGAR to set up UBOs, associated BUBO bank accounts, and nominee fictitious trust accounts as depositors for the bank accounts. Specifically, SUGAR established Jasper Management, Amethyst Management, Capricorn Management, Diamond Management, Emerald Management, Moonstone Management, Pearl Management, Sagittarius Management, and Sapphire Management, each associated with its own fictitious trust entity.

b. LAURENCE caused his wife to be identified as "Assistant Administrator" with signatory authority for the Jasper Management, Emerald Management, Moonstone Management, and Pearl Management bank accounts with authority to use a facsimile signature. SUGAR identified herself as the "Managing Director" for the fictitious trust entities with signatory authority for each of the BUBO bank accounts.

c. SUGAR and LAURENCE'S wife were the only individuals with signatory authority for the bank accounts LAURENCE ultimately controlled. LAURENCE himself was not named in any position for the numerous entities SUGAR and LAURENCE established.

d. SUGAR and LAURENCE caused signature stamps to be created for LAURENCE'S wife and authorized facsimile signatures for the BUBO bank accounts for which she had signatory authority.

e. LAURENCE caused GFCO to issue checks payable to the fictitious trust entities associated with his BUBO bank accounts to make a portion of GFCO's business income appear as legitimate deductions and costs of goods sold, thereby reducing GFCO's taxable income. LAURENCE also caused the GFCO partnership federal income tax returns prepared for calendar years 2002 through 2007 to report those sums as deductions.

f. LAURENCE used the management companies, fictitious trust entities, and SUGAR's services to disguise the existence of GA. LAURENCE did not

file federal income tax returns for GA for calendar years 2002 through 2007.

g. LAURENCE used fictitious trust entity Dynamic Health Care Staffing and Jasper Management, along with SUGAR's services, to pay himself and employees of GA and GFCO as "independent contractors" and to avoid paying federal employment taxes. LAURENCE did not issue those employees IRS Forms 1099.

h. Laurence used the funds in the BUBO bank accounts to pay for items including expenses associated with his businesses, school tuition for his children, cars, and credit card payments.

i. During the time period at issue, from January 2002 through April 2008, neither SUGAR nor LAURENCE filed Forms 1065 for the UBO management companies or federal tax returns for any of the fictitious entities.

The foregoing was in violation of Title 26, United State Code, Section 7212(a).

COUNT 6
GREGORY LAURENCE
(18 U.S.C. § 1503 – Obstruction of Justice)

16. Beginning on or about March 5, 2008, and continuing thereafter up to and including on or about January 22, 2009, in the State and District of Colorado and elsewhere, LAURENCE corruptly endeavored to influence, obstruct, and impede the due administration of justice, in that, after contact by Internal Revenue Service criminal investigators and the service of Grand Jury subpoenas relating to GA and GFCO, LAURENCE committed the following acts.

a. LAURENCE signed and sent or caused to be sent to one or more

IRS Special Agents, through the United States Attorney's Office, documents including: (1) "Public Servant's Questionnaires" requesting the Special Agents to provide personal information, and (2) "Disclosure Statements" asserting that failure to respond to the questionnaire and failure to answer questions in the statement will result in the Special Agents' agreement to "Commercial Dishonor," that "a Default be entered against you for Two Hundred Thousands [sic] Dollar [USD]," and to "being a participant in Fraud."

b. LAURENCE signed and sent or caused to be sent to one or more IRS Special Agents a "Notice of Default and Dishonor of a Lawful Public Servant Questionnaire."

c. LAURENCE failed to comply with Orders to Compel production of the subpoenaed records issued by the United States District Court for the District of Colorado on November 17 and December 8, 2008.

The foregoing was in violation of Title 18, United States Code, Section 1503.

A TRUE BILL

Ink signature on file in the Clerk's Office
FOREPERSON

JOHN WALSH
United States Attorney

By: *s/ Anna K. Edgar*
Matthew Kirsch
Anna K. Edgar
Assistant United States Attorneys
United States Attorney's Office
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Attorneys for the United States

EXHIBIT L

UNITED STATES DISTRICT COURT

for the

District of Colorado

United States of America)
v.)
Gregory Laurence) Case No. 13-cr-193-JLK
Defendant)

ORDER SETTING CONDITIONS OF RELEASE

IT IS ORDERED that the defendant's release is subject to these conditions:

(1) The defendant must not violate federal, state, or local law while on release.

(2) The defendant must cooperate in the collection of a DNA sample if it is authorized by 42 U.S.C. § 14135a.

(3) The defendant must advise the court or the pretrial services office or supervising officer in writing before making any change of residence or telephone number.

(4) The defendant must appear in court as required and, if convicted, must surrender as directed to serve a sentence that the court may impose.

The defendant must appear at: UNITED STATES DISTRICT COURT
Place

on AS DIRECTED
Date and Time

If blank, defendant will be notified of next appearance.

(5) The defendant must sign an Appearance Bond, if ordered.

(6) Surrender passport to Clerk's office within one week.

ADVICE OF PENALTIES AND SANCTIONS

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

Violating any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of your release, an order of detention, a forfeiture of any bond, and a prosecution for contempt of court and could result in imprisonment, a fine, or both.

While on release, if you commit a federal felony offense the punishment is an additional prison term of not more than ten years and for a federal misdemeanor offense the punishment is an additional prison term of not more than one year. This sentence will be consecutive (*i.e.*, in addition to) to any other sentence you receive.

It is a crime punishable by up to ten years in prison, and a $250,000 fine, or both, to: obstruct a criminal investigation; tamper with a witness, victim, or informant; retaliate or attempt to retaliate against a witness, victim, or informant; or intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If, after release, you knowingly fail to appear as the conditions of release require, or to surrender to serve a sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more – you will be fined not more than $250,000 or imprisoned for not more than 10 years, or both;
(2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years – you will be fined not more than $250,000 or imprisoned for not more than five years, or both;
(3) any other felony – you will be fined not more than $250,000 or imprisoned not more than two years, or both;
(4) a misdemeanor – you will be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender will be consecutive to any other sentence you receive. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of the Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and surrender to serve any sentence imposed. I am aware of the penalties and sanctions set forth above.

Defendant's Signature

Memphis, TN
City and State

Directions to the United States Marshal

(X) The defendant is ORDERED released after processing.
( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judge that the defendant has posted bond and/or complied with all other conditions for release. If still in custody, the defendant must be produced before the appropriate judge at the time and place specified.

Date: May 29, 2013

Judicial Officer's Signature

Printed name and title

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICE U.S. ATTORNEY U.S. MARSHAL

EXHIBIT M

UNITED STATES DISTRICT COURT

for the

District of Colorado

NOTICE REGARDING UNITED STATES PASSPORT FOR CRIMINAL DEFENDANT

TO: United States Department of State
Office of Passport Services
Legal Affairs Division
2100 Pennsylvania Avenue, NW, 3rd Floor
Washington, DC 20037

FROM: United States District Court
District of Colorado
901 19th Street, Room A105
Denver, CO 80294

☑ **Original Notice**
Date: 06/04/2013
By: s/ A. Garcia

☐ **Notice of Disposition**
Date:
By:

Defendant: Gregory N. Laurence
Date of Birth: [redacted]
SSN:

Case Number: 13-cr-0193-JLK
Place of Birth: Texas, USA

Notice of Court Order (Order Date: 05/29/2013)

☐ The above-named defendant is not permitted to apply for the issuance of a passport and/or passport card during the pendency of this action.

☑ The above-named defendant surrendered passport number 496292037 and/or passport card number to the custody of the U.S. District Court on 06/04/2013 - via FedEx.

NOTICE OF DISPOSITION

The above case has been disposed of.

☐ The above order of the court is no longer in effect.

☐ Defendant not convicted – Document returned to defendant.

☐ Defendant not convicted – Document enclosed for further investigation due to evidence that the document may have been issued in a false name.

☐ Defendant convicted – Document and copy of judgment enclosed.

Distribution:
Original to case file
Department of State
Defendant *(or representative)*
Clerk of Court

EXHIBIT N

ORIGINAL

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' ANSWERS AND RESPONSES TO PLAINTIFF'S THIRD SET OF DISCOVERY REQUESTS

Defendants hereby submit their Answers and Responses to Plaintiff's Third Set of Discovery Requests as follows:

depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond. Dr. Kerr has not testified in any matter in the last four years. He is not a retained expert. His curriculum vitae was previously produced and is incorporated by this reference.

Gregory Laurence, M.D.
Germantown Aesthetics
7475 Poplar Pike
Germantown, Tennessee 38138
(901) 624-5605

Subject Matter: Facts of case, applicable standards of health care practice, causation, damages and the care and treatment of Krystal Ballard.

Substance of facts and opinions held: Dr. Laurence is a physician licensed in the state of Tennessee to practice medicine and surgery. Dr. Laurence is board certified in both family practice and laser surgery and has engaged in the medical specialty of cosmetic surgery at all times relevant herein. Dr. Laurence will testify as a retained expert witness at the trial. Dr. Laurence will testify that he has actual knowledge of the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010 and that in his opinion Dr. Kerr met such standard taking into account Dr. Kerr's background, training, experience and field of medical specialization with respect to any and all medical services rendered to the patient.

Dr. Laurence will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types

of procedures and treatment performed by Dr. Kerr in this case. Part of the basis for Dr. Laurence's opinions include: his background, training, research, practice and experience in performing cosmetic procedures as a licensed physician, his experiences in the peer review process associated with his hospital staff privileges at Baptist Memorial Hospital and St. Francis Hospital in Memphis, Tennessee, his experience of having performed hundreds of cosmetic surgical procedures, his knowledge of how cosmetic procedures like liposuction and fat transfers were performed in Boise in 2010, his experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed, how fat transfers/grafting procedures are performed, his knowledge of the types of equipment and instruments needed to perform the nature and types of cosmetic procedures at issue in this case, his knowledge of the scope of practice of cosmetic providers like Dr. Kerr in Boise, Idaho and elsewhere, his knowledge of the types of medical providers who perform cosmetic procedures like the ones at issue in this case and his knowledge of the manner and method by which surgical equipment and surgical procedure facilities are maintained in a sterile fashion. As part of his testimony, Dr. Laurence may also explain his training and experience at the University of Tennessee during his residency in family practice in 1992-95 as it relates to sterile operating conditions for the procedures he performed, was taught and observed. He will explain the same matters for his experience in his own aesthetics surgical center which he operates in Germantown, Tennessee from 2003 to the present.

Dr. Laurence will discuss the standard of health care practice employed at his own surgical facility in Tennessee for achieving sterile operating conditions and the

disinfection of instruments and equipment and maintaining a sterile operative field and that the similar actions and efforts undertaken by Dr. Kerr as have been described for the procedure on Krystal Ballard in this case were used and exceeded in his opinion. Dr. Laurence will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were appropriate and working properly at the time of the surgery at issue in this case.

Dr. Laurence will testify that during his professional career he has been acquainted with numerous physicians who perform cosmetic procedures that are not plastic surgeons, but rather come from a number of different medical backgrounds including: family practice, anesthesia, general surgery, dermatology and obstetrics and gynecology. He will discuss the training he has been provided in cosmetic surgery by various physicians who are not plastic surgeons. Dr. Laurence has become acquainted with the nature and scope of the practice of these other cosmetic procedure providers and the procedures utilized by them in this specialty, including the procedures utilized for maintaining a sterile field and how to properly clean and maintain the surgical equipment and instruments utilized for cosmetic procedures including the procedures at issue in this case. Dr. Laurence will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice in the same medical specialty as his and Dr. Kerr.

Dr. Laurence will render the opinion that Dr. Kerr had proper training and experience in order to perform the procedures at issue on Krystal Ballard. As part of his testimony, he is expected to refer to the publications, data and documents that have been produced in discovery on this subject and explain the numbers of similar procedures he has performed. Dr. Laurence will explain that there was no requirement, per the standard of health care practice or otherwise, for Dr. Kerr's facility to be certified, inspected or approved by any organization or government agency, which included his autoclave, his clinic and the instruments he used for surgery and that his medical license allowed him to conduct his medical practice and the procedures he performed on Krystal Ballard. He will testify that he was not required to test for spores or mold and that these issues have nothing to do with the case.

During Dr. Laurence's professional career he has received specific training in various lipolysis procedures including traditional, laser assisted and ultrasonic assisted lipolysis. He will testify that he has reviewed the nature and degree of training obtained by Dr. Kerr and that in his opinion Dr. Kerr had adequate training and experience to perform the liposuction and fat transfer procedures on the patient at issue. Dr. Laurence will testify regarding the significant experience he has in performing these types of procedures as part of his cosmetic practice. He will testify that it was appropriate for the procedures at issue to be performed on patients like Krystal Ballard in an office based setting without general anesthesia and that Dr. Kerr had proper facilities, equipment and personnel to do these procedures safely and within the applicable local standard of health care practice. Dr. Laurence will testify that he possesses the professional knowledge

and experience that allows him to express the opinion and testimony described in this document.

Dr. Laurence will testify that the fact this patient experienced a post-operative complication like the one alleged in this case which resulted in a patient death does not establish that the standard of practice was violated by Dr. Kerr. He will testify that postoperative infections are not proof of a violation. He will render the opinion that the patient's death was not due to any error or omission on Dr. Kerr's part or the part of anyone associated with his practice. He will discuss his own sterilization techniques, training and experience in this area which will help support his opinion that Dr. Kerr employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies.

Dr. Laurence will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient, but also in all of the operative sites of the subsequent patients which did not occur in this case. Dr. Laurence will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

As part of his testimony, Dr. Laurence will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures did not cause or result in the introduction of any bacteria to the patient. Dr. Laurence actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty.

Dr. Laurence will testify regarding the specific issues set forth in this disclosure, but he will also testify globally that nothing Dr. Kerr elected to do or not do with respect to the medical services provided to Krystal Ballard in Boise in 2010 violated the applicable local standard of health care practice which in turn caused or contributed to any damages or injuries to the patient. Dr. Laurence will testify that the unfortunate death of Krystal Ballard was not and cannot be assumed to be the result of violations of the standard of health care practice.

Dr. Laurence will testify that the standard of health care practice applicable to physicians engaged in the medical specialty of cosmetic surgery in Boise in 2010 is established by the local community of physicians engaged in this specialty and the way they typically practice in the community and not by any organization, academic center, publication, foreign physician, or by virtue of any specialty board certification. In this regard, Dr. Laurence will testify regarding his various publications, honors and university appointments as set forth in his curriculum vitae which is hereby incorporated as if set forth in full. He will also discuss his various society memberships which provide him with opportunities to expand his knowledge and networking base in the field of cosmetic surgery including his affiliations with the American Institute of Ultrasound Medicine, the

Association of American Physicians and Surgeons, the American Society of Cosmetic Breast Surgeons, and the National Society of Cosmetic Physicians.

Dr. Laurence will opine that the standard of health care practice is the care typically provided under similar circumstances by Boise physicians engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. As part of his testimony, Dr. Laurence will express and define the local standard of practice as it existed in Boise in 2010 with respect to the medical issues in this case consistent with this disclosure and any deposition which may subsequently be taken and which is hereby incorporated as if set forth in full. Dr. Laurence holds the opinion and will discuss how compliance with the standard of practice does not guarantee a perfect result and its application and compliance is intended to minimize and hopefully largely reduce undesirable and unintended results. He will explain that the standard of healthcare practice for physicians engaged in the medical specialty of cosmetic surgery is not perfect and the records and deposition testimony demonstrate and confirm that no perfect outcome was ever warranted or represented to this patient.

Dr. Laurence will explain how the standard of practice applicable includes, as a major element, aspects of provider judgment as opposed to the application of science which may vary depending on the patient and care circumstances. He will render the opinion that Dr. Kerr provided appropriate post-operative instructions and properly followed the patient and communicated with her and her family. Dr. Laurence will be prepared to testify about his experiences in this regard at trial and why Dr. Kerr's care in this case was consistent with the standards of practice he is held to. As with all operative procedures, the risk of infection is always a possibility and Dr. Laurence will

explain that post-operative infection, if it should develop, is an accepted and recognized risk factor that is not due to inappropriate care or violations of the standard of health care practice by the physician and that under the best of circumstances and medical care, infections can and do occur.

Dr. Laurence will render the opinion that Dr. Kerr gave appropriate advice and information to Krystal Ballard in regard to the risk, benefits and options prior to the procedure on July 21, 2010 which is documented in Dr. Kerr's medical records. Dr. Laurence will explain that everything undertaken by Dr. Kerr in his care and treatment of Krystal Ballard is illustrative of, and in compliance with, the standard of health care practice, based on the class of health care provider to which Dr. Kerr belonged and in which capacity he was functioning. Dr. Laurence will explain that the standard of health care practice provides that Dr. Kerr must be judged and evaluated in comparison with similarly trained and qualified physicians of the same class as himself, taking into account his training, experience and field of medical specialization and not by a plastic surgeon which Plaintiff is unfairly trying to do in this case.

As part of his testimony, Dr. Laurence will discuss his training and the certifications he obtained in order to become a physician engaged in the medical specialty of cosmetic surgery as well as the adequacy and nature of those obtained by Dr. Kerr. He will discuss the care and treatment of the patient as outlined in the patient's medical records and he will discuss the appropriate nature, timing and content of Dr. Kerr's documented conversations and interactions with the patient and her husband.

With respect to the fat injection procedure at issue, Dr. Laurence will discuss and explain to the jury the medical basis upon which a person's own fat may be

used to improve the appearance of the body by moving it from an area where it is less needed (usually the thighs or abdomen) to an area that has less tissue volume. He will explain how typically, the transferred fat results in an increase in volume of the body site being treated. He will explain how before the removal procedure begins the areas from where the fat is being removed are injected with a tumescent fluid which helps to minimize bruising and discomfort to the patient. He will explain how and why the adipose tissue or fat is freed and ultimately removed from the body via a cannula placed through a small incision in the patient's skin.

Dr. Laurence will discuss and describe how the adipose tissue is then prepared to be re-injected back into the patient's body and strategically placed into the desired area using either a smaller cannula, or as was done in this case, a needle. He will render the opinion that the manner, method and volume by which Dr. Kerr re-injected the adipose tissue back into the patient was appropriate in all respects. He will explain how some of the fat that is transferred often does not maintain its volume over time, which is often addressed by the physician having to re-inject more adipose tissue into a specific location to achieve the desired end aesthetic result. He will explain how the fat transfer procedure was done using a local anesthetic and that this was consistent with the local standard of practice given the nature and extent of the procedure.

As part of his testimony, Dr. Laurence will discuss the entries in Dr. Kerr's records including the first encounter with the patient on July 13, 2010, what treatment she desired, the fact that this was an elective procedure, that it was a purely cosmetic procedure, he will discuss the entries in patient's health history form, the general state of the patient's health and the absence of risk factors for infection preoperatively, the fact

that she had previously had a liposuction procedure and desired further treatment of this type. To the extent it is relevant to his opinions, Dr. Laurence will also discuss Dr. Kerr's operative report as well as an explanation of how the procedure was performed, the patient's vital signs and her clinical condition before and after the surgery as well as at the post-operative visit with the patient. He will discuss the adequacy of the Dr. Kerr's post-operative discussions, instructions and directions shared with the patient and then ultimately the discussions he had with patient's husband and aunt. Dr. Laurence will explain that Krystal Ballard appeared to be in good health and without a urinary tract infection before the procedure on July 21, 2010 and there is no evidence that she had a urinary tract infection and that the pre-operative work up of Dr. Kerr was within the standard of health care practice.

Dr. Laurence will discuss the technical aspects of the Vaser liposuction procedure including how the local anesthetic is given, how the tumescent anesthetic is prepared and injected, what it does to the adipose tissue, how the Vaser device operates to liquefy the adipose tissue, how and where the cannulas are placed, the amount of energy applied to the device to effectuate the desired impact on the adipose tissue, and the amount of traction applied to free the adipose tissue. From his unique perspective as a cosmetic surgeon, Dr. Laurence will explain the artistic nature of the liposuction procedure and the laborious aspect of moving the cannula back and forth in order to feather the tissue and achieve the desired aesthetic result which varies depending on the location of the procedure and the body habitus and surgical goals of each patient.

In the process of providing his opinions that the care by Dr. Kerr was appropriate, Dr. Laurence will also explain the manner and method by which the adipose

tissue harvested was then drained and prepared for reinjection. He will also discuss how the instruments and equipment are routinely cleaned and sterilized for each procedure, he will discuss these pieces of equipment as well as their various attachments as well as describing the medical equipment which is new versus that which must be re-sterilized for reuse between patients and/or procedures. Dr. Laurence will discuss the pre and post-operative antibiotics administered by Dr. Kerr to the patient and explain why they were appropriate medications to give to the patient as a prophylaxis against infection.

Dr. Laurence will discuss how the patient never appeared infected or septic per the medical records and deposition testimony. He will discuss the expected localized pain patients can expect to experience following a fat transfer procedure. To the extent it becomes relevant to aid in expressing his favorable opinions, Dr. Laurence may also discuss the cardinal signs of infection and how the patient did not have any fever or warmth to the surgical area, there was no oozing of pus or other signs of active drainage from the operative sites, and there was no swelling or signs of a rash or change in condition of the skin surrounding the area or abnormal odor.

Dr. Laurence will discuss the appropriate manner in which Dr. Kerr looked for and then properly documented the absence of signs and symptoms of infection during his postoperative visit on July 23 and in his subsequent discussions with the patient and her family prior to her death. He will testify that he concurs with Dr. Kerr that at no point did the patient present to Dr. Kerr as having an infection, nor did the standard of practice applicable to Dr. Kerr require him to refer the patient, prescribe a different course of medical care or obtain any further diagnostic testing than was done.

Consistent with his background and experience in medicine and surgery, Dr. Laurence will discuss his knowledge of gram negative rods and the fact that such organisms do not exist on or in the skin, nor would they be found on surgical instruments. Instead, they represent a class of bacteria which reside in the urinary tract and bowels of a patient. He will testify that Dr. Kerr had adequate training and experience to perform the surgeries in question, that Dr. Kerr's medical records contain an adequate description of the care rendered and the discussions with the patient, that Dr. Kerr implemented appropriate sterility techniques and conditions for surgery and that he used correct solutions for cleaning and disinfecting instruments and assuring that operative conditions were adequately sterile to guard against the risk of infection. He will testify that postoperative infections can and do occur even under ideal conditions which are not the subject malpractice, but rather as accepted complications which are impossible to prevent.

To the extent the surgical selection is questioned or needs further explanation at trial, Dr. Laurence will be prepared to discuss why the Vaser procedure is an appropriate method of removing unwanted adipose tissue in a patient like Krystal Ballard. As part of his testimony and in order to expand upon his background and experience in cosmetic surgery, Dr. Laurence may offer testimony explaining how the field of laser lipolysis with the use of tumescent anesthesia has developed in recent years. This may include testimony addressing that when considering different types of the body for lipolysis that each area has its own unique geography and involves a degree of physician judgment as to how much material to remove and/or re-inject into each location.

As part of his testimony, Dr. Laurence will be prepared to explain the positioning of the patient, incision sites, pre and post-operative photos, patient behavior, choice of instruments, his artistic eye and attention to detail, management of patient expectations, and patient education and counseling from the informed consent phase through the postoperative follow up period. He is expected to utilize at trial various anatomical illustrations as well as various cannulas and related instrumentation for the procedures at issue including those depicted in the discovery photos of instruments and supplies produced to date.

As part of his testimony, he will explain how Vaser Lipo involves a minimally invasive technique to selectively break apart and gently remove unwanted fat. He will explain how the targeted area is injected with a special saline solution known as tumescent fluid which numbs the target area and shrinks local blood vessels. This also temporarily expands the volume of the targeted area, making fat cells easier to remove. With the use of exemplars, he will demonstrate how small-diameter probes are then inserted into the body through small incisions. He will explain how by way of using a resonating high ultrasonic frequency, the probes literally shake loose fat cells — while leaving blood vessels, nerves and connective tissues unharmed. The loose fat cells mix with the tumescent fluid, which is then removed from the body using gentle suction. After the surgery, patients are prescribed a recovery regimen to promote maximum skin retraction, smoother results with minimal recovery time compared to traditional liposuction.

Dr. Laurence may also discuss his knowledge of the history of tumescent technique liposuction which was started by dermatologists, not plastic surgeons. As part

of his explanation of the surgery at issue, he will describe how the affected area is expected to drain postoperatively, the types of dressings placed on the affected area, the instructions given to the patient, he will discuss the cardinal signs of an infection and how Dr. Kerr's records and deposition evidence that he specifically and appropriately evaluated and questioned the patient and then documented in his records regarding these issues on each encounter he had with the patient. He will discuss the amount of time it takes to perform the procedures in question and that there was nothing usual or out of character regarding the amount of time it took Dr. Kerr to perform the procedures on July 21, 2010.

As outlined above, Dr. Laurence will discuss his knowledge of the various cosmetic organizations to which he belongs and/or has knowledge of, what they offer their members and the opportunities to associate with colleagues and obtain continuing education in this emerging field. Dr. Laurence will explain the adequacy of the postoperative evaluation Dr. Kerr undertook on July 23, 2010 for evaluating Krystal Ballard and assessing whether there was any clinical evidence of infection of the surgical sites, including absence of any abnormal odor or other evidence or suggestion of infection of any of the surgical sites.

He will discuss his review and comments of the autopsy record and the patient's subsequent treatment records. By way of example, Dr. Laurence is expected to discuss the hospital records from Elmore Medical Center and Saint Alphonsus Regional Medical Center, including the laboratory reports showing the patient had 3+ bacteria in her urine. Based on his experience in family practice, he will render the opinion that this laboratory finding is consistent with, and provides strong evidence of, an infectious

process located within the patient's bladder. He will explain how the bladder is also an area wherein gram negative rod bacteria are known to populate and exist in the face of an infection.

Dr. Laurence will also comment upon the significance from his perspective regarding how the patient did not present with any fever, but had a WBC count of 14.7. He will discuss causes for an elevated WBC count including surgery, stress and dehydration. He will comment upon the fact that the autopsy failed to address the patient's bladder or urinary tract (aside from the kidneys) or perform any microscopic examination of that organ to address the nature of the bacteria identified in the positive UA performed at Elmore Medical Center on July 25, 2010. He is also expected to discuss the patient's elevated creatinine and how this can be signs of dehydration as well as the evidence that the patient's kidneys were not functioning properly.

Dr. Laurence will address the vague and confusing nature of the autopsy report wherein the pathologist at autopsy referred to an increase in the amount of acute inflammatory cells within tissue from the surgical sites, and how it is not clear which surgical sites he is referring to in his report. He will discuss how it is not clear where the tissue sections where harvested from on the patient. Dr. Laurence will render the opinion, more likely than not, that the gram negative bacterial rods were introduced into the patient's surgical site sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure.

He will comment upon the significance of the finding by Dr. Kerr that when he saw the patient on July 23, two days post operatively, he did not observe any evidence of cellulitis or redness in the surgical site. He will discuss what it means to him as a

physician that the patient repeatedly concealed this procedure from her husband, her employer and that she engaged in noncompliant behavior despite what she had been told both in writing and verbally about how to care for herself and what she agreed to do. He will discuss the challenging position the patient elected to place herself and her health care provider in by erroneously reporting to her husband that she had simply fallen and injured her back and falsely claimed this was the source of her pain rather than admit she had cosmetic surgery performed.

In this regard, he will discuss how the patient admitted she was not taking her medications because she did not want proof of them to show up in any drug screen she might take with the military. He will discuss that when a patient elects to disobey her health care provider that there is only so much the physician can do and that the patient is essentially interfering with and limiting the physician's ability to provide her with care and to make decisions which may have made a difference in her overall outcome. He will discuss concerns regarding whether the patient was properly changing her bandages and caring for herself as instructed and how during any of these times would have been an opportunity for the bacteria in question to be introduced into her system.

Dr. Laurence will testify that Dr. Kerr and his employees followed the appropriate sterile technique in regards to the procedure he performed on Krystal Ballard. He will explain that there are no absolutes with a sterile technique and that one can do everything right and still have situations where unwanted bacteria can become introduced into the surgical site, but that given the gram negative rods claimed to have been identified at autopsy, this is not what occurred in this case. He will discuss the patient's admission that she was not taking the narcotic pain medication Norco and was instead

taking the non-narcotic drug Motrin which did not appear to be providing the patient with adequate pain control.

Dr. Laurence will render the opinion that the minimal amount of bruising and edema observed on July 23 was consistent with what he would expect to see at that point postoperatively. He will testify that the standard of practice did not require Dr. Kerr to obtain a complete blood count on the patient on July 23 in order to determine what her white count was at that time. He will discuss his background, training and experience in the use and regular implementation of the sterile technique in his practice in order to lay a foundation for his opinions as to the adequacy of Dr. Kerr's sterile technique. Dr. Laurence will discuss how liposuction and fat transfers are office based procedures which are not required to be performed in a hospital setting, nor are hospital privileges required in order to perform such procedures. Dr. Laurence will render the opinion that Dr. Kerr was not required, nor does the standard of practice applicable to Dr. Kerr, require that his facility be certified or approved by any accreditation facility such as the AAACH or AAAASF or any governmental agency.

As part of his testimony, Dr. Laurence will render the opinion that Dr. Kerr's procedure room was properly prepared for surgery and to protect and preserve an appropriate sterile field. He will discuss the autoclave at issue, how it operates and how it helps Dr. Kerr maintain a sterile field for his procedures. He will discuss the areas around the patient which are considered part of the sterile field depending on the nature and type of procedure at issue. He will discuss the operation and use of the Vaser ultrasonic lipolysis machine utilized for the procedure in this case. He will explain how the tumescent lidocaine is mixed, prepared and injected into the patient. He will explain

how the Vaser procedure is done with the device in place under the skin without direct visualization. He will discuss how Dr. Kerr documented having harvested 400 cc of fat from the patient's anterior abdomen, 200 cc of fat from her right lateral waist flank and 200 cc of fat from the patient's left lateral waist flank. He will discuss how the Vaser in this case was utilized for less than eleven minutes and that this time was appropriate for the nature of the procedure.

As it relates to rebutting the testimony of the Plaintiff's experts, Dr. Laurence will explain how the fat was injected into the patient using only a needle and syringe and that there were no incisions made into the patient during the injection phase of the procedure. He will testify that it was proper and acceptable technique for the same needles to be used to inject the fat into both the left and right buttocks of the patient. He will discuss the adequacy of the informed consent discussion Dr. Kerr had with the patient including the content of the informed consent document signed by the patient in this case. He will discuss the risk of infection as being a specifically consented risk of the lipolysis and fat injection procedure. He will discuss how the consent form discusses with the patient both pre and post treatment instructions and how it warns the patient that if they fail to comply with these instructions may increase the possibility that the patient will develop complications.

Dr. Laurence will challenge the foundation as well as rebut the opinions of the expert witnesses listed by the Plaintiff. Regarding the issue of consent, he will testify that Dr. Kerr discussed with the patient the nature and the extent of the risks normally attendant to the procedure in question such that the giving of consent by the patient was valid in all respects. As part of his testimony, he may also discuss the adequacy of Dr.

Kerr's preoperative clinical examination including evaluation of the regions to be lipo-contoured including review for hernias, scars, asymmetries, cellulite, stretch marks, the quality of the skin and its elasticity, the presence of stria and dimpling and the location of fat deposits. He will rebut any testimony by Plaintiff's experts that Dr. Kerr improperly performed the lipolysis procedure, the fat injection procedure, that Dr. Kerr improperly sterilized his equipment or that Dr. Kerr did anything to cause the patient's death.

As part of his testimony, Dr. Laurence may also address and explain the weight changes of Krystal Ballard. On July 23, 2010 she weighed 135 pounds. On July 25, 2010 at Elmore Medical Center she weighed 130 pounds. At autopsy on July 26, 2010 she weighed 180 pounds. He will explain the medical reasons and significance of these changes in weight. He may also comment upon the entries in the records from Elmore Medical Center for July 25, 2010, wherein the treating physician evaluated the buttocks and abdomen of Krystal Ballard and noted little induration of the skin and no redness, warmth or skin sensitivity and delayed the administration of IV antibiotics until 4 ½ hours after admission. At Elmore, cardiac ejection fraction was only 17% and at Saint Alphonsus on July 25, 2010, central venous pressure was measured at 20 which is very high and proof of fluid overload. To the extent it relates to his opinions on causation, Dr. Laurence will explain these factors and their relative significance in terms of the possible reasons for the death of Krystal Ballard.

Dr. Laurence will testify that the laboratory data of Elmore Medical Center and the clinical findings are indicative of urinary tract infection the developed after his procedure of July 21, 2010 and if gram negative rods were in fact present at autopsy in certain locations, they came from the urinary tract of Krystal Ballard or her intestinal tract

and were not introduced during his surgical procedure. As part of his testimony, it is expected that Dr. Laurence will explain pertinent anatomy, infectious processes, pathophysiology of infections, treatment for infections, gram negative rods, types of bacteria, reasons why the blood cultures and urine cultures were negative for growth, antibiotics used for the care and the comments of Krystal Ballard regarding that drugs would show up on drug test by the Air Force.

As part of his testimony, Dr. Laurence will discuss the patient's anatomy including the location of nerves, blood supply, adipose tissue, organs as well as the body's response to surgery, infection, pain medication and antibiotics. This may include extensive testimony by way of demonstrative exhibits depicting general anatomy and/or pictures of the patient and/or of the surgical equipment itself. Dr. Laurence will testify that even in hindsight the patient in this case did not present with any increased risk for infection that would have raised any concern about her undergoing the procedures on July 21, 2010. He will testify that at the time of Dr. Kerr's procedure on July 21, 2010, there was no evidence of a urinary tract infection of Krystal Ballard.

Data and other information considered and summary of qualifications: In forming his opinions, Dr. Laurence has relied upon his own unique training and experience as a licensed physician engaged in the medical specialty of cosmetic surgery in Tennessee in treating, diagnosing, managing and caring for patients like Krystal Ballard, his observations of the habits and practices of other cosmetic surgeons and care providers, his knowledge of the Boise, Idaho standard of practice applicable to Dr. Kerr in 2010 and his knowledge that it is within Dr. Kerr's specialty and capability to perform the procedures in question as part of his practice of medicine, and his membership and

participation in various medical associations and organizations as set forth herein. The data upon which his opinions are based include his medical education, training, skill, experience, his experience practicing cosmetic surgery, his review of the care and treatment experiences with similar lipolysis and fat injection cases over the course of his career in medicine.

Dr. Laurence's opinions are also based upon the findings of various other health care providers for the patient, the results and values of various laboratory studies and other testing and observation, treatment plans, consultations, referrals and recommendations for treatment for the patient derived from such medical services and interactions before, during and after the care rendered by Dr. Kerr as described in all medical records, discovery responses and depositions taken. Dr. Laurence's professional background and qualifications are set forth in his attached curriculum vitae which is incorporated herein by reference.

As part of his review of this case, and for purposes of forming his opinions, he has considered and reviewed the depositions taken to date including Dr. Kerr's, employees of Silk Touch, and the Plaintiff's. He has also reviewed and considered Dr. Kerr's medical records, the records of Elmore Medical Center, Elmore Ambulance Service, Life Flight, Saint Alphonsus Regional Medical Center, the Ada County Coroner's Office and the Plaintiff's expert witness disclosure. In the event further depositions or medical records are produced, they will also be considered. The data and information considered by Dr. Laurence in forming his opinions consist of the medical records of Dr. Kerr, Silk Touch Laser, Elmore Medical Center, Saint Alphonsus Regional Medical Center, Ada County Coroner, Autopsy Report of Dr. Groben, documents previously

produced for the training, received by Dr. Kerr, including seminars attended, photographs of the equipment used by Dr. Kerr in his operation, photographs of Krystal Ballard taken by Dr. Kerr, autoclave of Dr. Kerr, curriculum vitae of Dr. Kerr, records of Silk Touch regarding procedures that involved no infections, anatomical illustrations, all the documents and material described and noted in this disclosure. The exhibits to be used for support of his opinions included the items and documents described above, his curriculum vitae, and his qualifications are set forth in his curriculum vitae. His publications are listed in his curriculum vitae. His fees for testifying are $500 per hour for deposition and $4,000 per day for trial plus travel expenses. In the last four (4) years, he has testified at trial in the case of *Chopra v. Medi-Spa of Memphis*, Shelby County, TN.

Dr. Laurence reserves the right to rely as further support for his opinions on medical literature related to any of the subjects set forth in this disclosure as discovery continues. Dr. Laurence reserves the right not to offer all or any of the opinions set forth in this disclosure as it as an attorney prepared document and is intentionally worded broadly in order to comply with rule 26(b)(4). The ultimate testimony to be offered at trial will depend to an extent on what testimony is deemed necessary to refute the testimony of the Plaintiff and his experts consistent with the requirements of Idaho Code §6-1012. Plaintiff has the burden of proof and it is only after that burden has been met can the defense determine what evidence and testimony will be needed to respond.

Alan W. Frankle, Ph.D.
1491 Lewis Lane
Boise, Idaho 83712

Subject Matter: Damages and economic analysis.

reviewed, considered and/or relied upon in some fashion by one or more of the defense experts to support, address and explain their opinions and rebut the opinions of Plaintiff's experts. All of the exhibits referred to in the Answer to Plaintiff's Third Set of Discovery Requests have been produced to Plaintiff or are in the possession of the Plaintiff and his counsel. The same is true as respects the material and items referred to in the Answers to the Interrogatory No. 1. It is unreasonable and unduly burdensome to reproduce this material in response to this Request.

DATED this 22nd day of July, 2013.

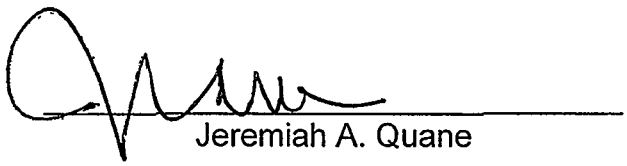
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2013, I served a true and correct copy of the foregoing DEFENDANTS' ANSWERS AND RESPONSES TO PLAINTIFF'S THIRD SET OF DISCOVERY REQUESTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP 303 West Bannock Street P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail [X] Hand Delivered, w/ attachments [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, w/o attachments [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 201 Monroe Street, Suite 2170 Montgomery, Alabama 36104 Telephone (334) 262-6485 *Attorneys for Plaintiff*	[X] U.S. Mail, w/o attachments [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (334) 262-0657



Jeremiah A. Quane

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Gregory N. Laurence, M.D.

Professional Experience

Medical Director, Complete Medical Care Germantown & Germantown Aesthetics Surgery Center
Hospital Laparotomy privileges
Qualified in laparoscopic procedures
Obstetrical Family-centered care
Capable abdominal and vascular ultrasound
Training, experience, and proven ability in office cosmetic surgery, facial and body

Board Certification	American Academy of Family Physicians 8880 Ward Parkway Kansas City, Missouri 64114-2797 September 1995–present	Diplomat 1995-2000 Fellow 2000-present
	American Board of Laser Surgery Diplomat	2009 - present
Medical Licensure	Tennessee #25017–Issued 10/26/93 State of Tennessee Division of Health Related Boards. Expires 6/30/2013	
	Idaho, pending licensure Utah, pending licensure	
Medical Education	May 2008	Fellow American Society of Cosmetic Breast Surgery
	July 1995–June 1996	The University of Tennessee, Memphis Fellowship in Advanced Women's Health Director, Charles E. Couch, M.D., FACOG
	July 1992–June 1995	The University of Tennessee, Memphis UT/Saint Francis Family Practice Residency Program, Memphis, TN
	August 1988–June 1992	University of Texas at Houston Medical School, Houston, Texas–M.D. Degree June 1992
Previous Education	January 1987–May 1987	University of Houston, Houston, Texas Graduate Studies

	September 1981–May 1986	Baylor University Waco, Texas B.S. Degree in Biology
Society Memberships	American Institute of Ultrasound in Medicine (AIUM) 1994–present Association of American Physicians and Surgery 1999-present American Academy of Family Physicians (AAFP) 1992–present American Society of Cosmetic Breast Surgeons 2003-present National Society of Cosmetic Physicians 2011-present American Congress of Phlebology 2009-present	
Hospital Appointments	Baptist Memorial Hospital – East, Department of Family Medicine Chairman October 1999 – 2000 Baptist Memorial Hospital – East, Medical Executive Committee, 2000 Tenet/St. Francis Hospital, Maternal/Fetal Well-Being Committee 1998 – 2000 Methodist Hospital, FP/OB Joint Practice Committee 1998 - 2000	
University Appointments	The University of Tennessee, Memphis Department of Family Medicine **Clinical Instructor** July 1, 1995–June 30, 1996 **Associate Clinical Professor** July 1, 1996–present	
Hospital Appointments	Active Staff Saint Francis Hospital 5959 Park Avenue Memphis, TN 38119 August 7, 1995–present	Courtesy Staff Methodist Hospital 1265 Union Avenue Memphis, TN 38104 December 1, 1996–2003
	Active Staff Baptist Memorial Hospital 899 Madison Avenue Memphis, TN 38146 October 1996–present	Courtesy Staff Delta Medical Center 3000 Getwell Road Memphis, TN 38118 September 12, 1996–present (901) 369-8517; fax 369-8503

Professional Experience	Private Practice (August 1996–1999) Peabody Healthcare 6005 Park Avenue Suite 424B Memphis, TN 38119 Private Practice (August 1999–2002) Laurence Family Practice & Obstetrics 2195 West Street Germantown, TN 38138 Private Practice (August 2002–2008) Germantown Family Practice & Obstetrics 2195 West Street Germantown, TN 38138 Private Practice (2003–present) Germantown Aesthetics, LP 7485 Poplar Pike Germantown, TN 38138 Private Practice (August 2008–present) Complete Medical Care Germantown 7485 Poplar Pike Germantown, TN 38138 Private Practice (August 2009–present) The Vein Institute 7485 Poplar Pike Germantown, TN 38138	
Publications	Laurence, Gregory; Orientale, Eugene, Jr., "Colorectal Cancer: Screening Diagnosis and Management," Manual of Family Practice; ed.: Robert B. Taylor, publisher: Little Brown. 1996. Laurence, Gregory, "Obstetrical Privileging in Memphis," Tennessee Family Physician; ed.: J. Lou Manning, pg 8-9, winter 1999. Laurence, Gregory, "MemoryGel TM Breast Implant Post-Approval Study," IRB Company, Inc; ed.: Clinical Study. 5271 Mentor PAS	
Preceptorships	June 30 – July 3, 2001 July10 – July 12, 2002	Subfascial Breast Augmentation Internal Mastopexy J. Dan Metcalf, MD (Oklahoma City, OK)
	June 2003	Transumbilical Breast Augmentaion

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	June 2004	Robert Shumway, MD (LaJolla, CA)
	June 2003 June 2004	Biplanar Breast Augmentation Chip Splinter, MD (San Diego, CA)
	June 2004 June 2005	Transumbilical Breast Augmentation Peter Cheski, MD (Beverley Hills, CA)
References	Adam Baker, M.D. 2120 Merchants Row Ste 2 Germantown, TN 38138 Ph: (901) 362-7170 Susan Nelson, M.D. 2032 Satinwood Memphis, TN 38119 (901) 758-8287 William Macmillan Rodney, M.D. Chairman University of Tennessee Department of Family Medicine, 1989–1997 6575 Black Thorn Cove Memphis, TN 38119 (901) 753-0423	
Malpractice Insurance Carrier	State Volunteer Mutual Insurance Company 1M/3M coverage 8/5/96 to present 101 Westpark Drive, Suite 300, P.O. Box 1065 Brentwood, Tennessee 37024-1065 (615) 377-1999 or (800) 342-2239; fax (615) 377-9192	
DEA Certificate	BL3847083, exp 3/31/2014	
Honors	University of Tennessee Community Physicians Award for teaching medical students 2003	
	"Physician Champion" for Baptist Memorial Hospital Celebrate Nursing	
	Germantown News Reader's Choice Award "Best Physician" – 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011	
	Plastic Surgery Practice Best of 2011 Named 'One of the Top Cosmetic Surgeons in the Nation'	
	The Aesthetic Awards 2011-2012 Awarded 'Best Non-Surgical Facial Rejuvenation'	

Gregory N. Laurence, M.D.

7485 Poplar Pike, Germantown, TN 38138
901-752-4999

SUMMARY OF QUALIFICATIONS

Medical Director, Complete Medical Care Germantown and Germantown Aesthetics Skin Center
Hospital surgical privileges, Level III
Qualified in laparoscopic procedures
Qualified ultrasound imaging
Surgical qualifications:

- Multi-modality surgical and nonsurgical facial aesthetics
- Surgical body contouring
- Primary breast augmentation and augmentation-mastopexy

FAMILY

- Elizabeth, wife
- Jacob, son
- William, son
- Andrew, son

BOARD CERTIFICATION

September 1995 – Present | **American Academy of Family Physicians**
8880 Ward Parkway
Kansas City, MO 64144-2797

BOARD STATUS

2009 (eligible) | **American Board of Laser Surgery**
Diplomat 1995 – 1999 | **American Board of Family Practice**
Fellow 2000 – Present | **American Board of Family Practice**

MEDICAL LICENSURE

October 26, 1993 | **State of Tennessee Division of Health Related Boards**
Expires June 30, 2013 – #25017

MEDICAL EDUCATION

May 2008 | **American Society of Cosmetic Breast Surgery – Fellow**
July 1995 – June 1996 | **The University of Tennessee**
Memphis Fellowship in Advanced Women's Health, Charles E. Couch, M.D., FACOG
July 1992 – June 1995 | **The University of Tennessee**
Memphis UT/Saint Francis Family Practice Residency Program, Memphis, TN

PREVIOUS EDUCATION

August 2008 – June 1992 | **University of Texas at Houston Medical School**
M.D. Degree, Houston, TX
January 1987 – May 1987 | **University of Houston**
Graduate Studies, Houston, TX

PREVIOUS EDUCATION (CONT'D.)

January 1981 – May 1986 | **Baylor University**
Bachelor of Science in Biology, Waco, TX

HONORS AND AWARDS

2012 | **The Aesthetic Show, Las Vegas, NV**
"Best Non-Surgical Facial Rejuvenation Enhancement"
2012 | **Germantown Chamber of Commerce**
"Small Business of the Year"
2012 | **Germantown Chamber of Commerce**
"Small Business of the Year"
2012 | **Best Plastic and Cosmetic Surgeons**
"The Personal Touch"
2011 | **Best Plastic and Cosmetic Surgeons**
"Putting Patients First"
2001-2009 | **Germantown News Reader's Choice Award**
2003 | **Community Physicians Award**
Community Physicians Award for teaching medical students
2003 | **Baptist Memorial Hospital**
Celebrate Nursing – "Physician Champion"

SOCIETY MEMBERSHIPS

2013 | **Tennessee Society of Laser Medicine and Surgery**
2011 – Present | **American Academy of Cosmetic Surgery (AACS)**
2003 – Present | **American Society of Cosmetic Breast Surgeons**
1994 – Present | **American Institute of Ultrasound in Medicine (AIUM)**
1999 – Present | **Association of American Physicians and Surgery**
1992 – Present | **American Academy of Family Physicians (AAFP)**
2011 – Present | **American College of Phlebology, Aesthetic Faculty**

HOSPITAL APPOINTMENTS

August 7, 1995 – Present | **Tenet/Saint Francis Hospital, Memphis, TN**
Active Staff
October 1996 – Present | **Baptist Memorial Hospital, Memphis, TN**
Active Staff
December 1, 1996 – Present | **Methodist Hospital, Memphis, TN**
Courtesy Staff
September 12, 1996 – Present | **Delta Medical Center, Memphis, TN**
Courtesy Staff
2000 | **Baptist Memorial Hospital, Memphis, TN**
Medical Executive Committee
2000 | **Methodist Hospital, Memphis, TN**
FP/OB Joint Practice Committee
1999 – 2000 | **Baptist Memorial Hospital, Memphis, TN**
Chairman, Department of Family Medicine
1998 – 2000 | **Tenet/Saint Francis Hospital, Memphis, TN**
Maternal/Fetal Well-Being Committee

UNIVERSITY APPOINTMENTS

July 1, 1996 – present | **The University of Tennessee, Memphis**
Associate Clinical Professor, Department of Family Medicine
July 1, 1995 – June 30, 1996 | **The University of Tennessee, Memphis**
Clinical Instructor, Department of Family Medicine

PROFESSIONAL EXPERIENCE

2012 | **Product Launch of New Medical Device**
Kuwait
1996 – 1999 | **Peabody Healthcare, Memphis, TN**
Private Practice
1999 – 2002 | **Laurence Family Practice & Obstetrics, Germantown, TN**
Private Practice
2002 – 2008 | **Germantown Family Practice & Obstetrics, Germantown, TN**
Private Practice
2008 – Present | **Complete Medical Care of Germantown, Germantown, TN**
Private Practice
2009 – Present | **The Vein Institute, Germantown, TN**
Private Practice
October 2012 | **Tennessee Academy of Family Physicians**
Alternate Delegate from District 10, Memphis Chapter
Shelby County President
October 2013 | **Tennessee Academy of Family Physicians**
Alternate Delegate from District 10, Memphis Chapter
Shelby County President

PUBLICATIONS

Laurence, Gregory; Orientale, Eugene, Jr., "*Colorectal Cancer: Screening Diagnosis and Management*," Manual of Family Practice; ed.: Robert B. Taylor, publisher: Little Brown. 1996.
Laurence, Gregory, "*Obstetrical Privileging in Memphis*," Tennessee Family Physician; ed.: J. Lou Manning, pg 8-9, winter 1999.
Laurence, Gregory, "*MemoryGel TM Breast Implant Post-Approval Study*" IRB Company, Inc; ed.: Clinical Study. 5271 Mentor PAS
Laurence, Gregory, "*Implant Rippling and Palpability*" Mugea T. Shiffman MA (ed), New Frontiers in Aesthetic Surgery of the Breast; 2013

PRECEPTORSHIPS

June 2005 | **Peter Cheski, M.D., Beverly Hills, CA**
June 2004 | **Chip Splinter, M.D., San Diego, CA**
June 2004 | **Robert Sumway, M.D., LaJolla, CA**
June 2004 | **Transumbilical Breast Augmentation**
June 2003 | **Transumbilical Breast Augmentation**
June 2003 | **Biplanar Breast Augmentation**
June 10, 2001 – July 12, 2002 | **J. Dan Metcalf, M.D., Oklahoma City, OK**
June 30, 2001 – July 3, 2001 | **Subfascial Breast Augmentation Internal Mastopexy**

EXHIBIT O

PO Box 83720
Boise, Idaho 83720-0058

(208) 327-7000
info@bom.idaho.gov
bom.idaho.gov

STATE OF IDAHO
BOARD OF MEDICINE

PHYSICIAN AND SURGEON LICENSE RENEWAL APPLICATION FORM

LICENSE NO: **Expiration Date: 06/30/2015**

The Board of Medicine must receive your license renewal application and payment before the expiration date printed above or your license will be cancelled.

One Year Renewal Fee

[ ] Two Year Renewal Fee

Practice

[ ] Full Time	[ ] Locum tenens
[ ] Part Time	[ ] Inside Idaho
[ ] Retired	[ ] Outside Idaho
[ ] Not Practicing	
(Select only one)	(Select all that apply)

Renewal fee includes an administrative processing fee of **$20.00**.

1. **CHECK THE APPROPORIATE RESPONSE TO EACH QUESTION BELOW**
2. **READ AND SIGN THE AFFIDAVIT**
3. **INCLUDE LICENSE NUMBER ON CHECK OR MONEY ORDER (NO CASH PAYMENTS)**
4. **SEND PAYMENT AND COMPLETED RENEWAL APPLICATION TO THE BOARD OF MEDICINE (ADDRESS AT TOP OF FORM)**

RENEWAL QUESTIONS - Since the date of your last application for license renewal, have you:

	Yes	No	
A.	[ ]	[ ]	Had an application for a professional license denied or refused?
B.	[ ]	[ ]	Been terminated from any residency or fellowship program?
C.	[ ]	[ ]	Been investigated by any licensing board, hospital, healthcare organization, agency or professional association in connection with incompetency, practice act violations, unprofessional conduct or unethical conduct?
D.	[ ]	[ ]	Been subject to informal or formal proceedings by the federal government or any branch of the military, licensing board, hospital, healthcare organization, agency or professional association to revoke, suspend, restrict or limit a professional license/registration/permit?
E.	[ ]	[ ]	Been subject to informal or formal proceedings which required or resulted in the surrender of a state and/or federal narcotic registration certificate?
F.	[ ]	[ ]	Had hospital privileges removed or resigned hospital privileges to avoid formal or informal action?
G.	[ ]	[ ]	Been a party or defendant in any malpractice proceedings?
H.	[ ]	[ ]	Been arrested, cited, charged with or convicted of a felony or misdemeanor other than minor traffic violations, regardless of the outcome?
I.	[ ]	[ ]	Had any serious physical or mental condition which in any way impairs or limits your ability to practice your medical profession with reasonable skill and safety?
J.	[ ]	[ ]	Had issues with the use of alcohol, stimulants, habit forming and / or illegal drugs which in any way impairs or limits your ability to practice your medical profession with reasonable skill and safety? (Voluntary PRN or PHP participants may answer NO)
K.	[ ]	[ ]	IDACARE: Ensured that your IDACARE profile is current in accordance with Idaho Code Section 54-4601?
L.	[ ]	[ ]	ATTESTATION: I attest that I have completed 40 hours of Category 1 Continuing Medical Education in the last 2 years. (20 hours of Category 1 CME every 1 year)
M.	[ ]	[ ]	ATTESTATION: I attest that, as a licensee, I will serve as a physician panelist for prelitigation screening panels when called upon to do so, as REQUIRED pursuant to IDAPA 22.01.01.081.

AFFIDAVIT: I hereby certify under penalty of perjury that my responses to the above are true and correct, and that I am lawfully entitled to renew the license noted above.

_____ _____

Signature of Applicant Date

EXHIBIT P

INFORMATION SHEET

DEFENDANT: GREGORY N. LAURENCE

YEAR OF BIRTH: 1942

ADDRESS: Germantown, TN

COMPLAINT FILED? _____YES ___x_____NO
IF YES, PROIVDE MAGISTRATE CASE NUMBER_____

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? _____YES _____NO

OFFENSE:	COUNT 5:	26 U.S.C. § 7212(a), Corrupt Endeavor to Obstruct or Impede Due Administration of IRS Laws, and Aiding and Abetting
	COUNT 6:	18 U.S.C. § 1503, Obstruction of Justice
LOCATION OF OFFENSE:		County of Denver, CO
PENALTY:	COUNT 5:	NMT 3 years' imprisonment, a fine of NMT the greater of $250,000 or 2x the gain/loss from the offense, or both; 3 years' supervised release; $100 special assessment.
	COUNT 6:	NMT 10 years' imprisonment, a fine of NMT the greater of $250,000 or 2x the gain/loss from the offense, or both; 3 years' supervised release; $100 special assessment.

AGENT: Special Agents Michelle Hagemann & Richard Ptak, IRS-CID

AUTHORIZED BY: Matthew T. Kirsch & Anna Edgar, Assistant U.S. Attorneys

ESTIMATED TIME OF TRIAL: Over five days

THE GOVERNMENT will not seek detention in this case.

OCDETF case: NA

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED SEPTEMBER 9, 2013

Undersigned counsel for the Defendants hereby certifies that the Court ordered exchange of information conference with counsel for the Plaintiff was conducted

October 22, 2013 and that a discussion was held on matters specified by Rules 16(a) and 16(b), I.R.C.P. and the attorneys for the parties engaged in an exchange of information. The subject of settlement or alternate dispute resolution was brought up by Defense counsel and discussed. For the first time in the history of the case, counsel for the Plaintiff said that his client would agree to mediation, even though the trial is scheduled to start November 5, 2013. Defense counsel had to decline the untimely suggestion of mediation due to the date the trial was to start, the impossibility of arranging mediation on such short notice and the fact that the bulk of the trial preparations had been completed and that defense counsel would be completely occupied with continued trial preparations.

Persons disclosed as possible witnesses for the Defendants

Dr. Brian Kerr

Susan Kerr

Briana Dumas

Donna Berg

Dr. Thomas Coffman

Dr. Charles Garrison

Dr. Gregory Laurence

Dr. Alan Frankle

Dr. John Lundeby

Dr. Geoffrey Stiller

Stephanie Miller

Dr. Karl Olson

Dr. Matthew Campbell

Dr. Glen Groben

Dr. Billy Morgan

Dr. Howard Schaff

Dr. Bertram Stemmler

Melissa Fellows

Cody Murphy

Wendy Vanderburgh

Dr. Tisha Fujii

Charles Ballard

Descriptive list of all exhibits proposed to be offered in evidence by the Defendants

1. Curriculum vitae of Dr. Kerr;

2. Curriculum vitae of Dr. Laurence;

3. Curriculum vitae of Dr. Garrison;

4. Curriculum vitae of Dr. Coffman;

5. Curriculum vitae of Dr. Frankle;

6. Curriculum vitae of Dr. Lundeby;

7. Curriculum vitae of Dr. Stiller.

8. Medical records of Dr. Kerr and Silk Touch Laser.

9. Records of Elmore Medical Center for treatment of Krystal Ballard.

10. Records of Elmore Ambulance Service for care and treatment of Krystal Ballard.

11. Records of Life Flight for care and treatment of Krystal Ballard.

12. Records of St. Alphonsus Regional Medical Center for treatment of Krystal Ballard.

13. Records of Ada County Coroner.

14. Autopsy Report for Krystal Ballard.

15. 21 photographs of Krystal Ballard taken by Dr. Kerr for his operative procedure.

16. 43 photographs of Krystal Ballard taken at autopsy.

17. 6 photographs of Susan Kerr that depict the positions of Krystal Ballard for the operative procedure of Dr. Kerr.

18. Photographs of brain and kidney tissue from the autopsy of Krystal Ballard prepared by Dr. Garrison that show the presence of fat emboli.

19. Autopsy tissue slides.

20. 4 photographs of Krystal Ballard that depict the entry sites by markings for liposuction and fat transfer.

21. Report of Dr. Morgan.

22. CT study of Krystal Ballard of July 25, 2010.

23. Report of Dr. Stemmler for chest x-ray of Krystal Ballard of July 25, 2010.

24. Report of Dr. Schaff for chest x-ray of Krystal Ballard of July 25, 2010.

25. Visible glass container that shows the quantity of fluid measured in milliliters or the equivalent in cubic centimeters.

26. Medical devices, equipment, supplies, packaged material, autoclave and instruments used by Dr. Kerr for his procedures with photographs of the same.

27. Compilation of data and database for operative procedures of Dr. Kerr by date, procedure and patient's first name from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 and the number of liposuction procedures, consisting of a total of 338 procedures.

28. Documents, records, material, data and calendars produced with Defendants responses to Plaintiff's First Requests for Production of Documents dated June 29, 2012.

29. For illustrative purposes, the following medical artist illustrations:

a. 18 depicting liposuction of anatomy with and without the cannula.

b. 1 depicting anatomy for fat transfer in the bilateral buttocks.

c. 1 depicting various tissue layers.

d. 1 depicting the content of the abdomen.

e. 1 depicting the urinary system.

f. 1 depicting gram negative and gram positive bacteria or rods.

Exhibits counsel have agreed may be received in evidence without objection:

Defense exhibits to which this section applies are numbers 1 through 16, 19, 21, 22, 23 and 24.

The rest of defense exhibits are objected to by the Plaintiff on all grounds allowed by law.

Plaintiff's exhibits to which this section applies are numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 24 and 25.

The rest of Plaintiff's exhibits are objected to by the defense on all grounds allowed by law except that no objections will be asserted to the following exhibits on the basis of authenticity – numbers 12, 13, 15, 16, 17 and 18.

The Plaintiff disclosed the following exhibits at the exchange of information conference that undersigned counsel has numbered 1 through 37.

1. Medical records – charts for Silk Touch, Elmore Ambulance, Elmore Medical Center, St. Alphonsus Regional Medical Center, Ada County Coroner including Autopsy Report;

2. Cell phone record of Silk Touch;

3. Curriculum Vitaes of Dr. Sorensen, Dr. Nichols, Dr. Armitage and Cornelius Hofman;

4. Funeral placard;

5. Funeral placard;

6. Photo of Charles and Krystal;

7. Photo of Charles and Krystal;

8. Framed photos of Charles and Krystal;

9. Photo of Krystal tubing;

10. Marriage License;

11. Death Certificate;

12. Tillman Funeral Home invoice;

13. Artistic Flowers invoice;

14. Memorial program;

15. Bill from St. Alphonsus;

16. Bill from Elmore Medical Center;

17. Bill from Rost Funeral Home;

18. Bill from Lifeflight;

19. Memorandum – Extension of Enlistment for PCS (Elmendorf);

20. USAF Records Certification;

21. Line of Duty Determination;

22. Awards and Decorations info;

23. Air Force Achievement Medal;

24. Air Force Commendation Medal;

25. DJMS LES – Krystal;

26. DJMS LES – Charles;

27. Letter from Major Thomas Brown to Charles expressing sympathies;

28. Statement of Service;

29. Enlisted Performance Review 2010;

30. EPR 2009;

31. EPR 2008;

32. EPR 2007;

33. Reenlistment Eligibility Annex;

34. Air University CCAF Transcript;

35. BSU Transcript;

36. Embry-Riddle Transcript; and

37. University of Maryland Transcript.

DATED this 29th day of October, 2013.

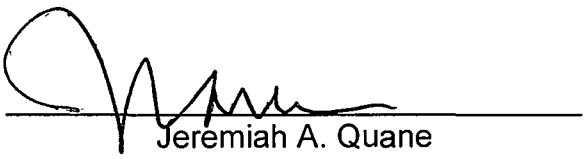
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2013, I served a true and correct copy of the foregoing CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED SEPTEMBER 9, 2013 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896



Jeremiah A. Quane

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS IN LIMINE

This Memorandum is submitted in opposition to Plaintiff's fifteen Motions in Limine filed on October 22, 2013. For ease of organization, this Memorandum tracks the order of Motions filed by the Plaintiff.

GA

I. The possibility that the Plaintiff may remarry

Plaintiff contends that the defense should be precluded from offering any argument, testimony or evidence pertaining to the issue of whether he will ever remarry claiming that it is irrelevant and improper speculation. However, to the extent the Plaintiff and his experts seeks damages from the Defendants for increased costs associated with caring for a home, the defense should be entitled to ask questions to both the Plaintiff and his experts how the damages picture would change if the plaintiff remarried.

Plaintiff cites the case of ***Westfall v. Caterpillar, Inc.***, 120 Idaho 918, 821 P.2d 973 (1991) in support of his claim that the defense should be precluded from offering any evidence at trial regarding the probability that Charles Ballard may remarry. ***Westfall*** dealt with the death of a log skidder operator and a products liability case involving a metal brush guard on a piece of Caterpillar equipment. Of the many issues on appeal, one dealt with whether the district court properly granted the Plaintiff's Motion in Limine precluding the defendant from offering evidence that the plaintiff had remarried since the death of her husband. ***Id.*** at 922. The appellate court agreed that the district court did not abuse its discretion in precluding the admission of such evidence at trial.

While the ***Westfall*** case can be interpreted to stand for the proposition that it is not proper to argue that the jury should consider the fact that the decedent's surviving spouse had a possibility of remarrying, this is not the purpose for which such testimony or evidence would be offered by the defense. Instead, the defense contends that in a wrongful death action, it is proper to impeach an expert witness who is

testifying on the alleged amount of economic damages by reviewing the assumptions that underlie expert's opinion. This would include asking whether the expert was assuming that the surviving spouse would or would not remarry.

The defense should be allowed to cross examine the Plaintiff's damage expert regarding the fact that in his loss of consortium claim he is assuming Charles Ballard does not get remarried. This was the very issue addressed by the Michigan Supreme Court in the case of ***Schaible v. Myers***, 411 Mich. 704, 311 NW2d 297 (Mich. 1981). ***See Schaible*** Decision attached to the Affidavit of Counsel in Opposition to Plaintiff's Motions in Limine as Exhibit A.

Schaible involved a motor vehicle accident where liability was admitted. During the trial, the plaintiff called a damages expert and on cross examination defense counsel questioned the assumptions underlying the expert's opinions and conclusions. ***Id.*** at 299. One of the assumptions the expert was asked related to whether or not the plaintiff would remarry or things would stay the way they were until his death. ***Id.*** Reversing the decision of the Michigan Court of Appeals, the court stated:

> The jury was not told to take into account the possibility that the plaintiff might remarry. Rather it listened to an exposition of the many assumptions upon which the expert witness relied in making his calculations of the plaintiff's economic loss. Such an exposition is necessary to an intelligent understanding and evaluation of the worth of the expert's opinion.
>
> Unlike the situation in ***Wood***, this expert's assumption concerning remarriage was of interest to the defendants solely because of its effect on the expert's opinion as to the amount of economic damages. It was proper for defendant to examine fully the assumptions which underlay the expert's opinion. **By calling into question the worth of an expert's many assumptions, defense counsel can seek to show that what appears to be the opinion of an expert is no**

more than conjecture which the jury can then be urged to ignore.

Schaible, 311 N.W.2d at 299-300 (emphasis added).

Because this issue was never before the court in ***Westfall***, Plaintiff cannot fairly interpret that decision so broadly as to preclude the defense from doing precisely what was approved by the court in ***Schaible***. In this case, the Plaintiff's expert Cornelius Hofman, has included predicted losses for financial support and household services based on the assumption that the plaintiff will never remarry. ***See*** assessment of economic loss report of the GEC Group attached to the Affidavit of Counsel in Opposition as Exhibit B. Regardless of whether or not the Plaintiff does remarry, the defense should be entitled for purposes of cross examination to address the assumptions Mr. Hofman made to show, just like the court in ***Schaible*** discussed as to whether "what appears to be the opinion of an expert is no more than conjecture which the jury can then be urged to ignore." ***Id.*** For this reason, to the extent the Plaintiff's Motion in Limine is overbroad and seeks to preclude any such reference regarding the probability of remarriage, it should be denied.

II. Krystal Ballard's purported noncompliance

This entire section of Plaintiff's brief raises complaints related to factual issues which go to the weight the jury should give to the evidence as opposed to the legal question of whether it should be admissible. The defense contends this is not the proper subject of a motion in limine. Plaintiff's brief identifies numerous instances of noncompliance by the decedent as identified in both the medical records and by communications with Dr. Kerr, but then claims that the evidence is not sufficient to allow any of it to be presented to a jury. Instead, Plaintiff takes the position that the defense

should be precluded from presenting any evidence whatsoever of patient noncompliance.

The jury is entitled to hear issues which related to the patient care involved in this case which include repeated acts of noncompliance. For example, the evidence in this case will show that the patient failed to present at Dr. Kerr's office with someone to drive her home following the procedure as she had been told, she failed to take her narcotic pain medications, she failed to tell her husband she had the procedure so he could help care for her at home, she did not refrain from physical activities as she was told to do after surgery, she misrepresented to her husband that she had fallen down stairs causing her to be sore rather than telling him the truth about her procedure and why she was in pain, she did not want to take any medications that may show up on a drug test by the military, in part, because she failed to inform anyone at the military as she was required to do that she was going to have the surgery performed to begin with, she failed to return or follow up with Dr. Kerr when her condition worsened, she never told her husband about her prior liposuction procedure and she failed to present to the hospital in Mountain Home until her condition had massively deteriorated. All of these issues the jury should be entitled to hear about when presented properly. It is not each of these events in isolation that makes them nearly as relevant as when they are all combined, at which point they aptly illustrate a pattern of behavior on behalf of the patient to conceal her condition and to prevent others from being able to assist her.

Plaintiff argues the fact the patient was initially prescribed narcotic pain medication by Dr. Kerr to be taken every four hours or as needed for pain, but then asked for a non-narcotic pain medication is wholly irrelevant and therefore inadmissible

at trial. Plaintiff seeks to look at this issue standing alone as opposed to taking it in conjunction with all the other issues outlined above. It is not disputed that the patient was within her right to take something for pain other than the prescribed narcotic pain medication. Physicians do not force patients to take any medication, but rather they prescribe them for a condition and expect the patient will comply with the physician orders. The fact that the patient elected to take the nonnarcotic pain medication because she was concerned about a narcotic drug showing up on a drug screen makes it relevant because it is proof that she did not inform her employer that she was having this procedure done. This means that the patient had not told her employer that she would need to be on light duty and not be able to participate in routine physical training exercises which the patient later admitted she had overdone her physical activities contrary to the instructions given to her by Dr. Kerr. All of these actions are not irrelevant as Plaintiff so desperately argues, but rather, taken together they establish this pattern of patient noncompliance by the patient.

The defense does not have the burden of proof and is entitled to present evidence of noncompliance by the patient as a basis for why the standard of practice was not violated in this case. Plaintiff's assertion that the defense "noncompliance theory rests upon irrelevant, highly prejudicial, factually unsupported, speculative and casually disconnected information" is simply not true. The medical records document issues of noncompliance that the jury should be allowed to consider. This is particularly true considering the records themselves will be in evidence and explained to the jury. The jury should be allowed to hear Dr. Kerr and his experts testify that they had never before had a patient following a liposuction procedure ask what medications a patient

could take that would not show up on a drug test. The Plaintiff himself admits he did not know the patient was having the procedure done.

Why all of these actions were taken or not taken by the patient and whether she put her vanity and secrecy above her recovery will be up to the jury to conclude. In this regard, Plaintiff's brief on this issue does nothing more than to point out areas of perceived factual weakness that can easily be advanced at trial. Plaintiff's counsel will be free to bring up on cross examination with each witness the very issues raised in his brief as to why the jury should give certain evidence regarding noncompliance and/or concealment little or no weight. Furthermore, where the proper support for some aspect of patient noncompliance is deemed speculative, the court is well capable of ruling upon an appropriate objection at that time. Contrary to the Plaintiff's contention, the defendants are not limited to only being able to advance evidence of patient noncompliance solely for the purpose of establishing a comparative fault defense at trial, nor is such evidence only admissible if it directly caused the patient's death. Plaintiff cites no controlling case authority for such a proposition.

Rather, the jury is entitled to consider this evidence in connection with evaluating whether or not the Defendants violated the standard of health care practice and whether the actions of the patient impacted the medical care she received and the decisions by her health care providers. In this regard, the physicians, as expert witnesses, are entitled to discuss their habit, custom and experience in treating patients following cosmetic surgery and how issues of noncompliance both generally and specifically in this case, impact their practice decisions and compliance with the standard of practice. It would therefore be improper to invoke a wholesale prohibition,

at the outset of the trial, as to any evidence of patient noncompliance. As a result, the plaintiff's motion on this issue should be denied.

III. Absence of infections involving other patients of Dr. Kerr

Plaintiff seeks an order precluding the defense from being able to advance as proof in this case that the patient did not suffer from an infection caused by a breach in sterility associated with cleaning the reusable surgical equipment since there have been no other such cases in the years of Dr. Kerr's practice. In support of his Motion in Limine, Plaintiff advances two arguments: 1) that opinions involving Dr. Kerr's lack of infections were not timely disclosed by the defense and that should therefore be precluded; and 2) that evidence of Dr. Kerr's infection rates are irrelevant and should therefore be excluded. As outlined below, Plaintiff's motion fails on both counts.

Many of the allegations in Plaintiff's complaint and expert witness disclosures relate to the cleaning, disinfecting and sterilization of reusable medical equipment. ***See*** Plaintiff's Complaint and Expert Disclosures attached to the Affidavit of Counsel in Opposition as Exhibits C and D. On this issue, the defense has consistently brought up throughout this litigation that Dr. Kerr has never had any issues with breach of sterility or equipment failures causing post-operative infections regarding any of his liposuction patients. Indeed, Plaintiff's brief at page 13 acknowledges this very issue was addressed during the deposition of Dr. Kerr taken all the way back in January of this year. More to the point, however, this information and the expert opinions related to this issue were timely set forth in the defense expert witness disclosures. For example, the defense expert witness disclosure served on Plaintiff's counsel on June 3, 2013, contained multiple opinions regarding the lack of postoperative infection rates to be

addressed by the defense experts.

Dr. Kerr's expert disclosure at page 6 of exhibit O attached to the Affidavit of Plaintiff's Counsel Motion in Limine:

> He will testify that he employed the use of proper cleaning and sterilization techniques for his equipment and instruments and that he utilized proper procedures and supplies. Dr. Kerr will explain the procedures he performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will explain the same matters in regard to the multitude of procedures her performed before the procedure he performed on Krystal Ballard.

Dr. Kerr's Expert Disclosure at page 14 of exhibit O attached to the Affidavit of Plaintiff's Counsel Motion in Limine:

> Dr. Kerr will render the opinion, more likely than not, that the gram negative bacterial rods, if they existed, were introduced into the patient's surgical site sometime after the procedure rather than being introduced during the procedure. He has never had a patient experience such an infection in all his years. Dr. Kerr will testify that few of his patients who have undergone a lipolysis procedure have ever experienced any kind of post-operative infection and none of those patients died and all of them were diagnosed based on clinical observation. These were limited cellulitis based on clinical suspicion and not based on a culture result. Dr. Kerr will explain that if the opinions of Dr. Dean Sorensen are valid, there should have been other infections of patients before and after the procedure on Krystal Ballard, and there were not.

Dr. Laurence's expert disclosure at page 24 of exhibit O attached to the Affidavit of Plaintiff's Counsel Motion in Limine:

> Dr. Laurence will discuss the standard of health care practice employed at his own surgical facility in Tennessee for achieving sterile operating conditions and the disinfection

> of instruments and equipment and maintaining a sterile operative field and that the similar actions and efforts undertaken by Dr. Kerr as have been described for the procedure on Krystal Ballard in this case were used and exceeded in his opinion. Dr. Laurence will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility procedures employed by the Defendants in this case were appropriate and working properly at the time of the surgery at issue in this case.

Dr. Laurence's expert disclosure at page 27, Dr. Lundeby's expert disclosure at page 67, and Dr. Stiller's expert disclosure at page 90 of exhibit O attached to the Affidavit of Plaintiff's Counsel Motion in Limine:

> [He] will testify regarding the significance of the fact that the procedures Dr. Kerr performed on patients the days following his procedure on Krystal Ballard, starting on July 23, 2010 through July 31, 2010 in which he utilized the same sterile and disinfection procedures he employed in his procedure on Krystal Ballard and there were no infections or infectious conditions with any of the patients. He will discuss how if there had been a failure to adequately sterilize the equipment in question that evidence of that should have shown up not only in all of the operative sites on this patient, but also in all of the operative sites of the subsequent patients which did not occur in this case. [He] will similarly discuss the significance of these same matters in regards to the multitude of procedures Dr. Kerr performed before the procedures performed on Krystal Ballard.

Dr. Lundeby's expert disclosure at page 64 of exhibit O attached to the Affidavit of Plaintiff's Counsel Motion in Limine:

> Dr. Lundeby will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero, with possibly one or two minor cellulitis cases that were easily treated successfully with no adverse consequences. He will comment upon how this is evidence that the sterility

procedures employed by the Defendants in this case were adequate and working properly at the time of the surgery at issue in this case.

Although he certainly could have asked each of the defense experts about this issue during depositions (since he deposed all of them), the only defense expert that Plaintiff's counsel elected to question regarding infection rates was Dr. Lundeby:

> Q. Okay. It says, "Dr. Lundeby will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero" and it talks about some other things. But as far as your knowledge of infection rates, have you been provided -- Well, first of all, do you have an understanding whether or not Dr. Kerr tracks his patient complications in some type of written documentation?
>
> A. I'm thinking back to his deposition, and without reviewing it, I think that he said that they tracked it but not in written form.
>
> Q. Okay. I mean have you been -- I mean I know you brought everything that you've seen. You've not seen Dr. Kerr's patient charts from other patients before or after Krystal Ballard's procedure, correct?
>
> A. No.

See Depo. of Dr. Lundeby, p. 58, ll 1-18 attached to the Affidavit of Counsel in Opposition to Plaintiff's Motion in Limine as Ex. O.

The above disclosure and deposition excerpts totally rebut Plaintiff's false claims that this issue was somehow not timely disclosed in discovery in this case. The fact that the defense experts have not reviewed all of the other individual patient charts for Dr. Kerr's other liposuction patients does not impact the admissibility of the infection rates issue before the jury. Instead, as with much of Plaintiff's Motions in Limine, this simply goes to the weight the Plaintiff can argue the jury should assign it. The fact that Plaintiff does not like the trial exhibit which the defense prepared and produced early

which merely demonstrates the number of patients and the area of the body where the liposuction was performed, does not change the fact that the defense opinions on this issue were timely disclosed.

This leaves the second argument advanced by Plaintiff regarding whether data relating to the absence of infections is relevant to the issues in this case involving the death of Krystal Ballard. In this regard, the court need look no farther than the testimony of Plaintiff's own expert, Dr. Sorensen. Dr. Sorensen is a plastic surgeon practicing medicine in Boise. During his August 21, 2013 deposition he gave the following testimony:

> Q. Okay. Have you formed an opinion as to what is the best evidence that a doctor utilizes appropriate sterile conditions during surgery, disinfectant procedures with equipment, operating room, and the entire area where the procedure is done, cleansing of instruments -- what's the best proof that that is being done appropriately? What would be the best proof?
>
> **A. I think lack of complications would be the best answer.**

See Sorensen depo p. 152, ll 6-16. (emphasis added), attached to the Affidavit of Counsel in Opposition as Ex. E.

Per the expert testimony of Dr. Sorensen, he has made it clear that the best evidence of whether a physician is using appropriate sterile technique and engaging in proper cleaning, disinfecting and sterilization of his instruments is by looking at his rate of complications – the very evidence that Plaintiff is arguing is irrelevant. Due in part to the above testimony by Dr. Sorensen, the defense prepared a trial exhibit which simply summarizes records in order to demonstrate the lack of complications by the Defendants for any patients following liposuction and/or fat transfer

procedures. This exhibit simply summarizes for the jury the timely disclosed expert opinions of both Dr. Kerr and the defense experts which Dr. Sorensen's own testimony vouches for in terms of its key importance to the standard of practice issues in this case.

The ancillary arguments advanced by Plaintiff's counsel that he has not been provided with the medical records for all of Dr. Kerr's other liposuction patients or that he desires to challenge and/or further depose Dr. Kerr's wife regarding her ability to assist with compiling any prior surgical data does not impact the admissibility of this issue.[1] Again, it goes to the weight the evidence should be given by a jury and the arguments Plaintiff's counsel can advance as to why such evidence should not be credible as he has argued in his brief. Plaintiff should not be allowed to get around the fact that his own expert clearly states that the infection rates by Dr. Kerr are the "best evidence" of whether they are properly cleaning their equipment.

This is precisely how hospitals and clinics review their sterility protocols and whether they are being followed is by looking at infection rates of not one, but large groupings of patients to look for trends and patterns. This is powerful testimony which directly contradicts and belies Plaintiff's argument that other patients' alleged lack of infections is somehow irrelevant for purposes of establishing whether Defendants satisfied the standard of practice as to Krystal Ballard. Indeed, this was discussed by Plaintiff's counsel with the defense infectious disease expert, Dr. Thomas Coffman, during his deposition when he stated:

Q. So to compare infection rates at a hospital that might

[1] Federal HIPAA rules as well as the State of Idaho Board of Medicine rules governing patient privacy preclude the defense from disclosing the charts of the patients not related to this case. Plaintiff never filed any motion to compel these voluminous patient charts and it is improper for him to claim on the eve of trial that this issue should be off limits at trial when he took no action to timely address it with this court prior to trial.

> have orthopedic procedures, abdominal procedures, bowel procedures and comparing it to a facility like Silk Touch that may do liposuction and fat transfer is kind of like comparing apples and oranges in a sense; correct?
>
> A. Yeah. We would only -- we don't really try to compare hospital-wide stuff. We look at specific surgery types. So we'd look at joint replacements. We look at spine fusions versus simple laminectomies, mastectomies, breast reconstructions, intra-abdominal cases. And we look at those separately. We don't try and group everything together because the rates are so variable.

See Depo. of Dr. Thomas Coffman, at p. 97, lls 6 to 21 attached to the Affidavit of Counsel in Opposition to Plaintiff's Motions in Limine as Ex. F.

All of the defense experts, as well as the Plaintiff's lone standard of practice expert will testify that if Dr. Kerr and his staff were engaging in improper cleaning, disinfecting and sterilization techniques of medical equipment that they should have a clear history of other patients suffering from post-operative infections related to any alleged breach in sterility. The failure to properly clean and sterilize medical equipment does not present itself as an isolated problem that occurs only one time. This is exactly why one would expect to see a breach of sterility involving at least several procedures right before and/or right after the one at issue.

The fact that there were no other cases of any alleged breach in sterility or post-operative infection is strong evidence that the defendants were acting in compliance with the standard of practice associated with the cleaning, disinfecting and sterility of the medical equipment at issue in this case. Plaintiff provides no case authorities from any jurisdiction wherein infection rates were deemed irrelevant and therefore inadmissible for the purpose advanced in this case.

Also noticeably absent from Plaintiff's argument on this issue is what more

he would have asked at a further deposition of Ms. Kerr. Furthermore, when the defense refused to produce Susie Kerr for a second deposition, Plaintiff was informed he was welcome to take this issue before the court, but failed to do so. Now, he complains that the defense is somehow unfairly "ambushing" him when the reality is that he seeks to have the infection rates excluded at trial simply because he does not like the fact that the information identified as the "best evidence" by his own expert substantially hurts his case. Furthermore, Plaintiff's counsel had every opportunity to question Susie Kerr about this issue during her deposition.

> Q. Okay. Yesterday there was a discussion -- Mr. Quane had represented that you had compiled data on the number of liposuctions that had been performed, I think, through July 20 of 2010 as well as the number of fat transfers that had been performed by Dr. Kerr through July 20, 2010. Did you compile that data?
>
> A. Yes.
>
> Q. Okay. Where did those numbers come from? I know one was 199, I think, liposuctions 25 and 33 fat transfers
> . . . . .
>
> Q. Where did that information come from?
>
> A. Just from our database.
> Q. What kind of database do you maintain that would compile that information?
>
> A. The database that we run our transactions through.
>
> Q. Kind of explain that to me. How would you know -- If you've got this database and you're trying to find out how many liposuctions, how do you make a query into your database to identify which procedures were liposuction procedures?
>
> A. So they would be named "liposuction" or "fat transfer." So we would be able to pretty much -- pretty accurately be able to figure out a number of lipos, number of fat transfers.

Q. Do you keep some kind of running total as part of your business operations?

A. No, we don't keep a running total.

Q. Okay. Did you have to look—

A. I would have to go back and look.

Q. Okay. I mean, are these within the data for each patient and you'd have to look at each patient and say, "What did we do for them," or is it a separate database that would only reflect on a given day, like a calendar, what was done?

A. Okay. You'll have to break that one up because that was a little bit too much.

Q. When you look at this database, is it a database that you had to retrieve information like a liposuction procedure by looking at each patient's medical chart?

A. No.

Q. Is it a database where you would look at some type of scheduling calendar that you might have had to see what procedures were scheduled for a given day?

A. No.

Q. Okay. I'm just trying to think of where-- How do you input information into your database such that you can retrieve the number of liposuctions?

A. So there's a category, "lipo." There's a category, "fat transfer." And so when we run a transaction through it, it will keep track of the number of fat transfers and the number of lipos.

Q. Okay. What's the purpose of keeping that data?

A. Well, you'd want to know so that if you needed to go back and figure out what you did that day, then you'd be able to figure that out.

See Depo. of Susie Kerr at p. 144, ll 14 to p. 147, ll 5 attached to the Affidavit of Counsel in Opposition as Ex. G.

For the Plaintiff to suggest that evidence of other infections or lack thereof is irrelevant to this case is simply incorrect. Throughout discovery Plaintiff has claimed that the cleaning, disinfecting and sterilization techniques of the defendant facility were improper. He will argue to the jury that the staff at Silk Touch were poorly trained, that the facility was improperly set up, that Dr. Kerr was not properly trained or experienced to perform a surgery of this type in an office based setting, that proper cleaning materials were not used and that proper records of cleaning were not kept. Plaintiff's counsel seeks to broadly comment upon all of these issues at trial, but conversely wants to take the position that the defense cannot raise the obvious fact that if the cleaning, disinfecting and sterilization techniques were so deficient as alleged - then why weren't there rampant or at least multiple problems with postoperative infections involving any other patients. Plaintiff's Disclosures for his experts demonstrate his plan of attack and open the door for the defense to advance the lack of infections as a defense to any claim that the facility did not know what they were doing. Plaintiff's motion in limine on this issue is without merit and should be denied.

IV. Life Insurance and other collateral sources

The defense agrees that life insurance is a collateral source and does not oppose Plaintiff's motion on this issue. The defense will not seek to introduce evidence during the trial that Plaintiff received life insurance benefits following the death of Krystal Ballard. The jury will be free to draw whatever inferences they seek to form their own personal knowledge of what happens following the death of an active duty service

person. Health insurance payments for services for Krystal Ballard are not collateral sources for the Plaintiff, but rather Krystal Ballard or her Estate. They were paid or generated by the Air Force for Krystal Ballard and a recovery for then by the Plaintiff could constitute an unjustified windfall, since he did not pay them or incur a debt for them. The Plaintiff has no obligation to repay the Air Force or the insurer.

V. Whether Dr. Garrison's' Fat Embolism Opinions Were Timely Disclosed.

After learning additional opinions from the defense experts during their respective depositions, Plaintiff claims the defense did not timely disclose these opinions and now seeks to exclude them, particularly Dr. Garrison on the issue of fat embolism. In support, Plaintiff directs the court to the defense disclosure served on June 3, 2013, and points out that the opinions of Dr. Garrison in that disclosure did not include that the patient's death was due to fat embolism syndrome. On this basis, Plaintiff argues that such an opinion is untimely and should therefore be excluded at trial.

Plaintiff's argument fails to consider and comply with the requirements of Rule 26(b)(4) and should therefore be denied. This rule states in pertinent part:

> Discovery of facts known and opinions held by experts expected to testify, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by **interrogatory and/or deposition**, including:
>
> > (A)(i) A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within

> the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. ***See*** Rule 26(b)(4) (emphasis added).

Despite the fact that Plaintiffs' counsel took not one, but two depositions of Dr. Garrison and despite the fact that he has supplemented all of the Plaintiff expert witness opinions on the issue of fat embolism, he nevertheless seeks to have this court preclude seasonably supplemented expert opinions on the manufactured basis that they were somehow untimely. Plaintiff maintains this position despite the fact that Rule 26(b)(4) specifically states that a party may discover facts and opinions of experts acquired or developed in anticipation of trial by interrogatory **or** deposition. Here Plaintiff was allowed the opportunity to receive expert witness information from the defense by both means. Plaintiff could have relied wholly on the written interrogatory responses setting forth the opinions for the defense experts, however, he elected to also take the depositions of each and every defense expert. It was counsel for the Plaintiff who caused the opinions of Dr. Garrison on fat embolism to be disclosed and supplemented, not defense counsel. Had Plaintiff's counsel not brought up the subject at the deposition of Dr. Garrison, it would never have been disclosed or discussed.

Plaintiff's counsel concedes that Dr. Garrison only developed the opinions at issue days before his deposition was taken, but yet he perplexingly maintains that the additional disclosures in response to his own questioning about "other" opinions were somehow untimely. Plaintiff cites to no case authority in Idaho or anywhere else standing for the proposition that when you elect to take an expert's deposition and you ask him questions about his opinions that you can simply move the court to have them

excluded on such a basis. Counsel for the Defendants elected to depose only one of Plaintiff's experts and will otherwise rely on the written disclosures of Plaintiff's counsel for the substance of their opinions. Because Rule 26(b)(4) allows two options for acquiring the opinions of experts and because the Plaintiff elected to utilize both options, he is not entitled to exclude additional opinions learned at a deposition in direct response to his own questions.

Plaintiff rehashes much of the case authority cited elsewhere in his memo regarding the supplemental opinions of Dr. Garrison. The reality is that defense counsel provided numerous dates for Plaintiff to conduct the deposition of Dr. Garrison throughout the months of August and September, far in advance of the trial. Due solely to the unavailability of Plaintiff's counsel, this deposition was pushed off until late September. As explained by Dr. Garrison, during the preparation for his deposition, he re-reviewed the medical records and tissue slides and it became apparent to him that the cause of death was directly related to the patient having suffered from a fat embolism syndrome which he properly shared in response to questioning by Plaintiff's counsel.

Furthermore, in terms of fat embolism being an issue in the case, Plaintiff's brief does not relay to the Court the multiple direct references to the patient having suffered a fat embolism which were contained directly within the decedent's own medical records. The records from both Elmore Medical Center and St. Alphonsus Regional Medical Center which have been in the possession of Plaintiff's counsel for years reflect the fat embolism issue ***See*** Records of Betram Stemmler, M.D, attached to the Affidavit of Counsel in Opposition as Ex. H, records of Billy Morgan, M.D.

attached to the Affidavit of Counsel in Opposition as Ex. I, records of Howard Schaff, M.D. attached to the Affidavit of Counsel in Opposition as Ex. J.

Despite the fact that defense counsel provided a substantial over one hundred page long expert witness disclosure setting forth the opinions of the defense experts, during the deposition of Dr. Garrison, Plaintiff's counsel specifically asked him if he had any opinions regarding the issue of fat embolism – a topic not specifically mentioned in his disclosure. This was not a question that Plaintiff's counsel had any reason to explore unless he was looking for new opinions. Dr. Garrison provided him with a response to his own question addressing fat embolism, thereby supplementing his prior disclosure. This was discussed by Dr. Garrison during his deposition as follows:

> Q. First of all, Doctor, do you hold some opinion that Crystal Ballard had a fat embolism?
>
> A. I do.
>
> Q. Did Dr. Groben refer to a fat embolism in his autopsy?
>
> A. No, sir, he did not.
>
> Q. So you think he's wrong by not including fat embolism as a pathological diagnosis?
>
> A. Retrospectively, perhaps; but at the time, I don't think so.
>
> . . . . .
>
> Q. Yeah. Mr. Quane has filed a disclosure that identifies each of his experts and the subject matter upon which those experts are to testify. Have you seen that document?
>
> A. Yes, sir, I have.
>
> Q. Okay. And maybe I'm missing it, Doctor, does it talk about fat embolism as a diagnosis?
>
> A. No, it does not.

Q. When did you come up with a theory that Miss Ballard experienced a fat embolism?

. . . . .

A. After looking at this case and going over it since the disclosure was made, it was my opinion that there had to be more going on, so I went through the medical record again in detail and reread what all the notes were, reviewed the CT's and the X-rays that were done, both at Elmore and in Saint Al's. And the opinion that I came up with, or the thought that I came up with was based upon the fact that the clinical symptomatology was also clinical symptomatology that was looked at by the physicians of fat embolism syndrome, then I felt it was worth doing another search to look for it; and in doing so, I reviewed all the slides again, which have been reviewed several times by myself, as well as Dr. Groben, and whomever else has reviewed these slides, and I came to the opinion, after having reviewed the slides again, that this lady has fat emboli.

Q. Okay. My question was, Doctor: When did you come to that con -- when did you come to that conclusion?

A. Since this last disclosure was made.

Q. When? When was that, Doctor? You tell me when that last disclosure was made.

A. When was the last disclosure made? I can't give you a date. It's been in the last week or so.

See Depo. of Dr. Garrison at p. 29, lls. 6 to p.31, lls 11 attached to the Affidavit of Counsel in Opposition as Ex. K.

Q. (BY MR. QUANE:) Isn't it true that yesterday, the 22nd day of September of this year, is the first time you've brought up to my attention and discussed the situation involving the fat embolism?

A. That's correct.

Q. And isn't it true that my disclosure that I sent to you the second time you approved didn't mention fat embolism, correct?

A. That's correct.

See Depo. of Dr. Garrison at p. 66, lls 3 to 12 attached to the Affidavit of Counsel in

Opposition to Plaintiff's Motion in Limine as Ex. K.

Unhappy with the answer he received to his questions about fat embolism, Plaintiff's counsel demanded a second opportunity to depose Dr. Garrison regarding his opinions relating to fat embolism. Specifically to resolve Plaintiff's counsel's concerns about getting an adequate opportunity to depose Dr. Garrison on this issue, counsel for the defense allowed a second deposition to occur during which even more information and opinions relating to fat embolism was expressed. After taking two depositions of Dr. Garrison, Plaintiff's counsel then prepared and served supplemental expert opinions for all of his experts specifically rebutting any opinions advanced by Dr. Garrison on the issue of fat embolism syndrome. ***See*** Plaintiff's Fifth Supplemental Answers to Defendant's First Set of Interrogatories served on October 18, 2013, attached to the Affidavit of Counsel in Opposition at Ex. L. On this basis alone, Plaintiff has had the opportunity to fully explore each of the defense experts and in some instances taking multiple depositions and having the opportunity to submit rebuttal expert disclosures. The defense disputes that the Plaintiff has been placed at any disadvantage for purposes of trial and maintains that the pending motion is without merit and should be denied.

VI. Defense Experts Knowledge of the Local Standard of Practice

Plaintiff contends that Drs. Stiller and Laurence failed to properly familiarize themselves with the standard of practice applicable to Dr. Kerr. Plaintiff's counsel appears to have confused the foundational issues requirements with Rule 56(e), Idaho Code §6-1012 and the case authority interpreting these rules at the summary judgment stage as opposed to the adequacy of an expert disclosure for

purposes of trial. It is without question that both Drs. Stiller and Laurence are out of area physicians within the meaning of Idaho Code §6-1012. In order for their testimony to be admissible at trial, they must be able to demonstrate that they have taken appropriate steps to familiarize themselves with the local standard of practice.

It is well settled in Idaho that to avoid summary judgment for the defendant in a medical malpractice context, "the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice." ***Dulaney v. St. Alphonsus Reg'l Med. Ctr.***, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002). In order for expert testimony to be admissible in a plaintiff's opposition to summary judgment, "the plaintiff must lay the foundation required by Idaho Code § 6-1013." ***Dulaney***, 137 Idaho at 164, 45 P.3d at 820. The statute requires the expert witness to, among other things, establish that "he or she is familiar with the standard of care for the particular health care professional for the relevant community and time." ***Ramos v. Dixon***, 144 Idaho 32, 37, 156 P.3d 533, 538 (2007). "Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." ***Id.*** (quoting ***Dulaney***, 137 Idaho at 164, 45 P.3d at 820. Idaho Code § 6-1012 defines the relevant community as "both site and time specific." ***Id.*** (quoting ***Gubler v. Boe***, 120 Idaho 294, 296, 815 P.2d 1034, 1036 (1991)).

The statute "precludes assuming that the standard of care is uniform throughout Idaho." ***Id.*** The statute requires actual knowledge of the standard in the community in which the alleged malpractice occurred. ***Morris v. Thomson***, 130 Idaho 138, 146, 937 P.2d 1212, 1220 (1997) (citing ***Dekker v. Magic Valley Reg'l Med. Ctr.***,

115 Idaho 332, 766 P.2d 1213 (1988)). According to the Idaho Supreme Court, an out-of-area expert can meet the foundational requirement of personal knowledge by inquiring of a local specialist regarding the standard of care. ***Id.*** (citing ***Perry v. Magic Valley Reg'l Med. Ctr.***, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000)). Additionally, when consulting with a local specialist, that specialist need not have practiced in the same field as the defendant, so long as the consulting specialist is sufficiently familiar with the defendant's specialty. ***Newberry v. Martens***, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005). The plaintiff's expert can also make inquiries to another out-of-area specialist, so long as that specialist has had sufficient contacts with the area in question to demonstrate personal knowledge of the local standard. ***Shane v. Blair***, 139 Idaho 126, 130, 75 P.3d 180, 184 (2003); ***see also Suhadolnik v. Pressman***. 151 Idaho 110, 254 P.3d 11 (2011).

An expert may also become familiar with the local standard by reviewing the defendant health care provider's deposition, provided the standard is discussed in the deposition. ***Suhadolnik v. Pressman***, 151 Idaho 110, 254 P.3d 11 (2011) citing ***Rhodehouse v. Stutts***, 125 Idaho 208, 212, 868 P.2d 1224, 1228 (1994). "When consulting with a local specialist, that specialist need not have practiced in the same field as the defendant, so long as the consulting specialist is sufficiently familiar with the defendant's specialty." ***Suhadolnik***, 151 Idaho at 116, 254 P.3d at 17. "Health care providers are to be judged in comparison with similarly trained and qualified providers of the same class in the same community." ***Dekker v. Magic Valley Reg'l Med. Ctr.***, 115 Idaho 332, 334, 766 P.2d 1213, 1215 (1988).

With this background, most of which relates to the summary judgment

stage, all of the defense experts, at the request and direction of defense counsel, have taken affirmative steps to communicate with a cosmetic surgeon, Dr. Kelly O'Neil, who was practicing in Boise at the time in question. As a cosmetic surgeon who performed liposuction in Boise in 2010, Dr. O'Neil has actual knowledge of the local standard of practice for cosmetic surgeons like Dr. Kerr which he conveyed and confirmed with the defense experts. Contrary to the arguments advanced by Plaintiff, there is nothing in the ***Dulaney***, nor any other case in Idaho, which requires an out of area expert to ask each any every question the Plaintiff's counsel may deem relevant from a foundational standpoint. None of the defense experts have submitted any affidavit testimony in regards to any motion for summary judgment.

All that is before the court are the expert disclosures of the defense and excerpts of the deposition testimony reflecting the limited questions posed by Plaintiff's counsel. Based solely upon these documents, Plaintiff contends he should be entitled to preclude Drs. Stiller and Laurence from testifying at trial. Such a contention is wholly inconsistent with the above case authorities and the language of Idaho Code §6-1012 and 1013. As out of area experts, even if Drs. Stiller and Laurence had not discussed this case with anyone thus far, it would still be premature to exclude their testimony from the trial by way of a motion in limine as the perceived foundational defect could still be cured prior to trial.

Regardless, the deposition testimony of each of these experts aptly demonstrates that they have adequately familiarized themselves with the standard of practice applicable to Dr. Kerr in Boise in 2010. To the extent Plaintiff's counsel is dissatisfied with the scope of knowledge or the level of detail discussed between the

defense experts and Dr. O'Neil, this again goes to the weight the jury should give their opinions and not their admissibility, particularly considering the limited nature of questions posed during their respective depositions.[2] For example, during Dr. Stiller's deposition he gave the following answers to Plaintiff counsel's questions:

> Q. When you were talking to him [Dr. O'Neil], did you ask him how he was trained, both in - - through medical school, residency and in cosmetic procedures?
>
> A. No, I asked him about the standard of practice in Boise at that point in time.

Deposition of Dr. Stiller at p. 70, lls 17 to 21 attached to the Affidavit of Counsel in Opposition as Ex. M.

> Q. All right. What were the general topics, and then we might get into specifics, that you discussed with Dr. O'Neil?
>
> A. We discussed the care of the patient.
>
> Q. Okay. I'll stop you there. Did – did Dr. O'Neil have the medical records of Krystal Ballard, to your knowledge?
>
> A. I believe he said he reviewed them. I don't -- I don't know what in total he had.
>
> Q. Okay. So he had -- at least based on your conversation with him, he had been supplied with medical records?
>
> A. I believe so.
>
> Q. Concerning Krystal Ballard?
>
> A. Correct.
>
> Q. Okay. So when you discussed the care of the patient, tell me what it is you and Dr. O'Neil discussed.
>
> A. The -- the procedure, itself. We discussed the follow-up of the patient.

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[2] Interestingly, Plaintiff's counsel has known about the role played by Dr. Kelly O'Neil for months and despite the fact he now challenges the basis for his knowledge of the local standard of practice, he never sought to take his deposition. Instead, he waits until the eve of trial to try and sandbag the defense with his meritless foundational challenges.

Q. What else?

A. We also discussed what it was like practicing in Boise at that point in time, how many cosmetic physicians were there. And we discussed the sterilization that was -- the deposition of the sterilization by Dr. Kerr on what his opinions regarding the adequacy of that, of sterilization.

Id. at p. 72, ll 24-25, p. 73,ll 1-25.

Q. Did you ask Dr. O'Neil whether or not he used an alcohol-Hibiclens solution, mixture, to clean medical equipment and supplies?

A. I asked him whether that was an adequate cleaning at that point in time in Boise with Dr. Kerr. And he agreed that he didn't see any issues with that.

Id. at p. 80, ll 25, p. 81, ll 1-5.

Q. Do you know whether or not Dr. O'Neil's cosmetic practice is accredited?

A. I don't believe it was.

Q. Did you ask him, or are you just --

A. I believe it came up in conversation.

Q. Okay. Do you know whether other physicians in Boise, how many of those that practice cosmetic surgery and have their own surgery centers, have accredited versus non-accredited centers?

A. As far as at that time, I don't believe any of the cosmetic physicians had it. And we did discuss that, that being said.

Id. at p. 83 ll 12 to 23. Similarly during the deposition of Dr. Laurence, he was asked the following questions:

Q. (BY MR. HADDAD) Okay. And Dr. O'Neil is a physician that you were referred to by Mr. Quane to contact in order to avail yourself of what the standard of practice was in Boise in in 2010, correct?

A. Yeah, correct. I did not know him before.

Q. Okay. Basically, counsel for Dr. Kerr told you, "You

need to learn what the standard of practice was in 2010, and here's the guy that can tell you what the standard of practice is," and they named Dr. O'Neil, correct?

THE WITNESS: So, yes, I spoke to him after they referred me to him as someone who was reliable.

Deposition of Dr. Laurence at p. 56, ll. 9 to 24 attached to the affidavit of counsel in opposition as Ex. N.

Q. And it looks like the letter that was sent from Mr. Quane's office indicates that Dr. O'Neil was actually practicing in California at the time he wanted you to contact him but had practiced in Boise in 2010. Is that your understanding?

A. It's my understanding that he relocated his practice, correct.

Q. Did you do anything independently to determine whether, in fact, Dr. O'Neil practiced cosmetic surgery in 2010 in Boise other than based on the representation of counsel for Dr. Kerr?

A. Correct. I just -- I asked him if that was the time that he practiced, and he said yes, he was practicing at that time.

Id. at p. 60, ll 18 to 25; p. 61, ll 1 to 12.

Q. (BY MR. HADDAD) Okay. Well, let me ask you this: Tell me everything, and I mean everything, you remember about your conversation with Dr. O'Neil, the longer call.

A. The main thing that was memorable about the conversation -- Again, I regret that I don't have any notes with this. But it was clear after this 30- to 45-minute conversation that I had with Dr. O'Neil that he knew how other physicians in Boise practiced, that there were a combination of physicians with different backgrounds that performed similar procedures, and that the way -- And I don't remember whether he had independent knowledge or if I dis -- if I had to tell him, you know, what Dr. Kerr did in the process of performing liposuction. But I was -- the impression that I had after that 30- to 45-minute conversation is the way that liposuction is performed in Boise is very similar to how it's practiced in my area. That's not true with several other procedures in which I've been

involved in. Boise is much different than where I'm from. But in the area of liposuction, my practice mirrors that of Dr. Kerr's substantially.

Q. You said that's the main thing, and I don't want to know just the main thing. I want to know everything that you recall, and then we'll try to put a little more substance behind the things that you mentioned just now. What other things did you and Dr. O'Neil discuss about the standard of practice in Idaho?

A. One issue would be do doctors in this area of Idaho practice in the hospital primarily or in an office-based situation. And as in the area where I practice, there's a really good combination. There's a lot of physicians that take their patients into a non-office base that is an ambulatory or hospital situation, and then there's a portion of physicians of many different specialties who perform these procedures in their office.

Q. Okay. What did he tell you about Boise, Idaho, physicians in 2010 in terms of where they carried out their cosmetic procedures?

A. Well, I would have -- I would have not have been surprised if he had said, you know, there's a lot of reconstruction-trained doctors who have started to do liposuction and some of them are using some of the new techniques and Dr. Kerr is the only non-reconstruction doctor who performs liposuction because there are some areas of the country in which that dynamic is somewhat true. So I was surprised to hear a substantial number -- and I don't remember the number -- and he may have even given me names. But apparently over -- during that time period, there were several physicians of multiple specialties, both in the immediate Boise area and in the state, that perform liposuction procedures.

Q. Okay. I think the question that prompted -- or your statement that prompted my last question was: Did doctors in Boise, Idaho, as you understood it, practice in primarily a hospital setting or ambulatory care center associated with a hospital in carrying out liposuction or did they practice in their private office settings to do that?

A. Dr. O'Neil related to me that both situations were fairly common.

Q. What else did you discuss -- First of all, did he tell you the names of any of the physicians in Boise, Idaho, that practiced cosmetic surgery?

A. He did.

Q. What are the names?

A. I don't recall those names, but he -- he mentioned the names specifically and what their specialty had been.

Q. Okay. Did he tell you what each of those physicians -- in terms of their specialty, their name, whether they practiced in a hospital setting, an ambulatory care setting, or an office-based setting to practice liposuction?

A. He, you know, voluntarily gave me a pretty good description of the landscape, and then I asked him a lot of specific questions about, you know, the -- "That particular doctor that you mentioned, does he continue to be in practice to this day? Does he have a fairly high-volume practice? How does he compare to, you know, the busiest hospital-based physician?" I don't remember all those details, but I do remember I was impressed that it was a little bit more robust community. Boise is a fairly small area, and I guess it just has a draw. But there was a fairly robust spectrum of different specialties that perform liposuction in both hospital and office-based situations.

Q. In terms of fat transfer -- because that's part of what was done on Krystal Ballard, correct?

A. Correct.

Q. Okay. Did Dr. O'Neil talk to you about -- Well, first of all, does he practice -- Was he, Dr. O'Neil, actually doing liposuction himself in July of 2010?

A. Yes, he was. Are you talking about here? Yes, he was.

Q. I mean other than saying, "I had an office practice that did cosmetic procedures in 2010," did he actually specifically tell you he did liposuction in 2010?

A. I don't -- I don't recall whether he said in any particular month or any year whether his case list had been up or down. But he -- he -- this was a procedure that he performed, and he was in Boise and -- And so I think he

meets the criteria for being able to tell me the standard of practice.

See Depo. of Dr. Laurence at p. 64 ll 5 to p. 69 ll 3 attached to the Affidavit of Counsel in Opposition to Plaintiff's Motion in Limine as Ex. N.

Q. Okay. In terms of fat transfer, did you talk to Dr. O'Neil at all about fat transfer?

A. I did.

Q. Did Dr. O'Neil tell you that he performed fat transfers in 2010?

A. We talked about fat transfer specifically. Fat transfers are an area of liposuction where some doctors really, really are excited about it, and some do very little fat transfer. And I don't recall whether I asked him if fat transfer was something that he did routinely with every one of his liposuctions or with 10 percent. But he certainly was familiar with that aspect. We talked very specifically about the -- the different options that the physician had with regard to the addition of PRP, the addition of -- whether the fat was spun down or just gravity was5 used to separate out. And so he -- he was clearly knowledgeable about fat transfer, but I don't know how much he did it.

Id. at p. 70, ll 7 to p. 71, ll 3.

Despite all of this background and detailed data regarding Drs. Stiller and Laurence's conversations with Dr. O'Neil, Plaintiff maintains that these conversations were somehow not adequate. Plaintiff provides the court with limited excerpts about specific questions, but fails to present the court with a fair picture of the majority of the discussion wherein these experts explained that they discussed the types of procedures, various facts of the case, the types of specialists performing the procedures at issue, the Boise area in question and the timeframe in question in order to learn about the local standard of practice. Furthermore, what is contained within the depositions of the defense experts is not the totality of the evidence, but rather only

responses to the limited questions asked.

Plaintiff's counsel is free to try and criticize the defense experts at trial by arguing as to the amount of weight the jury should give to their testimony. However, the fact remains that the defense counsel has yet to question its own experts on the stand and lay the proper foundation necessary at trial. Only then will the court be in a position to rule upon any foundational objections. Plaintiff's motion on this issue therefore fails not only because the above deposition testimony establishes an adequate foundation, but his objection is premature and his motion should therefore be denied.

Finally, Plaintiff should be more concerned about the lack of foundation for his own expert, Dr. Sorensen. During his deposition he was asked about what knowledge he has about the standard of practice applicable to Dr. Kerr, who is of a different medical specialty than Dr. Sorensen. He provided the following information:

> Q. Okay. But you didn't learn that by any other··means, other than what you read in the newspaper?
>
> A. Yes.
>
> Q. Okay. Have you ever spoken with any physician in Idaho or in the world about the nature of Dr. Kerr's practice?
>
> A. Not that I can recall. I mean, if it came up in casual conversation with another person, I don't recall it.

See Depo. of Dr. Sorensen at p. 64, ll 15 to 23 attached to the Affidavit of Counsel in Opposition as Ex. E.

> Q. Okay. That was the whole question. Do you have any real knowledge of what Dr. Kerr's practice is?
>
> A. Only what I read in the newspaper.
>
> Q. That's your source of information?
>
> A. Well, I don't touch bases with him on a daily basis, so I don't know what he does. I know –

Q. Well, my question is, is that your source of information on his type of practice?

A. Yes.

Q. The newspaper; correct?

A. Correct.

Q. Okay. Is that the Idaho Statesman?

A. I'm sad to say it is.

Q. Okay. You have never seen him perform a cosmetic procedure; correct?

A. Correct.

Q. You have never talked to anyone who has ever seen him do a cosmetic procedure; correct?

A. Correct.

See Depo. of Dr. Sorensen at p. 78, ll 2-21 attached to the Affidavit of Counsel in Opposition to Plaintiff's Motion in Limine as Ex. E.

Q. Okay. Have you ever heard the term the "standard of health care practice" in Idaho means how a particular doctor in a particular specialty typically practices medicine?

A. Yes.

Q. Where did you hear that?

A. I have no idea, but it's one of those common knowledge things, I would guess.

Q. Were there any other doctors in Idaho, to your knowledge, in July of 2010 who had practices similar to Dr. Kerr?

A. I would have no idea.

Q. When you talked to Dr. Wigod, did you ever bring up the type of practice of Dr. Kerr with him?

A. No.

Q. When you talked to Dr. McKim back in 2007, did you ever discuss with him the type of practice of Dr. Kerr?

A. No.

See Deposition of Dr. Sorensen at p. 115, ll. 3 to 20, attached to the Affidavit of Counsel in Opposition as Ex. E.

These deposition excerpts show that Dr. Sorensen, who is a plastic surgeon and not a cosmetic surgeon, has done absolutely nothing to learn the standard of practice applicable to Dr. Kerr. Thus, it is unclear how Plaintiffs can credibly argue about the foundation of the defense cosmetic surgeons, when the Plaintiff's lone expert, on his deposition testimony alone, would not be capable of rendering an admissible opinion at trial if limited to his deposition testimony.

VII. Admissibility of Dr. Kerr's Communications with Krystal Ballard's Aunt

Plaintiff contends that Dr. Kerr's communications with Angela Neil as well as his records of those communications are inadmissible hearsay. Plaintiff provides no case authorities to support his proposition. During the deposition of Dr. Kerr, Plaintiff's counsel framed many of his questions to suggest that Dr. Kerr and his staff did not respond in a caring manner when Krystal Ballard died. The conversation that Dr. Kerr had with the decedent's relative directly contradicts such a claim and may therefore be relevant for that purpose depending on the question asked and what proof is submitted at the trial. Furthermore, the simple fact that Dr. Kerr called Ms. Neil is not hearsay and would be admissible to show that Dr. Kerr did care about the patient and that he did communicate with the family after her death. As a result, Plaintiff's motion on this issue is not a proper subject for a motion in limine as it cannot be addressed until the specific

question can be evaluated during the trial and should therefore be denied.

VIII. Whether Dr. Lundeby can Testify as to Krystal Ballard's Cause of Death

Plaintiff argues that since Dr. Lundeby testified in his deposition that it was difficult to determine the patient's cause of death that he should somehow be precluded from offering any causation opinions at trial. Plaintiff has elected to present the court with an extremely narrow representation of Dr. Lundeby's opinions. The actual exchange in the deposition unfolded as follows:

> Q. (BY MR. HADDAD) Let me rephrase the question. They list, "Sepsis with probable toxic shock syndrome" as Cause A, which you understand to mean Cause A for the cause of death?
>
> A. Well, one of the causes of death, but that's – I guess Cause A means to me their principal cause.
>
> Q. We'll have to ask them. At least that's listed as a cause of death, correct?
>
> A. Yes.
>
> Q. Do you agree with that diagnosis, or do you agree with that cause, meaning "Sepsis with probable toxic shock syndrome"?
>
> A. I reviewed this case and looked at it and -- well, I -- I guess that's a very broad question and I'm trying to figure out the best way to answer it for you. I think the clinical picture that she presented would be consistent with sepsis. The toxic shock syndrome, from my medical recollection and training, is probably not used accurately here in that my understanding of toxic shock syndrome is not a gram negative sepsis, which seems to be the question in the medical record. But when I looked at this entire record, I was very -- it was difficult to figure out exactly why this patient died.
>
> Q. Okay.
>
> A. Like I say, the clinical picture would be most consistent with sepsis. I can see why the coroner's office and

the medical examiner put that.

Q. You just haven't -- Let me see if I can rephrase what you said, and if I mess it up, you let me know. At this point in time, you don't know whether or not you have enough information to form an opinion as to the cause of this patient's death; is that fair?

MR. JONES: Object to form.

THE WITNESS: I think forming an opinion as to the exact cause and having -- Yeah, I think -- I think that's fair.

See Deposition of Dr. Lundeby, at p. 82, ll 16 to p. 84, ll 3. (emphasis added) attached to the affidavit of counsel in opposition as Ex. O. In addition, the following information was also set forth in Dr. Lundeby's expert witness disclosure timely served upon the Plaintiff on June 3, 2013:

> As part of his testimony, Dr. Lundeby will render the opinion that the surgical technique employed by Dr. Kerr during his liposuction and fat transfer procedures would not have caused or resulted in the introduction of any bacteria to the patient. Dr. Lundeby actually holds the opinions expressed in this document and will express all opinions stated herein on a more probable than not basis and/or to a reasonable degree of medical certainty.

See Dr. Lundeby's expert disclosure at p. 68 attached to the Affidavit of Counsel in Support of Plaintiff's Motions in Limine as Ex. O.

> He will render the opinion that in order for Dr. Kerr to have infected the patient in some manner at the time the surgery was performed on July 21, that there would have to have been evidence of infection at the location of the surgery by the time of the autopsy or at Elmore Medical Center. He will testify that the absence of any evidence of infection at the injection or liposuction sites is proof to Dr. Lundeby that the patient was not infected during the surgery and that her death is due to some other cause.

Id. at p. 76.

> He will discuss the normal wound biology is to see evidence of bacteria on the surface. Dr. Lundeby will render the

> opinion, more likely than not, that the gram negative bacterial rods were introduced into the patient's surgical site sometime after Dr. Kerr's surgical procedure rather than being introduced during the procedure. Dr. Lundeby will render the opinion that based on his experience that gram negative rods do not result in the sudden and unexpected patient death such as occurred in this case.

Id. at p. 78.

These disclosed opinions demonstrate that Dr. Lundeby has produced opinions regarding various aspects of causation which he should be entitled to render at trial. There can be more than one cause of death and the fact that Dr. Lundeby stated he could not identify precisely which condition actually caused the patient's death does not preclude him from rendering opinions as to the most likely causes. Plaintiff is free to challenge the weight the jury should give those opinions and he can also try to impeach Dr. Lundeby with the deposition testimony he points out in his brief, but he cannot, based on the limited showing made establish a basis for this court to exclude him from rendering any opinions as to cause of death. For example, at no point during his deposition did Plaintiffs' counsel ever ask Dr. Lundeby whether he rejected any of the above opinions set forth in his expert disclosure. Plaintiff's motion on this issue is premature and addresses only a fraction of the testimony rendered by Dr. Lundeby during his deposition. This is not the proper subject for a motion in limine and it should therefore be denied. Plaintiff's expert, Dr. Sorensen, a plastic surgeon, renders the opinion on the cause of death and he is no more qualified than Dr. Lundeby. If Dr. Sorensen can give his opinion on the cause of death, so can Dr. Lundeby.

IX. Admissibility of Evidence Regarding Third Party Liability

Plaintiff argues that the defense should be precluded from presenting any

evidence regarding third party liability simply because the defense did not assert third party liability as an affirmative defense at trial. This is not the test nor does it serve as a basis for precluding such evidence at trial. Plaintiff claims that the record "in this matter is wholly undeveloped as to third party liability." ***See*** Plaintiff's Memo at p. 27. Such a position is not supported by the record in this case or the expected evidence to be submitted at trial.

Plaintiff claims the patient died as a result of an infection caused by some act or omission by Dr. Kerr during his surgery. Thus, in order to prove causation, Plaintiff must prove that the gram negative bacteria at issue were introduced during Dr. Kerr's surgery as opposed to the bacteria being introduced somewhere else or by someone else after the surgery. The medical records in this case document the timing of medical care, the observations of the providers and their decisions. The defense is free to have its experts render their disclosed opinions which bear on the care and treatment decisions of third parties without necessarily asserting a third party is liable. The jury is free to draw whatever permissible inferences are allowed in order to arrive at a conclusion as to whether or not the standard of practice was violated – which is the key issue in the case.

The medical decisions, observations and treatment by the other providers have a direct bearing on the patient's outcome and the defense is entitled to advance disclosed expert opinions on these issues at trial. For example, the jury is entitled to know that the patient's subsequent providers waited hours before administering any antibiotics and that none of the subsequent providers ever saw any evidence of an infection. Whether the defense pled third party liability as an affirmative defense and

whether or not a jury would deem said evidence sufficient to assign third party liability to such evidence is not the deciding factor as to whether or not such testimony would be admissible.

The trial has not started and no proof has been submitted to the jury. Thus, Plaintiff's second argument on this topic regarding who can be named on the special verdict form is therefore simply premature and cannot be fairly addressed at this juncture. The issue is not whether the Plaintiff was allowed to engage in discovery regarding third party liability, but whether opinions regarding the care and treatment provided by others have been identified in the expert witness disclosures such that opposing counsel was put on notice. The defense does not have to "blame" another party before evidence of the actions or inactions of other healthcare providers can be presented to the jury. Plaintiff's motion is not the proper subject of a motion in limine and should be denied.

X. Testimony From Dr. Kerr Involving Dr. Sorensen's Prior Malpractice Actions

Although not for the various reasons stated, the defense does not oppose this motion and agrees that Dr. Kerr will not be called upon to testify regarding Dr. Sorensen's prior malpractice actions.

XI. Speaking Objections, Testimony of Counsel and References to Motion Practice in Front of the Jury

Plaintiff argues that the defense should be broadly precluded from making all manner of references and statements during the trial. Such an overly broad sought prohibition is unnecessary. Defense counsel have tried cases before this court in the past and were quite capable of staying within the rules of this court. If granted, such a broadly worded motion on such an unknown grouping of topics is sure to do nothing but

generate allegations that it is, was or may have been violated in any number of circumstances. Plaintiff's counsel seems to be trying to prevent defense counsel from "sharing" inappropriately with the jury. Plaintiff cites to no case authority to support such a proposition as framed in his motion. Defense counsel is comfortable that this Court is fully capable of determining whether any lines are about to be crossed during the trial before it occurs. For that reason, the defense contends this is not a proper motion in limine and should be denied with the understanding that the court is always aware of these issues and expects the same of counsel.

XII. Ad Hominem comments

Lead counsel for the Plaintiff has requested that the defense be prohibited from commenting upon the fact that he is not an Idaho attorney. The fact that he is not an Idaho attorney will be blatantly obvious to the jury without any comment by defense counsel. The jury will be free to draw any conclusions they choose without defense counsel pointing out the obvious. This too is not a proper motion in limine, is overly broad and should be denied.

XIII. Settlement Negotiations

Counsel for the defense does not oppose this Motion and agrees that evidence relating to settlement negotiations should not be admitted in any form.

XIV. Admissibility of Expert Testimony on the Ultimate Issue

Plaintiff contends that the defense experts should not be allowed to render opinions to the extent they go to an ultimate issue to be decided in the case by the jury. Plaintiff makes this argument despite citing directly to IRE 704 which is on point and states that an expert's testimony is not inadmissible merely because it embraces an

ultimate issue to be decided in the case. Plaintiff argues that where expert testimony on an ultimate issue concerns opinions or conclusions which an average juror should be allowed to draw that such testimony should be inadmissible. Plaintiff cites no medical malpractice authorities in Idaho in support of such a proposition, but rather a host of criminal cases which are inapplicable to the case at bar.

Indeed, pursuant to Idaho Code §6-1013, Plaintiff and other lay witnesses are prohibited from testifying in regards to causation, the patient's diagnosis and/or future prognosis. Idaho Code §6-1013 provides:

> Testimony of expert witness on community standard. **The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses**, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

This statute makes it clear that in the medical malpractice context the propriety of such testimony lies solely within the realm of expert testimony and may not be presented by any lay witnesses. It is well-settled in Idaho that a lay person is not qualified to give an opinion about the cause of a medical condition or disease. Lay persons, such as the Plaintiff, do not possess the knowledge, training, or experience to render an opinion on such matters. ***See*** I.R.E. 701 and 702.

In this regard the Idaho Supreme Court stated that Courts should disregard lay opinion testimony relating to the cause of a medical condition. ***See, i.e., Bloching v. Albertson's, Inc.***, 129 Idaho 844, 934 P.2d 17 (1997) (lay person was not qualified to testify that the seizure he suffered immediately after using a blend of pork and beef insulin was caused by the insulin); ***Evans v. Twin Falls County***, 118 Idaho 210, 796 P.2d 87 (1990) (husband was not qualified to testify that conduct by sheriff's deputies on April 15, 1987 in grabbing and shaking his wife was a cause of her cardiac arrest and death over eleven months later); ***Flowerdew v. Warner***, 90 Idaho 164, 409 P.2d 110 (1965) (patient was not qualified to testify that his injury was caused by physician's treatment).

Idaho Rule of Evidence 701 has not altered the requirement that medical causation be proved by expert testimony. In ***Cook v. Skyline Corp.***, 135 Idaho 26, 13 P.3d 857 (2000), the Court held that physical manifestations of emotional distress were medical conditions which required expert testimony. The Court stated:

> I.R.E. 701 affords the district court discretion to determine whether a lay witness may testify as to his or her opinion regarding certain matters but testimony offered by a lay person relating to the cause of a medical condition should be disregarded.

Cook, 135 Idaho at 35, 13 P.3d at 866 (emphasis added), citing ***Evans v. Twin Falls County***, 118 Idaho 210, 796 P.2d 87 (1990) (wherein the Court held the plaintiff's opinions as to the cause of his high blood pressure would be inadmissible under I.R.E. 701.) In support of the Court's holding in ***Evans v. Twin Falls County***, the Court quoted from 31A Am.Jur.2d, Expert & Opinion Evidence § 207 as follows:

> Where the subject matter regarding the cause of disease, injury, or death of a person is wholly scientific or so far removed from the usual and ordinary experience of the

> average person that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease or physical condition.

Id., 118 Idaho at 214, 796 P.2d at 91 (emphasis added).

This result was re-affirmed by the Idaho Supreme Court in ***Swallow v. Emergency Medicine of Idaho, P.A.***, 138 Idaho 589, 67 P.3d 68, 76-77 (2003) . In ***Swallow***, the district court granted a physician's motion for summary judgment on the grounds that the plaintiffs could not or did not produce admissible evidence regarding any correlation between plaintiff David Swallow's heart attack and the ingestion of an overdose of the antibiotic Cipro. ***Id.*** at 138 Idaho at 596, 67 P.3d at 75. In granting the motion, the court noted that "without some reliable expert testimony relating Cipro to a myocardial infarction, there is no chain of circumstances from which causation reasonably could be inferred." ***Id.***

The same considerations that disqualified the lay testimony in the above cases apply in the instant action. Neither the Plaintiff nor any of his proposed lay witnesses are competent to testify as to the cause of death or the patient's prognosis at any point in time prior to her death. Such testimony can only come from a properly qualified expert witness. As a result, it is not the defense experts, but rather the Plaintiff and any of his lay witnesses who should be precluded from offering any such improper opinion testimony at trial.

Other Courts have held similarly. For example, the Michigan Court of Appeals has stated:

> A lay witness generally may testify to something he knows and that does not require expert testimony to establish, such as the existence of a physical injury. Where, however, the contested issue involves medical questions beyond the

> scope of lay knowledge, such as the existence vel non of an injury, the scope of injury or the causal link between an alleged accident and an injury, testimony by the lay witness may be improper.

See Howard v. Feld, 298 N.W.2d 722, 723 (Mich. App. 1980). Similarly, the Court in ***Morphew v. Morphew***, 419 N.E.2d 770 (Ind. App. 1981), superseded by statute on other grounds, stated:

> These cases illustrate that although a lay witness may testify about his or her illness, lay testimony or opinion must be limited to or based upon facts of which the witness has knowledge. However, "[w]ith regard to diagnosis, causes and effects of disease, and other matters of medical science, skill, and practice, knowledge of which is confined to those trained for the profession, opinions of lay or nonexpert witnesses are not competent. . . .31 Am.Jur.2d Expert and Opinion Evidence § 95 (1967).

Id. at 777. One of the cases referred to by ***Morphew*** concerned the inadmissibility of a plaintiff's testimony regarding the permanence of his condition of impairment "because this was a medical question upon which only expert testimony was competent." ***See Kenwood Erection Co. v. Cowsert***, 115 N.E.2d 507 (Ind. App. 1953). ***See also Hunnicutt v. Hunnicutt***, 228 S.E.2d 881 (Ga. 1976) ("The diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay-persons."); ***Gerland's Food Fair, Inc. v. Hare***, 611 S.W.2d 113 (Tex. Civ. App. 1980) (plaintiff held not qualified to state an opinion that she had permanent brain damage).

Whether or not the care and treatment provided by the Defendants caused or contributed to Krystal Ballard's death represents "a matter of science that is far removed from the usual and ordinary experience of the average person." ***See Swallow v. Emergency Medicine of Idaho, P.A.***, 138 Idaho 589, 67 P.3d 68, 76-77. Such

testimony can therefore only be offered by an appropriately qualified expert witness. Absent such testimony, any findings by the jury regarding such issues would be based upon sheer speculation. Consistent with Idaho Code §6-1013, the jury is required to make their decision based on the opinions of the experts alone. In light of the foregoing, the Court should deny the Plaintiff's motion in limine on this issue as it is clear that Plaintiff is precluded from offering any evidence by way of lay witnesses regarding the diagnosis, prognosis, or causation for damages. Rule of Evidence 704 allows opinion testimony on the ultimate issue of the case.

XV. Issue of Cumulative Expert Testimony

Plaintiff basically rehashes arguments that were advanced and rejected by this court months ago at the hearing on July 10 regarding the number of defense experts. Plaintiff offers no authority for the position that because the defense out-of-area experts spoke with the same physician for purposes of confirming they were familiar with the local standard of practice that it somehow makes the testimony needlessly cumulative per IRE 403. Plaintiff totally misses the purpose of the familiarizing physician.

The purpose of the inquiry between the out of area expert and the familiarizing physician is to confirm that the out of area expert has basic knowledge about the local standard such that he would have a foundational basis for his opinions. The expert's opinions he advances at trial are his own. Again, Plaintiff's arguments go to the weight a jury should give to the evidence as opposed to its admissibility. If Plaintiff wants to try and discredit the testimony of the defense experts based on the fact they all talked to Dr. O'Neil he is welcome to do so, but this does not add to his claim

that the presentation of their testimony would be needlessly cumulative.

Plaintiff seeks to unfairly contrast the foundational requirements of admissibility under Rule 56(e) and Idaho Code §6-1012 with the needlessly cumulative standard set forth under IRE 403. These are two totally separate and distinct requirements which each stand alone. The fact that the out-of-town experts for the defense discussed local standard of practice issues with the same physician does not render their testimony to be at any more risk of being needlessly cumulative had they each spoke with different providers. There is no requirement under Idaho Code §6-1012 that a different familiarizing physician be employed by each expert nor has Plaintiff identified any case authority so stating. Indeed, under many circumstances that option would simply not exist due to the limited number of providers in a given community.

The defense contends it is inappropriate for the Plaintiff to even bring such a motion prior to trial which is based solely on a rule of evidence when no evidence has been submitted to the jury. Expert witness disclosures are not evidence, nor are they admissible as evidence, but rather they are a discovery tool utilized to prepare for trial. As argued back in July, the defense contends that Rule 403 has no application whatsoever at this pretrial stage and that this rule of evidence does not provide the Plaintiff with a vehicle or mechanism by which the number of defense experts can be limited in advance of a trial.

In terms of addressing the application of Rule 403 during the trial in this matter, the court is well aware there are multiple Defendants in this case including Dr. Kerr and Silk Touch Laser and Med Spa. The complex medical issues in this case cover a large number of areas including the performance of multiple cosmetic

procedures and the equipment involved therein, the proper sterilization of surgical equipment and maintaining a proper sterile surgical field, the identification and treatment of a septic infectious process, the origin of different types of bacteria, the effectiveness of various antibiotics, the cause and effect of multi-system organ failure, the treatment provided by a number of different specialties in medicine and competing theories as to the cause of death for Krystal Ballard.

Due to the number of medical issues in this case, Plaintiff has listed the opinions of not less than three retained experts to address both standard of practice and causation issues including: Dean Sorensen, M.D., George Nichols, M.D. and Keith Armitage, M.D. Plaintiff has disclosed multiple supplemental expert witness disclosures for these witnesses, including his third one last week well after the deadline for discovery had expired. These individuals are disclosed as experts in various areas of medicine including plastic surgery, anatomical, clinical and forensic pathology and infectious disease.

In order to oppose these three experts, the defense has disclosed five retained experts who have all been deposed including: Gregory Laurence, M.D., a cosmetic surgeon from Tennessee with his background and training in family practice medicine in which he is boarded; Charles Garrison, M.D., forensic pathology from Idaho; Thomas Coffman, M.D., infectious disease from Idaho; John Lundeby, M.D., a cosmetic surgeon with his background and training in general surgery in which he is boarded from Idaho; and Geoffrey Stiller, M.D., who completed a fellowship in cosmetic surgery Idaho.

Idaho Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In terms of interpreting and applying Rule 403, Idaho courts have consistently determined that "the language of I.R.E. 403 tilts in favor of admissibility." ***State v. McGuire***, 135 Idaho 535, 540 20 P.3d 719 (Ct. App. 2001). Only if the probative value of the testimony is "**substantially outweighed** by danger of needless presentation of cumulative evidence," may a trial court exclude relevant evidence. ***See State v. Knight***, 120 Idaho 862, 865, 920 P.2d 78 (Ct. App. 1996) (emphasis added). In addition, "statements by witnesses which corroborate the facts, to which another has already testified, are not necessarily inadmissible because they are cumulative." ***State v. Blackstead***, 126 Idaho 14, 22, 878 P.2d 188 (Ct. App. 1994). Instead, "Rule of Evidence 403, prohibits the introduction of needlessly cumulative evidence." ***Id.***

Under the clear and unambiguous language of Rule 403, in order for the relevant testimony of any of the defense experts to be limited in any way, the Plaintiff must show that the presentation of such testimony from the Defense experts would amount to the "needless presentation of cumulative evidence." The fact that evidence to be provided by an expert witness may be similar or even cumulative to that of another witness does not, standing alone, meet the threshold test for exclusion under the Rule upon which the Plaintiff's motion is solely based. Rather, the evidence must be "needlessly" cumulative before the Court can even consider whether to limit it. The defense contends that such a determination cannot be made prior to trial before the parties have presented any evidence. For this reason, and the wealth of supporting case authority on this issue submitted back in July, the defense contends the Plaintiff's

Motion in Limine regarding perceived cumulative evidence should be denied.

XVI. Conclusion

Based on the forgoing, the defense requests that the court deny Plaintiff's Motion in Limine on all counts except for Motions No. IV and XIII to which the defense does not oppose as stated herein.

DATED this 29th day of October, 2013.

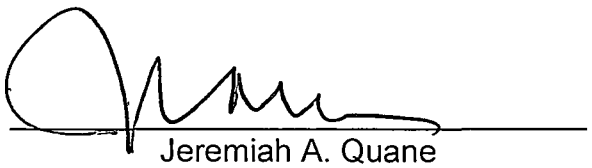
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2013, I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274 [X] Email
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709 [X] Email
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896 [X] Email



Jeremiah A. Quane

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL IN SUPPORT OF MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS IN LIMINE

STATE OF IDAHO)
: ss.
County of Ada)

Terrence S. Jones, having been first duly sworn upon oath, deposes and

says:

1. I am a member of the law firm, Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. Attached hereto as **Exhibit A** is a true and correct copy ***Schaible v. Myers***, 411 Mich. 704, 311 NW2d 297 (Mich. 1981).

3. Attached hereto as **Exhibit B** is a true and correct copy of the Assessment of Economic Loss Report from the GEC Group, signed by Cornelius A. Hofman, dated May 8, 2013.

4. Attached hereto as **Exhibit C** is a true and correct copy Plaintiff's Complaint and Demand for Jury Trial.

5. Attached hereto as **Exhibit D** is a true and correct copy Plaintiff's Expert Witness Disclosures.

6. Attached hereto as **Exhibit E** are true and correct copies of pgs. 110-121; and 146-157 of the deposition transcript of Dean Sorensen, M.D.

7. Attached hereto as **Exhibit F** are true and correct copies of pgs. 90-101 of the deposition transcript of Thomas Coffman, M.D.

8. Attached hereto as **Exhibit G** are true and correct copies of pgs. 140-151 of the deposition transcript of Susie Kerr.

9. Attached hereto as **Exhibit H** is a true and correct copy of the Record of Betram Stemmler, M.D.

10. Attached hereto as **Exhibit I** are true and correct copies of the Records of Billy Morgan, M.D.

11. Attached hereto as **Exhibit J** is a true and correct copy of the Record of Howard Schaff, M.D

12. Attached hereto as **Exhibit K** are true and correct copies of pgs. 49-60 of the deposition transcript of Charles Garrison, M.D., Vol. I.

13. Attached hereto as **Exhibit L** is a true and correct copy of Plaintiff's Fifth Supplemental Answers to Defendants' First Set of Interrogatories served on October 18, 2013.

14. Attached hereto as **Exhibit M** are true and correct copies of pgs. 66-89 of the deposition transcript of Geoffrey Stiller, M.D.

15. Attached hereto as **Exhibit N** are true and correct copies of pgs. 50-77 of the deposition transcript of Gregory Laurence, M.D.

16. Attached hereto as **Exhibit O** are true and correct copies of pgs. 54-65; and 78-89 of the deposition transcript of John P. Lundeby, M.D.

FURTHER your Affiant saith not.

Terrence S. Jones

SUBSCRIBED AND SWORN to before me this 29th day of October, 2013.

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris
Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2013, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274 [X] Email
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James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896 [X] Email

Terrence S. Jones

EXHIBIT A

411 Mich. 704
Supreme Court of Michigan.

Dennis L. SCHAIBLE, Administrator of the Estate of Kathleen A. Schaible, Plaintiff-Appellee,
v.
Kevin J. MYERS and Carleton N. Myers, Defendants-Appellants.

Docket No. 64809. | Nov. 2, 1981.

Jury returned verdict for surviving spouse in wrongful death action arising out of automobile accident. Appeal was taken, and the Court of Appeals, Bashara, P.J., reversed and remanded for new trial. The Supreme Court, held that cross-examination of expert witness, who offered his opinion as to amount of damages suffered by surviving spouse, as to whether he was assuming that surviving spouse would not remarry was not error since jury was not told to take into account possibility that spouse might remarry but listened to exposition of many assumptions upon which expert witness relied, necessary to intelligent understanding and evaluation of worth of expert's opinion.

Court of Appeals reversed; judgment of trial court reinstated.

Moody, J., filed dissenting opinion in which Levin and Kavanagh, JJ., concurred.

West Headnotes (3)

[1] **Evidence**
Facts Forming Basis of Opinion

Cross-examination of expert witness, who offered his opinion as to amount of damages suffered by surviving spouse, as to whether he was assuming that surviving spouse would not remarry was not error since jury was not told to take into account possibility that spouse might remarry but listened to exposition of many assumptions upon which expert witness relied, necessary to intelligent understanding and evaluation of worth of expert's opinion.

1 Cases that cite this headnote

[2] **Death**
Admissibility of Evidence

It is improper to introduce evidence of possibility of remarriage to prove that there had been no loss of consortium to surviving spouse for purpose of wrongful death action damages award.

[3] **Evidence**
Contradiction and Impeachment

Expert witness, who offers his opinion in wrongful death action as to amount of damages suffered by surviving spouse, may be impeached by reviewing assumptions which underlie expert's opinion and by arguing that expert's opinion is mere conjecture based upon erroneous assumptions.

Attorneys and Law Firms

**298 *705 McIntosh, Mugan, Cummings & McColl by John B. McNamee, Port Huron, for plaintiff-appellee.

Bush, Luce, Henderson & Bankson, Port Huron, for defendants-appellants.

Opinion

PER CURIAM.

In Wood v. The Detroit Edison Co., 409 Mich. 279, 288, 294 N.W.2d 571 (1980), a majority of this Court agreed that evidence of a plaintiff surviving spouse's remarriage was not to be used to determine damages in a wrongful death action. [1] We now must consider whether error occurred in this case when an expert witness, who offered his opinion as to the amount of damages suffered by the surviving spouse, was asked whether he was assuming that the surviving spouse would not remarry.

I

Plaintiff's decedent died in an automobile accident. Liability was admitted; the parties tried the issue of damages. A jury returned a verdict for the plaintiff in the amount of $30,000.

The Court of *706 Appeals reversed that judgment and remanded the case for a new trial.[2]

II

To establish the amount of his damages, the plaintiff called to the stand a witness who expressed the opinion that the plaintiff had been damaged by as much as $528,000. On cross-examination, the defendants undertook a detailed and comprehensive examination of the assumptions which underlay this opinion. A portion of this examination is recounted here:

"Q. One of your assumptions, I assume, is that Mrs. Schaible would continue to want to work during all of those years as opposed to being a housewife and mother?

"A. Yes, for the years after she would be age 42.

"Q. And, of course, if for one reason or another she decided she didn't want to work that would affect your calculations, would it not?

"A. That's correct.

"Q. One of your assumptions was that she would, if she continued working, that she would turn over all of her earnings, over and above the cost of her own maintenance, to her husband or at least he would receive the economic benefit of it?

"A. Based on the information I have this is what's been happening in the family.

"Q. That is one of your assumptions?

"A. That's correct.

"Q. It is one of your assumptions that would continue throughout her working life?

"A. Yes.

"Q. Even after they got in their forties and fifties, your assumption was that would still continue?

**299 *707 "A. That's correct.

"Q. She wouldn't keep any of her own earnings for herself or whatever purpose, they would all go other than the 30 percent that you subtracted for the cost of her maintenance, one of your assumptions was that all of it would go to Mr. Schaible or at least he would receive the economic benefit of that?

"A. I assumed beyond the 30 percent, right.

"Q. One of your assumptions, I assume, was that the marriage would continue during that period?

"A. Yes. All the indications I had it was a happy marriage.

"Q. But that was one of your assumptions?

"A. Based on the information I have.

"Q. And one of your assumptions, I assume, also, was that Mr. Schaible would not remarry and everything would remain the same up to his own death ?

"A. Yes.

"Q. Another one of your assumptions was that Mrs. Schaible would continue in good health and be able to work?

"A. That's correct.

"Q. Will you agree, Mr. Tansky, there is really no way you can say for sure any of the assumptions you made and upon which your opinions were based are valid with reference to this particular individual other than your opinion?

"A. Could you restate that question?

"Q. Okay, I can try, anyway. Would you agree there's really no way you can say, talking about you, now, for sure, that any or all of the assumptions that you have made and upon which your opinions are based, are valid, or would turn out to be valid with reference to this particular individual?

"A. In my opinion?

"Q. No, I'm not asking for your opinion, I'm asking whether there's any way you can say they will be valid.

"A. No, things might have been better or worse economically.

"Q. So, what we are saying, again, you don't have a crystal ball, you don't know what is going to happen in *708 the future or what would happen with reference to any one specific individual?

"A. That's correct." (Emphasis supplied.)

The defendants had earlier received permission from the trial court to ask the emphasized question. That question and its answer were discussed by defendants during closing argument.

The Court of Appeals described the question and answer as an "erroneous suggestion that the possibility of remarriage could be considered to mitigate damages". The Court reversed, stating:

> "Although the defendants' cross-examination and argument did not explicitly state that the possibility of remarriage should be considered to mitigate damages, the facts actually elicited serve no purpose other than to infer (sic) that the expert's estimate of economic loss was not accurate because it did not reflect a possibility that the plaintiff would remarry."

III

[1] We conclude that the Court of Appeals erred. The jury was not told to take into account the possibility that the plaintiff might remarry. Rather it listened to an exposition of the many assumptions upon which the expert witness relied in making his calculations of the plaintiff's economic loss. Such an exposition is necessary to an intelligent understanding and evaluation of the worth of the expert's opinion.

Unlike the situation in Wood,[3] this expert's assumption concerning remarriage was of interest to *709 the defendants solely because of its effect on the expert's opinion **300 as to the amount of economic damages. It was proper for defendant to examine fully the assumptions which underlay the expert's opinion. By calling into question the worth of an expert's many assumptions, defense counsel can seek to show that what appears to be the opinion of an expert is no more than conjecture which the jury can then be urged to ignore.

[2] [3] It remains improper to introduce evidence of the possibility of remarriage to prove that there has been no loss of consortium. It is proper, though, to impeach an expert witness by reviewing the assumptions which underlie the expert's opinion and by arguing that the expert's opinion is mere conjecture based upon erroneous assumptions.

In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court. GCR 1963, 853.2(4).

Costs to defendants.

COLEMAN, C. J., and WILLIAMS, FITZGERALD and RYAN, JJ., concur.

MOODY, Justice (dissenting).

Less than two years ago, in Wood v. The Detroit Edison Co., 409 Mich. 279, 286-287, 294 N.W.2d 571 (1980), a majority of this Court reaffirmed Michigan's rule that

> " 'evidence of plaintiff's remarriage or the probability of her remarriage is irrelevant and, therefore, was properly excluded, in determining the damages she suffered upon the death of her spouse' ".[1]

*710 Describing the reasons for the rule, the Court noted:

> "(E)vidence of the effects of a subsequent marriage should have no bearing on the amount due a plaintiff following a wrongful death. Compensation received from another source should not affect the responsibility owed to the injured party by the tortfeasor." Wood, 287, 294 N.W.2d 571.

Because the majority decision today not only undercuts the rule so recently restated in Wood, but also conflicts with its underlying rationale, we respectfully dissent.

As stated by the Court of Appeals in the instant case:

> "The defendants argue that the possible remarriage of the plaintiff in this case was not argued as a possible mitigating factor but that it was only mentioned to inform the jury that the plaintiff's expert witness based his calculation of damages upon the assumption that the plaintiff would not remarry. The defendants contend that their right to cross-examine the plaintiff's expert witness to determine the assumptions which he

made in calculating damages extends to asking whether or not the expert assumed that the plaintiff would not remarry. Although the defendants' cross-examination and argument did not explicitly state that the possibility of remarriage should be considered to mitigate damages, the facts actually elicited serve no purpose other than to infer (sic) that the expert's estimate of economic loss was not accurate because it did not reflect a possibility that the plaintiff would remarry. The assumption implicit within the expert's conclusion was, however, a proper application of the cases cited above (Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965); and Bradfield v. Estate of Burgess, 62 Mich.App. 345, 233 N.W.2d 541 (1975), lv. den., 395 Mich. 803 (1975)) to the estimate of damages in this case."

Thus, in effect, defendants were permitted to *711 bring an irrelevant and improper consideration, the possibility of plaintiff's remarriage, to the attention of the jury.[2] **301 Under the rationale stated in Wood, it should make no difference whether the jury is specifically told to take account of the factor of remarriage in assessing damages, as occurred in Wood, or whether that factor is used to evaluate an expert's testimony regarding damages, as occurred in the instant case. In either case, such evidence is irrelevant and should be excluded.

Accordingly, we would affirm the decision of the Court of Appeals and remand the case for a new trial.

LEVIN and KAVANAGH, JJ., concur.

Parallel Citations

311 N.W.2d 297

Footnotes

1 See also Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965).

2 Schaible v. Myers, unpublished per curiam opinion of the Court of Appeals of January 10, 1980, Docket No. 78-323.

3 In Wood the plaintiff had remarried prior to trial. The trial court permitted testimony concerning the remarriage on the ground that if loss of society and companionship were claimed as damages, all facts pertaining to such loss, including remarriage, should be considered. Wood, 409 Mich. 284, 294 N.W.2d 571.

1 The Wood Court quoted Bunda v. Hardwick, 376 Mich. 640, 656, 138 N.W.2d 305 (1965). In Bunda, as in the instant case, the Court focused upon the issue of economic loss, as opposed to loss of consortium.

2 In the instant case, not only did defendants' attorney raise the question of Mr. Schaible's remarriage during cross-examination of the expert witness, but he also discussed the question and its answer during his closing argument. Such repetition may have served to exaggerate the improper effect upon the jury.

End of Document

EXHIBIT B

THE GEC GROUP

Assessment of Economic Loss

Krystal Melissa Ballard

Ballard v. Kerr

May 8, 2013

Cornelius A. Hofman

The GEC Group
5555 N Star Ridge Way
Star, ID 83669
Tel: 208-286-0166
Fax: 888-221-0890

The GEC Group is a paperless office and its only file relating to this matter is in electronic format. If asked to present the file at a deposition or to otherwise publish the file at any time, it will be disclosed in an electronic format.

I. BACKGROUND

This report assesses the present value of economic loss resulting from the death of Krystal Melissa Ballard on July 26, 2010. The economic loss calculated in this analysis consists of lost financial support and lost non-financial support.

II. SUMMARY OF ANALYSIS

This analysis calculates lost financial support and lost non-financial support across two scenarios. Scenario 1 projects Ms. Ballard's career across the enlisted ranks of the U.S. Air Force for a total of 20 years of military service and then in accordance with the civilian earnings of the average female with a college degree. Scenario 2 assumes Ms. Ballard would have become a commissioned officer by January 1, 2016 and projects her career from that time forward across the officer ranks O1-O3 of the U.S. Air Force for a total of 20 years of military service and then in accordance with the civilian earnings of the average female with a college degree.

Under each scenario, lost financial support is projected (a) in accordance with a normal worklife expectancy and (b) assuming a full worklife to age 67 (social security full retirement age).

What follows is a summary of the economic loss to be associated with the death of Ms. Ballard.

The total present value of lost financial support ranges from $1,525,392 to $1,812,045 under Scenario 1 and from $1,872,058 to $2,197,079 under Scenario 2 (Table 1).

Assuming that Ms. Ballard typically provided between 23.7 and 24.2 hours of household services per week (i.e., the average for females with Ms. Ballard's socioeconomic characteristics), the present value of lost non-financial support ranges from $572,213 to $584,285 (Table 1).

The total present value of economic loss to be associated with the death of Ms. Ballard ranges from $2,109,677 to $2,384,258 under Scenario 1 and from $2,456,343 to $2,769,292 under Scenario 2 (Table 1).

III. SOCIOECONOMIC DATA

Age

Krystal Melissa Ballard was born on April 19, 1983 and was 27 years old at the time of her death.

Education

Ms. Ballard graduated from Arima Senior Secondary School in 2001. At the time of her death, Ms. Ballard was attending college and was well into the process of obtaining a bachelor's degree; she had accumulated 70 credits and was earning approximately 10 credits per calendar year. This analysis assumes Ms. Ballard would have continued her university studies and that she would have completed her bachelor's degree in 2015. Additionally, Scenario 2 assumes that Ms. Ballard would have completed officer training school by January 2016.

Life Expectancy

In determining Ms. Ballard's life expectancy, this analysis relies on the life tables assembled by the U.S. National Center for Health Statistics [1]. These tables show the normal life expectancy for women who are Ms. Ballard's age.

As of the date of her death, Ms. Ballard was 27.27 years old and had a life expectancy of 54.13 more years (i.e., to age 81 in the year 2064).

Furthermore, according to the mortality and morbidity data of the United States Department of Health and Human Services [2], as of July 26, 2010 at age 27.27, Ms. Ballard had a healthy life expectancy of 48.07 more years.

Household Data

Ms. Ballard was married to Charles K. Ballard. Mr. Ballard was born on September 30, 1982 and as of the date of this report (May 8, 2013), he is 30 years old.

As of the date of this report (May 8, 2013), Mr. Ballard has a life expectancy of 46.38 more years (i.e., to age 76 in the year 2059) [1].

Occupation and Earnings

Ms. Ballard was a staff sergeant (grade E-5) in the United States Air Force at the time of her death. She joined the Air Force as an Airman Basic on April 13, 2004.

In addition to basic pay, enlisted members of the United States Air Force also receive: subsistence allowance (food money), clothing allowance, housing allowance, a station allowance based on location, hardship duty pay, combat zone tax exclusion benefits, travel entitlements (relocation expense coverages), thrift savings benefits (401k-type), comprehensive medical, dental and vision benefits, and retirement pay.

During her career as an Air Force personnel, Ms. Ballard's personal consumption would have been minimized by her different allowances and benefits. This analysis offsets the normal level of personal consumption during Ms. Ballard's military career to account for the expenditure allowances provided to her by the US Air Force.

After her military career (20 years of service), this analysis projects Ms. Ballard's career in line with the earnings of the average female with a college degree. During her civilian career, this analysis estimates benefits to be 10 percent of money earnings to account for additional retirement income (legally required retirement benefits and 401K-type benefits).

Wage Base for Lost Financial Support

This report projects Ms. Ballard's military wages across two scenarios. At the time of her death, Ms. Ballard was a staff sergeant at grade E-5. Scenario 1 assumes Ms. Ballard would have completed her bachelor's degree as she continued to advance at the normal rate of an enlisted member of the U.S. Air Force (Table 2). Scenario 2 assumes that Ms. Ballard would have earned her bachelor's degree, completed officer training school, and been promoted to O-1 rank by January 1, 2016. After obtaining the O-1 rank, this analysis assumes that Ms. Ballard would have continued to progress at the normal pace to rank O-2 and O-3 (Table 3).

Ms. Ballard planned on retiring from the military after 20 years of service and expected to enter the civilian labor force at that time. Scenario 1 and 2 projects Ms. Ballard's civilian wages based on the average money earnings of females with a bachelor's degree who are Ms. Ballard's age (Table 4).

Ms. Ballard's civilan earnings estimates are adjusted each year in line with the earnings life cycle or individual productivity of the average female with a bachelor's degree who is Ms. Ballard's age (Table 5).

Future lost financial support has been reduced to present value according to the methodology described in Section IV.

Wage Growth

Table 6 presents some empirical evidence showing that workers may expect their wages to grow over time in line with the growing economy.

There are three key economic factors that drive wage growth: (1) inflation, (2) macroeconomic productivity, and (3) individual productivity.

If the prices of goods increase while wages remain fixed, the purchasing power of workers decreases (i.e., workers get poorer). Hence if inflation is 3.0 percent, wages must also increase by 3.0 percent in order for workers to remain as well off.

Another reason for wage growth is increased macroeconomic productivity. In other words, when workers have better capital goods to work with (e.g., computers instead of typewriters or bulldozers instead of shovels), productivity and wages increase.

Thus as technology and the efficiency of capital goods increase, the economy grows and wages increase. {[8], [9]}

The third key economic factor that drives wage growth is the productivity of individual workers. Workers with more human capital (e.g., informal and formal training, general and specific work experience, education, etc.) tend to be more productive.

Wage differentials due to differences in individual productivity levels are captured through an analysis of the age-earnings profiles (or earnings life cycles) of different age-education peer groups. {[8], [9], [10], [11]}

The annual earnings estimates in this analysis are adjusted each year in line with the earnings life cycle of the average worker in Ms. Ballard's peer group.

For further discussion regarding wage growth due to individual productivity (level of human capital) vis-à-vis economy-wide productivity (efficiency of capital goods) see Economics [8] or Modern Labor Economics [9].

Retirement and Worklife Expectancy

While the average retirement age is 63.7 for males and 63.6 for females [12], there are periods in the average worker's life during which he/she is not working (e.g., due to illness, job loss, voluntary retirement, etc.).

Given a person's gender, age and education level, worklife expectancy tables calculate the probabilities that periods of labor force separation will exist during the working life of an individual.

The expected working life is an estimate of the number of years, expressed as a function of constant employment, that the average person in a gender and age-education peer group is expected to continue to participate in the labor force.

Chart 1 of this report illustrates the process by which the worklife expectancy tables calculate and express an individual's normal expected working life.

According to the 1986 U.S. Department of Labor worklife tables (which rely on employment data from 1979 to 1980) [13], as of July 26, 2010 at age 27.27, Ms. Ballard had a normal expected working life of 27.01 more years.

To reflect the socioeconomic changes that have occurred over the last several decades, Ciecka, Epstein and Goldman [14], Richards and Abele [15], Skoog and Ciecka [16] and Skoog, Ciecka and Krueger [17] used the U.S. Department of Labor's methodologies to calculate updated worklife estimates using more current employment data.

More specifically, the Ciecka, Epstein and Goldman updates are based on 1994 labor data, the Richards and Abele updates are based on labor data from 1996 to 1998, the Skoog and Ciecka updates are based on labor data from 1997 and 1998, and the Skoog, Ciecka and Krueger updates are based on labor data from 2005 to 2009.

These updated calculations of the U.S. Department of Labor worklife tables indicate that given her gender, her education, and her age as of July 26, 2010, Ms. Ballard had a normal expected working life of 32.58 more years (Ciecka, Epstein and Goldman), 29.68 more years (Richards and Abele), 30.02 more years (Skoog and Ciecka), and 31.42 more years (Skoog, Ciecka and Krueger).

Summary of Worklife Expectancy Calculations			
Ciecka, Epstein and Goldman (1994)	Richards and Abele (1996-98)	Skoog and Ciecka (1997-98)	Skoog, Ciecka, Krueger (2005-09)
32.58	29.68	30.02	31.42

This analysis projects lost financial support in accordance with a normal worklife expectancy -- retirement at age 63.6, the average retirement age of all females, and a normal worklife expectancy of 30.93 more years.

Furthermore, in accordance with the Social Security Administration's increasing full retirement age, this analysis also projects lost financial support assuming a full worklife to age 67 (social security normal retirement age for people born in 1960 or later).

Household Services or Non-Financial Support

In the United States, time devoted to work is usually compensated in dollars and cents. A major exception is the household work performed by women, children and men in our society that is not sold in formal markets.

While household services may frequently be performed outside formal labor markets, it is clear these services do have a monetary value. {[8], [9], [20], [21], [22], [23], [24], [25], [26], [27], [28], [29]}

The "Dollar Value of a Day" summarizes the U.S. Department of Labor's American Time Use Survey data reporting the time spent by 124,517 persons across the country.

Using the hourly compensation actually paid to females whose employment involves the same activities that people with Ms. Ballard's socioeconomic characteristics typically provide to their own household, the national average household service replacement cost is $13.46 per hour. [29]

In this analysis, household service time is valued using a market alternative cost or a 2013 base replacement cost of $13.46 per hour.

This analysis calculates the present value of household services on a one hour per week basis.

This analysis values household services using *market alternative costs*, or the market wage rates actually paid to workers for performing household services in the marketplace.

The premise of this method is that household work should be valued at the rate one would have to pay someone to do that work, and as such, it is an accounting based measure rather than an opportunity cost based measure.

Furthermore, as this is an economic analysis, no attempt has been made to quantify the individualistic value associated with lost household services. In other words, while one person may value doing yard work more than another, while a person may value a spouse's or a parent's cooking more than a stranger's, or while the time a parent spends caring for a child may be priceless, this analysis limits the valuation of household service time to market alternative costs.

Future household services were projected through age 75.34 and reduced to present value according to the methodology described in Section IV.

Personal Consumption and Financial Support Factor

If a realistic estimate of lost financial support is to emerge from this analysis, consideration must be given to the portion of Ms. Ballard's earnings that would have been used for purchases exclusively for her own personal benefit if not for her premature death. The financial support factor necessary to maintain the living standard for surviving family members is a function of the deceased person's personal consumption. [30]

This analysis accounts for Ms. Ballard's personal consumption, and the estimates of economic loss in this analysis have been reduced by the portion of Ms. Ballard's earnings that she would have incurred for her own personal maintenance.

Each year since 1980, the Bureau of Labor Statistics (BLS) has conducted a survey study [31] of consumer expenditures by querying independent samples of thousands of households in areas representative of the total U.S. civilian population.

The BLS survey study (*Consumer Expenditure Survey*) is designed to obtain details regarding the spending patterns of individuals and households with varying characteristics.

An analysis of the BLS consumption data reveals that the financial support factor is highly correlated with income and household structure (i.e., age and number of members). [31]

This analysis uses data from the U.S. Department of Labor's annual survey studies of consumer expenditures to estimate Ms. Ballard's personal consumption and corresponding financial support factor based on her age, level of income and household size. [31]

For Ms. Ballard, personal consumption as a percentage of earnings ranges from 24 percent to 44 percent. These consumption percentages have been applied to expected earnings.

Based on Ms. Ballard's expected level of pay during her military career, normal personal consumption would be 36 percent of money earnings. However, Ms. Ballard's consumption would have been offset by the following military benefits: subsistence pay ($352/month), clothing allowance ($342/year), and housing allowance for her and her husband less normal rent ($632 x 2 - $890). After accounting for these expenditure benefits, Ms. Ballard's personal consumption during her military career is estimated to be 24 percent.

During her civilian worklife (post military and before final retirement), Ms. Ballard's personal consumption is estimated to be 26-28 percent (Scenario 1) and 25-26 percent (Scenario 2). After final retirement, her personal consumption is estimated to be 44 percent (Scenario 1) and 36 percent (Scenario 2).

Under Scenario 1, the present value of Ms. Ballard's personal consumption of money earnings ranges from $365,487 (normal worklife) to $491,695 (full worklife to age 67). Under Scenario 2, the present value of Ms. Ballard's personal consumption of money earnings ranges from $389,136 (normal worklife) to $505,432 (full worklife to age 67).

IV. PRESENT VALUE ANALYSIS

Present Value of Pecuniary Loss

The easiest and perhaps the best way to estimate the lost future financial support would be to wait and see what the average worker with Ms. Ballard's socio-economic characteristics earns each year in the future. Unfortunately, this cannot be done.

Pecuniary damages must be estimated as of today. This means that the expected future earnings of Ms. Ballard must be estimated in a reasonable way and then expressed in 2013 dollars or present value.

Empirical evidence from the past 57 years indicates that the time value of money and the workers' wage growth rate covary so as to establish a differential (discount rate minus wage growth rate) of zero to one percent.

More specifically, since 1956 the compound annual interest received from investments in U.S. Treasury securities with 1-month, 5-year and 20-year maturities has exceeded the annual increase in wages on a year-by-year basis at a median rate of 0.4, 1.0 and 1.6 percent per year, respectively. {[5], [32]}

Furthermore, since 1956 the average annual growth in total compensation (i.e., wages and benefits) has been approximately one percent higher than the average annual increase in wages alone {[5], [33], [34], [35]}. Since 1956 the compound annual interest received from investments in U.S. Treasury securities with 1-month, 5-year and 20-year maturities has exceeded the annual increase in compensation on a year-by-year basis at a median rate of -0.4, 0.2 and 1.1 percent per year respectively. {[32], [33], [34], [35]}

Further insights regarding future expected wage-interest differentials can be gleaned through an examination of the interest rate and wage rate expectations of some of the largest U.S. companies.

Hewitt Associates, a prominent national actuarial and benefit consulting firm, conducted an annual survey study [36] of the postretirement benefit liabilities of the Fortune 500 and S&P 500 companies. This study analyzes disclosures under the Financial Accounting Standards Board's (FASB) Statement 87 (accounting for pensions) and Statement 106 (accounting for postretirement benefits other than pensions). The key economic assumptions that determine a firm's obligation for pension benefits to its employees are the wage growth rate and the expected long-term rate of return on plan assets. Each year this study includes approximately 400 companies that have reported information on defined benefit pension plans in their financial statements (FAS 87). The historical average wage growth rate used by these companies has been 4.9 percent and the average long-term rate of return on plan assets used has been 9.0 percent.

Watson Wyatt Worldwide, another prominent national actuarial and benefit consulting firm, has conducted an annual survey study of pension plans in the United States covering 1,000 or more active participants. The 2006 survey study [37] looks at the actuarial assumptions of 478 large pension plans covering 1,000 or more active participants. For the 220 pension plans in this study that base retirement benefits on final average pay, the average wage growth rate used was 4.6 percent and the average rate of return on plan assets used was 8.0 percent. From 1990 to 2006, the average wage growth rate used for pension plans that base retirement benefits on final average pay is 5.2 percent and the average long-term rate of return on plan assets for the same plans is 8.2 percent.

In another study [40], Towers Watson analyzes the financial disclosures of 615 companies on the Fortune list of 1,000 companies. The report summarizes the assumptions used by these companies in the calculation of pension expense and obligations. This summary report is the twenty-fourth in a series of annual analyses of pensions. The average wage growth rate used by the companies in the 2011 study is 3.9 percent and the average long-term rate of return on plan assets is 7.9 percent. From 1990 to 2010, the wage growth rate used by companies has averaged 4.6 percent and the long-term rate of return on plan assets for the same period has averaged 8.8 percent.

The expected long-term rate of return on plan assets is the actuarial discount rate used to estimate the amount of money that must be invested to meet the future benefit obligations of a defined benefit pension plan. Thus the 7.9 to 9.0 percent expected rates of return on plan assets noted in the pension plan studies cited above are the discount rates used to reflect the earnings anticipated on the investments made by the fund in order to provide the projected benefit obligations. As such, these rates represent the average expected return on investments in a variety of risky assets. When adjusted for risk, the three-to-four percent differential (used by corporate defined benefit pension plans) which is based on the expected return from investments in risky assets and expected wage growth rates is equivalent to a zero percent differential which is based on the yields of U.S. Treasury securities and expected wage growth rates.

This risk adjusted equivalence can be easily demonstrated in either one of two ways: (1) by plotting the long-term expected rate of return on plan assets against the contemporaneous long-term risk-free rate (i.e., the current yield on 20-year U.S. Treasury bonds adjusted for expected horizon premium); or (2) by calculating the expected risk premium that corporate defined benefit pension plans anticipate from their risky investment portfolio (E[portfolio risk premium] = å [E(return on asseti) - E(risk free rate)] * [portfolio weight of asseti]).

Chart 8 illustrates the first method and suggests that corporate defined benefit plan sponsors would use a differential rate (interest rate minus wage growth rate) of approximately zero if pension assets were restricted to U.S. Treasury securities. Table 7 illustrates the second method and also suggests that corporate defined benefit plan sponsors would use a differential rate (interest rate minus wage growth rate) of approximately zero if pension assets were restricted to U.S. Treasury securities.

The annual report of the board of trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds [42] reports the financial and actuarial status of the Old-Age and Survivors Insurance (OASI) and Disability Insurance (DI) Trust Funds. The Old-Age, Survivors, and Disability Insurance (OASDI) program in the United States provides protection against the loss of earnings due to retirement, death or disability. The total assets of the OASI and DI Trust Funds at the beginning of the calendar year 2012 amounted to $2.68 trillion.

Unlike the investment portfolios of corporate pension plans, by law the investments of the OASI and DI Trust Funds must be made in interest-bearing securities of the U.S. Government or in securities guaranteed by the United States. Because of this, the invested assets of the trust funds are backed by the full faith and credit of the U.S. Government in the same way as other public-debt obligations of the United States. The OASI and DI Trust Funds employ a long-term expected annual return on assets (i.e., a U.S. Treasury bond yield assumption) ranging from 5.2 to 6.2 percent and a long-term annual wage growth assumption ranging from 3.51 to 4.32 percent. The maturity premium implicit in the yield curve of U.S. Treasury bonds has averaged 0.9 percent for intermediate-term bonds and 1.7 percent for long-term bonds during the 1926-2011 period [32]. Therefore, the wage-interest differential used by the OASDI program is equivalent to a net discount rate ranging from 0.0 to 1.9 percent.

Given the initial level of income (earnings base) and the length of the time period (expected working life), all that is necessary in order to estimate the present value of a worker's anticipated future income stream is knowledge of the wage-interest differential. In other words, it is the size of the differential, not the expected levels of wage rates or interest rates, that determines the present value of a future stream of earnings. Table 8 illustrates this point. The data in the table make it clear that regardless of what the actual interest rates and wage growth rates are in the future, the present values for a given differential are identical.

Hence while economists cannot predict what actual interest (discount) rates and actual wage growth rates will be over an extended period in the future, the present value of future economic losses can be bounded with a reasonable degree of economic certainty when a zero to one percent differential (discount rate minus the wage growth rate) is utilized to convert expected future amounts to their present values. This analysis calculates present values using a net discount rate of 0.5 percent.

It should be noted that sometimes the net discount rate is confused with the gross discount rate. This mistake leads to the erroneous conclusion that the net discount rate method assumes a severely limited ability, or no ability at all, to earn interest in the future. For example, with this misunderstanding, it is often argued that a net discount rate of zero percent means that x dollars is required today to cover x dollars of lost wages in the future. Obviously this is not the case. Chart 4 through Chart 7 illustrate the proper interpretation of the net discount rate method.

V. CONCLUSION

The total present value of economic loss to be associated with the death of Ms. Ballard ranges from $2,109,677 to $2,384,258 under Scenario 1 and from $2,456,343 to $2,769,292 under Scenario 2 (see Table 1).

This analysis does not include any allowance for incentive or special pay (family separation allowance, hazardous duty incentive pay, imminent danger pay/hostile fire pay, combat zone tax exclusion, drill pay, travel entitlements, relocation expense coverages, thrift savings benefits) that Ms. Ballard may have received as a member of the U.S. Air Force. Consequently, economic damages in this analysis are biased downward.

This analysis may be updated if additional relevant information becomes available as this litigation progresses.

Table 1: Present Value of Pecuniary Loss to be Associated with the Death of Krystal Melissa Ballard

	Scenario 1: Enlisted Rank		Scenario 2: Officer Rank	
	Normal Worklife	Full Worklife to Age 67	Normal Worklife	Full Worklife to Age 67
FINANCIAL SUPPORT				
Past Money Earnings (net of consumption)	$60,841	$71,464	$60,841	$71,464
Future Money Earnings (net of consumption)	$1,016,891	$1,274,703	$1,131,438	$1,423,288
Future Fringe Benefits (net of consumption)	$68,804	$88,906	$69,734	$91,375
Future Lost Military Retirement Income (net of consumption)	$378,856	$376,972	$610,046	$610,952
Total Lost Financial Support	$1,525,392	$1,812,045	$1,872,058	$2,197,079
NON-FINANCIAL SUPPORT (HOUSEHOLD SERVICES)				
Total Present Value per Hour of Service Time That Has Been Lost per Week (net of consumption)	$24,144	$24,144	$24,144	$24,144
Assumed Hours Lost per Week (average for females)	24.2	23.7	24.2	23.7
Total Household Services (net of consumption)	$584,285	$572,213	$584,285	$572,213
TOTAL	$2,109,677	$2,384,258	$2,456,343	$2,769,292

Table 2: Money Earnings Base For Lost Financial Support - Scenario 1

Year	Grade	TIG (Average)	TIS (Average)	Age (Average)	From	To	TIG (Krystal)	TIS (Krystal)	Age (Krystal)	Pay Grade and Tenure	Monthly Base Pay	Annual Basic Pay	Inflation Factor to Increase Money Earnings to 2013 Dollars	Present Value of Ms. Ballard's Money Earnings	2.5% Times Years of Service	Average of Highest 36 Months of Basic Pay	Monthly Retirement Income in 20135	Annual Retirement Income in 20135
2004	E-1				04/13/04	12/31/04	0.7	0.7	21.7	E-1 - 0 Yrs								
2010	E-5	1.9	4.5	25	01/01/10	12/31/10	1.0	6.7	27.7	E-5 - 6 Yrs	$2,584	$31,007	1.074	$33,300				
2011	E-5				01/01/11	12/31/11	2.0	7.7	28.7	E-5 - 7 Yrs	$2,620	$31,442	1.041	$32,735				
2012	E-5				01/01/12	12/31/12	3.0	8.7	29.7	E-5 - 8 Yrs	$2,845	$34,142	1.020	$34,825				
2013	E-5				01/01/13	12/31/13	4.0	9.7	30.7	E-5 - 9 Yrs	$2,894	$34,722	1.000	$34,722				
2014	E-5				01/01/14	12/31/14	5.0	10.7	31.7	E-5 - 10 Yrs	$3,046	$36,547	1.000	$36,547				
2015	E-6	5.4	10.6	31	01/01/15	12/31/15	1.0	11.7	32.7	E-6 - 11 Yrs	$3,299	$39,582	1.000	$39,582				
2016	E-6				01/01/16	12/31/16	2.0	12.7	33.7	E-6 - 12 Yrs	$3,495	$41,944	1.000	$41,944				
2017	E-6				01/01/17	12/31/17	3.0	13.7	34.7	E-6 - 13 Yrs	$3,495	$41,944	1.000	$41,944				
2018	E-6				01/01/18	12/31/18	4.0	14.7	35.7	E-6 - 14 Yrs	$3,556	$42,667	1.000	$42,667				
2019	E-7	4.0	15.6	36	01/01/19	12/31/19	1.0	15.7	36.7	E-7 - 15 Yrs	$4,044	$48,524	1.000	$48,524				
2020	E-7				01/01/20	12/31/20	2.0	16.7	37.7	E-7 - 16 Yrs	$4,159	$49,903	1.000	$49,903				
2021	E-7				01/01/21	12/31/21	3.0	17.7	38.7	E-7 - 17 Yrs	$4,159	$49,903	1.000	$49,903				
2022	E-7				01/01/22	12/31/22	4.0	18.7	39.7	E-7 - 18 Yrs	$4,281	$51,372	1.000	$51,372				
2023	E-8	4.1	19.3	39	01/01/23	12/31/23	1.0	19.7	40.7	E-8 - 19 Yrs	$4,721	$56,646	1.000	$56,646				
2024	E-8				01/01/24	04/13/24	2.0	20.0	41.0	E-8 - 20 Yrs	$4,848	$58,172	1.000	$58,172	0.500	$4,451	$2,225	$26,705

Sources: U.S. Department of Labor, Bureau of Labor Statistics. [7]

2012 Air Force Promotion averages per Air Force Personnel Center at www.afpc.af.mil

Military pay schedules 2010-2013 (http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html)

Base pay from 2014 forward is expressed in 2013 dollars (i.e., from the 2013 pay schedule)

Table 3: Money Earnings Base For Lost Financial Support - Scenario 2

Year	Grade	TIG (Average)	TIS (Average)	Age (Average)	From	To	TIG (Krystal)	TIS (Krystal)	Age (Krystal)	Pay Grade and Tenure	Monthly Basic Pay	Annual Basic Pay	Inflation Factor to Increase Money Earnings to 2013 Dollars	Present Value of Ms. Ballard's Money Earnings	2.5% Times Years of Service	Average of Highest 36 Months of Basic Pay	Monthly Retirement Income in 2013$	Annual Retirement Income in 2013$
2004	E-1				04/13/04	12/31/04	0.7	0.7	21.7	E-1 - 0 Yrs								
2010	E-5	1.9	4.5	25	01/01/10	12/31/10	1.0	6.7	27.7	E-5 - 6 Yrs	$2,584	$31,007	1.074	$33,300				
2011	E-5				01/01/11	12/31/11	2.0	7.7	28.7	E-5 - 7 Yrs	$2,620	$31,442	1.041	$32,735				
2012	E-5				01/01/12	12/31/12	3.0	8.7	29.7	E-5 - 8 Yrs	$2,845	$34,142	1.020	$34,825				
2013	E-5				01/01/13	12/31/13	4.0	9.7	30.7	E-5 - 9 Yrs	$2,894	$34,722	1.000	$34,722				
2014	E-5				01/01/14	12/31/14	5.0	10.7	31.7	E-5 - 10 Yrs	$3,046	$36,547	1.000	$36,547				
2015	E-6	5.4	10.6	31	01/01/15	12/31/15	1.0	11.7	32.7	E-6 - 11 Yrs	$3,299	$39,582	1.000	$39,582				
2016	O-1				01/01/16	12/31/16	1.0	12.7	33.7	O-1 - 12 Yrs	$4,297	$51,566	1.000	$51,566				
2017	O-1				01/01/17	12/31/17	2.0	13.7	34.7	O-1 - 13 Yrs	$4,297	$51,566	1.000	$51,566				
2018	O-2				01/01/18	12/31/18	1.0	14.7	35.7	O-2 - 14 Yrs	$5,311	$63,734	1.000	$63,734				
2019	O-2				01/01/19	12/31/19	2.0	15.7	36.7	O-2 - 15 Yrs	$5,311	$63,734	1.000	$63,734				
2020	O-3				01/01/20	12/31/20	1.0	16.7	37.7	O-3 - 16 Yrs	$6,471	$77,648	1.000	$77,648				
2021	O-3				01/01/21	12/31/21	2.0	17.7	38.7	O-3 - 17 Yrs	$6,471	$77,648	1.000	$77,648				
2022	O-3				01/01/22	12/31/22	3.0	18.7	39.7	O-3 - 18 Yrs	$6,659	$79,913	1.000	$79,913				
2023	O-3				01/01/23	12/31/23	4.0	19.7	40.7	O-3 - 19 Yrs	$6,659	$79,913	1.000	$79,913				
2024	O-3				01/01/24	04/13/24	5.0	20.0	41.0	O-3 - 20 Yrs	$6,659	$79,913	1.000	$79,913	0.500	$6,614	$3,307	$39,684

Sources: U.S. Department of Labor - Bureau of Labor Statistics [7]

2012 Air Force Promotion averages per Air Force Personnel Center at *www.afpc.af.mil*

Military pay schedules 2010-2013 (*http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html*)

Basic pay from 2014 forward is expressed in 2013 dollars (i.e., from the 2013 pay schedule)

U.S. Air Force Officer Promotion Process. Published at *http://www.military.com*

Table 4: Money Earnings Base For Lost Financial Support (Post Military Career) - Scenario 1 & 2

Year	Description	Average Annual Earnings for a Female with a Bachelor's Degree	Wage Growth Factor to Increase Money Earnings to 2013 Dollars	Present Value of Ms. Ballard's Net Money Earnings
1999	US Census - 2000 (median)	$36,267	1.4611	$52,989
2011	CPS Annual Survey (mean)	58,229	1.0123	$58,947

Sources: U.S. Department of Labor, Bureau of Labor Statistics [7]
Bureau of the Census, Earnings by Occupation and Education
Bureau of the Census, Current Population Survey, 2012 Annual Social and Economic Supplement.

Table 5: Life Cycle Index for Lost Financial Support (Post Military Career) - Scenario 1 & 2

Earnings Index of Average Female with a Bachelor's Degree

Age	Life Cycle Index	Median Age
All	1.00000	
21-24	0.71362	23.0
25-34	0.90606	30.0
35-44	1.10492	40.0
45-54	1.10125	50.0
55-64	1.08018	60.0
65-74	0.88345	70.0

Wage and Salary Earnings of Year-Round Full-Time Workers in the United States [3]

Table 6: U.S. Economic Growth and the Growth in Wages of U.S. Workers

Year	Gross Domestic Product (GDP) per Capita[1]	Hourly Wage of All Private Workers[2]	Hourly Wage of Mining Workers[2]	Hourly Wage of Construction Workers[2]	Hourly Wage of Manufacturing Workers[2]	Financial Activity Workers[2]	Average Annual Income of All U.S. Workers 15 Years Old and Over[3]	Compensation Index for All Workers[4]
1955	$2,509	$1.83		$2.03	$1.74		$2,916	0.0
1958	2,683	2.09	$2.42	2.40	1.99		3,186	0.0
1960	2,912	2.24	2.55	2.65	2.15		3,496	8.5
1964	3,458	2.53	2.76	3.08	2.41	$2.29	3,996	9.9
1965	3,700	2.63	2.87	3.23	2.49	2.38	4,232	10.3
1970	5,063	3.40	3.77	4.74	3.23	3.07	5,589	14.4
1975	7,583	4.73	5.68	6.78	4.71	4.08	7,705	21.4
1980	12,243	6.85	8.97	9.37	7.15	5.82	10,997	33.1
1985	17,683	8.74	11.87	11.75	9.40	7.97	15,323	44.1
1990	23,185	10.20	13.40	13.42	10.78	9.99	19,842	55.2
1991	23,635	10.52	13.82	13.65	11.13	10.42	20,280	58.0
1992	24,686	10.77	14.09	13.81	11.40	10.86	20,758	61.1
1993	25,616	11.05	14.12	14.04	11.70	11.36	22,199	62.5
1994	26,893	11.34	14.41	14.38	12.04	11.82	23,278	63.4
1995	27,813	11.65	14.78	14.73	12.34	12.28	24,211	64.7
1996	29,062	12.04	15.09	15.11	12.75	12.71	25,466	66.9
1997	30,526	12.51	15.57	15.67	13.14	13.22	27,022	69.1
1998	31,843	13.01	16.20	16.23	13.45	13.93	28,236	73.3
1999	33,486	13.49	16.33	16.80	13.85	14.47	29,677	76.6
2000	35,239	14.02	16.55	17.48	14.32	14.98	31,199	82.3
2001	36,063	14.54	17.00	18.00	14.76	15.59	32,099	86.1
2002	36,958	14.97	17.19	18.52	15.29	16.17	32,222	88.8
2003	38,339	15.37	17.56	18.95	15.74	17.14	32,976	93.0
2004	40,419	15.69	18.07	19.23	16.14	17.52	33,859	96.2
2005	42,646	16.13	18.72	19.46	16.56	17.95	35,499	100.0
2006	44,767	16.76	19.90	20.02	16.81	18.80	37,517	103.8
2007	46,499	17.43	20.97	20.95	17.26	19.64	38,174	108.1
2008	46,928	18.08	22.30	21.87	17.75	20.28	38,376	111.7
2009	45,481	18.63	23.29	22.66	18.24	20.85	38,213	113.5
2010	46,805	19.07	23.82	23.22	18.61	21.49	38,337	115.8
2011	48,373	19.47	24.51	23.64	18.94	21.91		117.9
Average Annual Rate of Growth	5.5%	4.3%	4.5%	4.5%	4.4%	4.9%	4.8%	5.3%

Sources: 1. U.S. Department of Commerce: Bureau of Economic Analysis and Bureau of the Census. ([4])
2 Wage Data from the U.S. Department of Labor, Bureau of Labor Statistics. [5]
3 Current Population Reports: Series P60. U.S. Department of Commerce. Bureau of the Census. [6]
4 Economic Report of the President ([33], [34] and [35])

Table 7: Expected Risk Premium of Corporate Pension Plans

Investment Asset	Expected Return on Asset, Over Next Five Years[1]	2004 Average Yield: 5-Year U.S. Treasury Constant Maturity[2]	Percent of Portfolio[1]	Expected Risk Premium,[3]
Equities (stocks)				
Domestic	8.1%	3.4%	44.9%	2.11%
International	8.7%	3.4%	16.6%	0.88%
Fixed Income (bonds)	4.9%	3.4%	27.7%	0.42%
Real Estate	8.1%	3.4%	3.5%	0.16%
Hedge Funds	8.6%	3.4%	1.5%	0.00%
Private Equity	11.1%	3.4%	4.0%	0.31%
Other[4]	3.4%	3.4%	1.8%	0.00%
Totals			100%	3.9%

1. Greenwich Associates [41]
2. The Federal Reserve Board [42]
3. Expected Risk Premium$_i$ = [Expected Return on Asset$_i$ - Yield on 5-Year U.S. Treasury] x Percent of Portfolio
4. The 2004 5-year Treasury rate is used to proxy the returns on "Other" assets.

The 3.9% risk premium of the average corporate pension plan portfolio is just 0.1% less than the average interest-wage differentials used by the pension plans included in the Hewitt Associates study [36] and the Towers Watson studies {[37], [38], [40]}, suggesting that corporate defined benefit pension plans would use a differential (discount rate minus wage growth rate) of zero if pension assets were restricted to U.S. Treasury securities. Details regarding the Hewitt and Towers Watson studies are discussed in the Present Value Analysis section of this report.

The Greenwich Associates survey study [41] is based on the review of 1,022 corporate pension plans and in-person interviews with 610 corporate fund officials between August and October of 2004.

Table 8A: Future Value of Earnings per $10,000 of Initial Earnings
Period = 36 Years of Earnings
Assuming Alternative Earnings Growth Rates

If the annual earnings growth is...	0.0%	1.0%	2.0%	3.0%	4.0%	5.0%	6.0%	7.0%	8.0%
...the initial earnings of $10,000 grows to this amount in year 36:	$10,000	$14,333	$20,544	$29,447	$42,207	$60,496	$86,711	$124,286	$178,145
...and the 36 years of earnings totals:	$360,000	$435,500	$532,506	$657,999	$821,385	$1,035,388	$1,317,262	$1,690,466	$2,186,976

Table 8B: Present Value of Earnings per $10,000 of Initial Earnings
Period = 36 Years of Earnings
Assuming Alternative Earnings Growth Rates and Discount Rates

Discount Rates \ Annual Earnings Growth	0.0%	1.0%	2.0%	3.0%	4.0%	5.0%	6.0%	7.0%	8.0%
0.0%	$360,000								
1.0%	300,815	$360,000							
2.0%	254,066	300,815	$360,000						
3.0%	216,849	254,066	300,815	$360,000					
4.0%	186,978	216,849	254,066	300,815	$360,000				
5.0%	162,801	186,978	216,849	254,066	300,815	$360,000			
6.0%	143,067	162,801	186,978	216,849	254,066	300,815	$360,000		
7.0%	126,819	143,067	162,801	186,978	216,849	254,066	300,815	$360,000	
8.0%	113,327	126,819	143,067	162,801	186,978	216,849	254,066	300,815	$360,000

The data in the table make it clear that the present values for a given differential are identical even though the total earnings over the 36 years vary from $360,000 for a zero percent wage growth rate up to $2,186,976 for an eight percent growth rate. If, for example, a 1.0 percent differential (discount rate minus growth rate) were appropriate, it makes no difference whether the actual discount-growth combination is 1.0 percent versus 0.0 percent, or 8.0 percent versus 7.0 percent. Furthermore, it makes no difference whether the differential is created by a constant discount-growth combination through time (e.g., the discount rate is always 3.0 percent and the growth rate is always 2.0 percent), or whether the differential emerges by virtue of a succession of different discount-growth combinations (e.g., the discount rate changes from 3.0 percent to 4.0 percent to 5.0 percent and the wage growth rate changes from 2.0 percent to 3.0 percent to 4.0 percent).

Table 9: Ms. Ballard's Past Money Earnings from Lost Employment - Scenario 1 & 2 (normal worklife)
(July 26, 2010 to May 08, 2013)

Year	From Age	To Age	Percent of Year	Military Earnings Base	Worklife Adjustment Factor	Present Value of Lost Money Earnings
2010	27.3	27.7	43%	$33,300	0.85136	$12,191
2011	27.7	28.7	100%	32,735	0.85136	27,869
2012	28.7	29.7	100%	34,825	0.85136	29,649
2013	29.7	30.1	35%	34,722	0.85136	10,346
						$80,055

Table 10: Ms. Ballard's Past Money Earnings from Lost Employment - Scenario 1 & 2 (full worklife to age 67)
(July 26, 2010 to May 08, 2013)

Year	From Age	To Age	Percent of Year	Military Earnings Base	Present Value of Lost Money Earnings
2010	27.3	27.7	43%	$33,300	$14,319
2011	27.7	28.7	100%	32,735	32,735
2012	28.7	29.7	100%	34,825	34,825
2013	29.7	30.1	35%	34,722	12,153
					$94,032

Table 11: Ms. Ballard's Future Money Earnings from Lost Employment - Scenario 1 (normal worklife)
(from May 08, 2013 through normal retirement)

Year	From Age	To Age	Percent of Year	Military Earnings Base	Civilian Earnings Base	Civilian Earnings Life Cycle Factor	Life-Cycle Adjusted Money Earnings	Worklife Adjustment Factor	Unemploy-ment Factor	Present Value of Lost Money Earnings
2013	30.1	30.7	65%	$34,722			$34,722	0.85136		$19,152
2014	30.7	31.7	100%	36,547			36,547	0.85136		30,860
2015	31.7	32.7	100%	39,582			39,582	0.85136		33,256
2016	32.7	33.7	100%	41,944			41,944	0.85136		35,065
2017	33.7	34.7	100%	41,944			41,944	0.85136		34,891
2018	34.7	35.7	100%	42,667			42,667	0.85136		35,316
2019	35.7	36.7	100%	48,524			48,524	0.85136		39,964
2020	36.7	37.7	100%	49,903			49,903	0.85136		40,895
2021	37.7	38.7	100%	49,903			49,903	0.85136		40,692
2022	38.7	39.7	100%	51,372			51,372	0.85136		41,681
2023	39.7	40.7	100%	56,646			56,646	0.85136		45,731
2024	40.7	41.7	100%	16,256	26,495	1.10448	45,519	0.85136	0.97089	35,881
2025	41.7	42.7	100%		52,989	1.10411	58,506	0.85136	0.97089	45,403
2026	42.7	43.7	100%		52,989	1.10374	58,486	0.85136	0.97089	45,162
2027	43.7	44.7	100%		52,989	1.10338	58,467	0.85136	0.97089	44,922
2028	44.7	45.7	100%		52,989	1.10301	58,447	0.85136	0.97128	44,702
2029	45.7	46.7	100%		52,989	1.10264	58,428	0.85136	0.97128	44,465
2030	46.7	47.7	100%		52,989	1.10228	58,409	0.85136	0.97128	44,229
2031	47.7	48.7	100%		52,989	1.10191	58,389	0.85136	0.97128	43,994
2032	48.7	49.7	100%		52,989	1.10154	58,370	0.85136	0.97128	43,761
2033	49.7	50.7	100%		52,989	1.10083	58,332	0.85136	0.97128	43,515
2034	50.7	51.7	100%		52,989	1.09872	58,220	0.85136	0.97128	43,215
2035	51.7	52.7	100%		52,989	1.09661	58,109	0.85136	0.97128	42,918
2036	52.7	53.7	100%		52,989	1.09451	57,997	0.85136	0.97128	42,622
2037	53.7	54.7	100%		52,989	1.09240	57,885	0.85136	0.97128	42,329
2038	54.7	55.7	100%		52,989	1.09029	57,774	0.85136	0.96867	41,924
2039	55.7	56.7	100%		52,989	1.08819	57,662	0.85136	0.96867	41,635
2040	56.7	57.7	100%		52,989	1.08608	57,550	0.85136	0.96867	41,347
2041	57.7	58.7	100%		52,989	1.08397	57,439	0.85136	0.96867	41,062
2042	58.7	59.7	100%		52,989	1.08187	57,327	0.85136	0.96867	40,778
2043	59.7	60.7	100%		52,989	1.07625	57,029	0.85136	0.96867	40,364
2044	60.7	61.7	100%		52,989	1.05657	55,987	0.85136	0.96867	39,429
2045	61.7	62.7	100%		52,989	1.03690	54,944	0.85136	0.96867	38,503
2046	62.7	63.6	89%		52,989	1.01821	53,954	0.85136	0.96867	33,501
										$1,363,164

Table 12: Ms. Ballard's Future Money Earnings from Lost Employment - Scenario 1 (full worklife to age 67)
(from May 08, 2013 through age 67)

Year	From Age	To Age	Percent of Year	Military Earnings Base	Civilian Earnings Base	Civilian Earnings Life Cycle Factor	Life-Cycle Adjusted Money Earnings	Unemployment Factor	Present Value of Lost Money Earnings
2013	30.1	30.7	65%	$34,722			$34,722		$22,496
2014	30.7	31.7	100%	36,547			36,547		36,248
2015	31.7	32.7	100%	39,582			39,582		39,062
2016	32.7	33.7	100%	41,944			41,944		41,187
2017	33.7	34.7	100%	41,944			41,944		40,982
2018	34.7	35.7	100%	42,667			42,667		41,482
2019	35.7	36.7	100%	48,524			48,524		46,941
2020	36.7	37.7	100%	49,903			49,903		48,035
2021	37.7	38.7	100%	49,903			49,903		47,796
2022	38.7	39.7	100%	51,372			51,372		48,958
2023	39.7	40.7	100%	56,646			56,646		53,716
2024	40.7	41.7	100%	16,256	26,495	1.10448	45,519	0.97089	42,146
2025	41.7	42.7	100%		52,989	1.10411	58,506	0.97089	53,329
2026	42.7	43.7	100%		52,989	1.10374	58,486	0.97089	53,047
2027	43.7	44.7	100%		52,989	1.10338	58,467	0.97089	52,765
2028	44.7	45.7	100%		52,989	1.10301	58,447	0.97128	52,506
2029	45.7	46.7	100%		52,989	1.10264	58,428	0.97128	52,228
2030	46.7	47.7	100%		52,989	1.10228	58,409	0.97128	51,950
2031	47.7	48.7	100%		52,989	1.10191	58,389	0.97128	51,675
2032	48.7	49.7	100%		52,989	1.10154	58,370	0.97128	51,401
2033	49.7	50.7	100%		52,989	1.10083	58,332	0.97128	51,112
2034	50.7	51.7	100%		52,989	1.09872	58,220	0.97128	50,760
2035	51.7	52.7	100%		52,989	1.09661	58,109	0.97128	50,411
2036	52.7	53.7	100%		52,989	1.09451	57,997	0.97128	50,064
2037	53.7	54.7	100%		52,989	1.09240	57,885	0.97128	49,719
2038	54.7	55.7	100%		52,989	1.09029	57,774	0.96867	49,243
2039	55.7	56.7	100%		52,989	1.08819	57,662	0.96867	48,903
2040	56.7	57.7	100%		52,989	1.08608	57,550	0.96867	48,566
2041	57.7	58.7	100%		52,989	1.08397	57,439	0.96867	48,231
2042	58.7	59.7	100%		52,989	1.08187	57,327	0.96867	47,897
2043	59.7	60.7	100%		52,989	1.07625	57,029	0.96867	47,411
2044	60.7	61.7	100%		52,989	1.05657	55,987	0.96867	46,313
2045	61.7	62.7	100%		52,989	1.03690	54,944	0.96867	45,225
2046	62.7	63.7	100%		52,989	1.01723	53,902	0.96867	44,166
2047	63.7	64.7	100%		52,989	0.99755	52,859	0.96867	43,077
2048	64.7	65.7	100%		52,989	0.97788	51,817	0.96572	41,889
2049	65.7	66.7	100%		52,989	0.95821	50,775	0.96572	40,842
2050	66.7	67.0	30%		52,989	0.94542	50,097	0.96572	12,071
									$1,743,830

Table 13: Ms. Ballard's Future Money Earnings from Lost Employment - Scenario 2 (normal worklife)
(from May 08, 2013 through normal retirement)

Year	From Age	To Age	Percent of Year	Military Earnings Base	Civilian Earnings Base	Civilian Earnings Life Cycle Factor	Life-Cycle Adjusted Money Earnings	Worklife Adjustment Factor	Unemploy-ment Factor	Present Value of Lost Money Earnings
2013	30.1	30.7	65%	$34,722			$34,722	0.85136		$19,152
2014	30.7	31.7	100%	36,547			36,547	0.85136		30,860
2015	31.7	32.7	100%	39,582			39,582	0.85136		33,256
2016	32.7	33.7	100%	51,566			51,566	0.85136		43,110
2017	33.7	34.7	100%	51,566			51,566	0.85136		42,895
2018	34.7	35.7	100%	63,734			63,734	0.85136		52,753
2019	35.7	36.7	100%	63,734			63,734	0.85136		52,491
2020	36.7	37.7	100%	77,648			77,648	0.85136		63,632
2021	37.7	38.7	100%	77,648			77,648	0.85136		63,316
2022	38.7	39.7	100%	79,913			79,913	0.85136		64,838
2023	39.7	40.7	100%	79,913			79,913	0.85136		64,515
2024	40.7	41.7	100%	22,332	26,495	1.10448	51,594	0.85136	0.97089	40,762
2025	41.7	42.7	100%		52,989	1.10411	58,506	0.85136	0.97089	45,403
2026	42.7	43.7	100%		52,989	1.10374	58,486	0.85136	0.97089	45,162
2027	43.7	44.7	100%		52,989	1.10338	58,467	0.85136	0.97089	44,922
2028	44.7	45.7	100%		52,989	1.10301	58,447	0.85136	0.97128	44,702
2029	45.7	46.7	100%		52,989	1.10264	58,428	0.85136	0.97128	44,465
2030	46.7	47.7	100%		52,989	1.10228	58,409	0.85136	0.97128	44,229
2031	47.7	48.7	100%		52,989	1.10191	58,389	0.85136	0.97128	43,994
2032	48.7	49.7	100%		52,989	1.10154	58,370	0.85136	0.97128	43,761
2033	49.7	50.7	100%		52,989	1.10083	58,332	0.85136	0.97128	43,515
2034	50.7	51.7	100%		52,989	1.09872	58,220	0.85136	0.97128	43,215
2035	51.7	52.7	100%		52,989	1.09661	58,109	0.85136	0.97128	42,918
2036	52.7	53.7	100%		52,989	1.09451	57,997	0.85136	0.97128	42,622
2037	53.7	54.7	100%		52,989	1.09240	57,885	0.85136	0.97128	42,329
2038	54.7	55.7	100%		52,989	1.09029	57,774	0.85136	0.96867	41,924
2039	55.7	56.7	100%		52,989	1.08819	57,662	0.85136	0.96867	41,635
2040	56.7	57.7	100%		52,989	1.08608	57,550	0.85136	0.96867	41,347
2041	57.7	58.7	100%		52,989	1.08397	57,439	0.85136	0.96867	41,062
2042	58.7	59.7	100%		52,989	1.08187	57,327	0.85136	0.96867	40,778
2043	59.7	60.7	100%		52,989	1.07625	57,029	0.85136	0.96867	40,364
2044	60.7	61.7	100%		52,989	1.05657	55,987	0.85136	0.96867	39,429
2045	61.7	62.7	100%		52,989	1.03690	54,944	0.85136	0.96867	38,503
2046	62.7	63.6	89%		52,989	1.01821	53,954	0.85136	0.96867	33,501
										$1,501,360

Table 14: Ms. Ballard's Future Money Earnings from Lost Employment - Scenario 2 (full worklife to age 67)
(from May 08, 2013 through age 67)

Year	From Age	To Age	Percent of Year	Military Earnings Base	Civilian Earnings Base	Civilian Earnings Life Cycle Factor	Life-Cycle Adjusted Money Earnings	Unemployment Factor	Present Value of Lost Money Earnings
2013	30.1	30.7	65%	$34,722			$34,722		$22,496
2014	30.7	31.7	100%	36,547			36,547		36,248
2015	31.7	32.7	100%	39,582			39,582		39,062
2016	32.7	33.7	100%	51,566			51,566		50,636
2017	33.7	34.7	100%	51,566			51,566		50,384
2018	34.7	35.7	100%	63,734			63,734		61,963
2019	35.7	36.7	100%	63,734			63,734		61,655
2020	36.7	37.7	100%	77,648			77,648		74,742
2021	37.7	38.7	100%	77,648			77,648		74,370
2022	38.7	39.7	100%	79,913			79,913		76,158
2023	39.7	40.7	100%	79,913			79,913		75,779
2024	40.7	41.7	100%	22,332	26,495	1.10448	51,594	0.97089	47,878
2025	41.7	42.7	100%		52,989	1.10411	58,506	0.97089	53,329
2026	42.7	43.7	100%		52,989	1.10374	58,486	0.97089	53,047
2027	43.7	44.7	100%		52,989	1.10338	58,467	0.97089	52,765
2028	44.7	45.7	100%		52,989	1.10301	58,447	0.97128	52,506
2029	45.7	46.7	100%		52,989	1.10264	58,428	0.97128	52,228
2030	46.7	47.7	100%		52,989	1.10228	58,409	0.97128	51,950
2031	47.7	48.7	100%		52,989	1.10191	58,389	0.97128	51,675
2032	48.7	49.7	100%		52,989	1.10154	58,370	0.97128	51,401
2033	49.7	50.7	100%		52,989	1.10083	58,332	0.97128	51,112
2034	50.7	51.7	100%		52,989	1.09872	58,220	0.97128	50,760
2035	51.7	52.7	100%		52,989	1.09661	58,109	0.97128	50,411
2036	52.7	53.7	100%		52,989	1.09451	57,997	0.97128	50,064
2037	53.7	54.7	100%		52,989	1.09240	57,885	0.97128	49,719
2038	54.7	55.7	100%		52,989	1.09029	57,774	0.96867	49,243
2039	55.7	56.7	100%		52,989	1.08819	57,662	0.96867	48,903
2040	56.7	57.7	100%		52,989	1.08608	57,550	0.96867	48,566
2041	57.7	58.7	100%		52,989	1.08397	57,439	0.96867	48,231
2042	58.7	59.7	100%		52,989	1.08187	57,327	0.96867	47,897
2043	59.7	60.7	100%		52,989	1.07625	57,029	0.96867	47,411
2044	60.7	61.7	100%		52,989	1.05657	55,987	0.96867	46,313
2045	61.7	62.7	100%		52,989	1.03690	54,944	0.96867	45,225
2046	62.7	63.7	100%		52,989	1.01723	53,902	0.96867	44,146
2047	63.7	64.7	100%		52,989	0.99755	52,859	0.96867	43,077
2048	64.7	65.7	100%		52,989	0.97788	51,817	0.96572	41,889
2049	65.7	66.7	100%		52,989	0.95821	50,775	0.96572	40,842
2050	66.7	67.0	30%		52,989	0.94542	50,097	0.96572	12,071
									$1,906,152

Table 15: Present Value of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 1 (normal worklife)

Year	from Age	to Age	% of Year	Annual Retirement Income Base in 2013$	Annual Retirement Income Base in 2024$ (3% growth)	Net Retirement Income Base in 2024$	PV Factor ndr = 1.5%	PV of Lost Retirement Income in 2024$
2024	41.0	41.7	72%	$26,705	$36,966	$26,517	1.0000	$26,517
2025	41.7	42.7	100%	$26,705	$36,966	$36,966	0.9852	$36,420
2026	42.7	43.7	100%	$26,705	$36,966	$36,966	0.9707	$35,882
2027	43.7	44.7	100%	$26,705	$36,966	$36,966	0.9563	$35,352
2028	44.7	45.7	100%	$26,705	$36,966	$36,966	0.9422	$34,829
2029	45.7	46.7	100%	$26,705	$36,966	$36,966	0.9283	$34,314
2030	46.7	47.7	100%	$26,705	$36,966	$36,966	0.9145	$33,807
2031	47.7	48.7	100%	$26,705	$36,966	$36,966	0.9010	$33,308
2032	48.7	49.7	100%	$26,705	$36,966	$36,966	0.8877	$32,816
2033	49.7	50.7	100%	$26,705	$36,966	$36,966	0.8746	$32,331
2034	50.7	51.7	100%	$26,705	$36,966	$36,966	0.8617	$31,853
2035	51.7	52.7	100%	$26,705	$36,966	$36,966	0.8489	$31,382
2036	52.7	53.7	100%	$26,705	$36,966	$36,966	0.8364	$30,918
2037	53.7	54.7	100%	$26,705	$36,966	$36,966	0.8240	$30,461
2038	54.7	55.7	100%	$26,705	$36,966	$36,966	0.8118	$30,011
2039	55.7	56.7	100%	$26,705	$36,966	$36,966	0.7999	$29,568
2040	56.7	57.7	100%	$26,705	$36,966	$36,966	0.7880	$29,131
2041	57.7	58.7	100%	$26,705	$36,966	$36,966	0.7764	$28,700
2042	58.7	59.7	100%	$26,705	$36,966	$36,966	0.7649	$28,276
2043	59.7	60.7	100%	$26,705	$36,966	$36,966	0.7536	$27,858
2044	60.7	61.7	100%	$26,705	$36,966	$36,966	0.7425	$27,446
2045	61.7	62.7	100%	$26,705	$36,966	$36,966	0.7315	$27,041
2046	62.7	63.7	100%	$26,705	$36,966	$36,966	0.7207	$26,641
2047	63.7	64.7	100%	$26,705	$36,966	$36,966	0.7100	$26,248
2048	64.7	65.7	100%	$26,705	$36,966	$36,966	0.6995	$25,860
2049	65.7	66.7	100%	$26,705	$36,966	$36,966	0.6892	$25,477
2050	66.7	67.7	100%	$26,705	$36,966	$36,966	0.6790	$25,101
2051	67.7	68.7	100%	$26,705	$36,966	$36,966	0.6690	$24,730
2052	68.7	69.7	100%	$26,705	$36,966	$36,966	0.6591	$24,365
2053	69.7	70.7	100%	$26,705	$36,966	$36,966	0.6494	$24,004
2054	70.7	71.7	100%	$26,705	$36,966	$36,966	0.6398	$23,650
2055	71.7	72.7	100%	$26,705	$36,966	$36,966	0.6303	$23,300
2056	72.7	73.7	100%	$26,705	$36,966	$36,966	0.6210	$22,956
2057	73.7	74.7	100%	$26,705	$36,966	$36,966	0.6118	$22,617
2058	74.7	75.7	100%	$26,705	$36,966	$36,966	0.6028	$22,282
2059	75.7	76.7	73%	$26,705	$36,966	$26,807	0.5939	$15,920
							Total in 2024$	$1,021,372
							PV factor to convert to 2013$ at an effective net discount rate of 0.5%	0.6849
							PV of lost military retirement income in 2013$	$699,584
							Less personal consumption (26% prior to retirement at age 63.6 and 44% after retirement at age 63.6)	$320,728
							PV of net lost retirement military retirement income	$378,856

Table 16: Present Value of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 1 (full worklife to age 67)

Year	from Age	to Age	% of Year	Annual Retirement Income Base in 2013$	Annual Retirement Income Base in 2024$ (3% growth)	Net Retirement Income Base in 2024$	PV Factor ndr = 1.5%	PV of Lost Retirement Income in 2024$
2024	41.0	41.7	72%	$26,705	$36,966	$26,617	1.0000	$26,617
2025	41.7	42.7	100%	$26,705	$36,966	$36,966	0.9852	$36,420
2026	42.7	43.7	100%	$26,705	$36,966	$36,966	0.9707	$35,882
2027	43.7	44.7	100%	$26,705	$36,966	$36,966	0.9563	$35,352
2028	44.7	45.7	100%	$26,705	$36,966	$36,966	0.9422	$34,829
2029	45.7	46.7	100%	$26,705	$36,966	$36,966	0.9283	$34,314
2030	46.7	47.7	100%	$26,705	$36,966	$36,966	0.9145	$33,807
2031	47.7	48.7	100%	$26,705	$36,966	$36,966	0.9010	$33,308
2032	48.7	49.7	100%	$26,705	$36,966	$36,966	0.8877	$32,816
2033	49.7	50.7	100%	$26,705	$36,966	$36,966	0.8746	$32,331
2034	50.7	51.7	100%	$26,705	$36,966	$36,966	0.8617	$31,853
2035	51.7	52.7	100%	$26,705	$36,966	$36,966	0.8489	$31,382
2036	52.7	53.7	100%	$26,705	$36,966	$36,966	0.8364	$30,918
2037	53.7	54.7	100%	$26,705	$36,966	$36,966	0.8240	$30,461
2038	54.7	55.7	100%	$26,705	$36,966	$36,966	0.8118	$30,011
2039	55.7	56.7	100%	$26,705	$36,966	$36,966	0.7999	$29,568
2040	56.7	57.7	100%	$26,705	$36,966	$36,966	0.7880	$29,131
2041	57.7	58.7	100%	$26,705	$36,966	$36,966	0.7764	$28,700
2042	58.7	59.7	100%	$26,705	$36,966	$36,966	0.7649	$28,276
2043	59.7	60.7	100%	$26,705	$36,966	$36,966	0.7536	$27,858
2044	60.7	61.7	100%	$26,705	$36,966	$36,966	0.7425	$27,446
2045	61.7	62.7	100%	$26,705	$36,966	$36,966	0.7315	$27,041
2046	62.7	63.7	100%	$26,705	$36,966	$36,966	0.7207	$26,641
2047	63.7	64.7	100%	$26,705	$36,966	$36,966	0.7100	$26,248
2048	64.7	65.7	100%	$26,705	$36,966	$36,966	0.6995	$25,860
2049	65.7	66.7	100%	$26,705	$36,966	$36,966	0.6892	$25,477
2050	66.7	67.7	100%	$26,705	$36,966	$36,966	0.6790	$25,101
2051	67.7	68.7	100%	$26,705	$36,966	$36,966	0.6690	$24,730
2052	68.7	69.7	100%	$26,705	$36,966	$36,966	0.6591	$24,365
2053	69.7	70.7	100%	$26,705	$36,966	$36,966	0.6494	$24,004
2054	70.7	71.7	100%	$26,705	$36,966	$36,966	0.6398	$23,650
2055	71.7	72.7	100%	$26,705	$36,966	$36,966	0.6303	$23,300
2056	72.7	73.7	100%	$26,705	$36,966	$36,966	0.6210	$22,956
2057	73.7	74.7	100%	$26,705	$36,966	$36,966	0.6118	$22,617
2058	74.7	75.7	100%	$26,705	$36,966	$36,966	0.6028	$22,282
2059	75.7	76.7	73%	$26,705	$36,966	$26,807	0.5939	$15,920

Total in 2024$	$1,021,372
PV factor to convert to 2013$ at an effective net discount rate of 0.5%	0.6849
PV of lost military retirement income in 2013$	$699,584
Less personal consumption (28% prior to retirement at age 67 and 44% after retirement at age 67)	$322,612
PV of net lost retirement military retirement income	$376,972

Table 17: Present Value of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 2 (normal worklife)

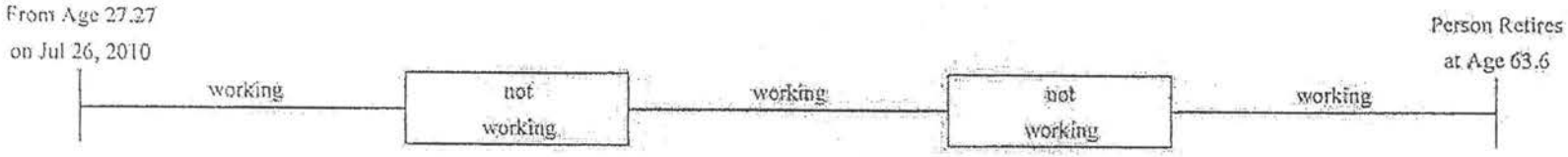
Year	from Age	to Age	% of Year	Annual Retirement Income Base in 2013$	Annual Retirement Income Base in 2024$ (3% growth)	Net Retirement Income Base in 2024$	PV Factor ndr = 1.5%	PV of Lost Retirement Income in 2024$
2024	41.0	41.7	72%	$39,684	$54,933	$39,404	1.0000	$39,404
2025	41.7	42.7	100%	$39,684	$54,933	$54,933	0.9852	$54,121
2026	42.7	43.7	100%	$39,684	$54,933	$54,933	0.9707	$53,321
2027	43.7	44.7	100%	$39,684	$54,933	$54,933	0.9563	$52,533
2028	44.7	45.7	100%	$39,684	$54,933	$54,933	0.9422	$51,757
2029	45.7	46.7	100%	$39,684	$54,933	$54,933	0.9283	$50,992
2030	46.7	47.7	100%	$39,684	$54,933	$54,933	0.9145	$50,238
2031	47.7	48.7	100%	$39,684	$54,933	$54,933	0.9010	$49,496
2032	48.7	49.7	100%	$39,684	$54,933	$54,933	0.8877	$48,764
2033	49.7	50.7	100%	$39,684	$54,933	$54,933	0.8746	$48,044
2034	50.7	51.7	100%	$39,684	$54,933	$54,933	0.8617	$47,334
2035	51.7	52.7	100%	$39,684	$54,933	$54,933	0.8489	$46,634
2036	52.7	53.7	100%	$39,684	$54,933	$54,933	0.8364	$45,945
2037	53.7	54.7	100%	$39,684	$54,933	$54,933	0.8240	$45,266
2038	54.7	55.7	100%	$39,684	$54,933	$54,933	0.8118	$44,597
2039	55.7	56.7	100%	$39,684	$54,933	$54,933	0.7999	$43,938
2040	56.7	57.7	100%	$39,684	$54,933	$54,933	0.7880	$43,289
2041	57.7	58.7	100%	$39,684	$54,933	$54,933	0.7764	$42,649
2042	58.7	59.7	100%	$39,684	$54,933	$54,933	0.7649	$42,019
2043	59.7	60.7	100%	$39,684	$54,933	$54,933	0.7536	$41,398
2044	60.7	61.7	100%	$39,684	$54,933	$54,933	0.7425	$40,786
2045	61.7	62.7	100%	$39,684	$54,933	$54,933	0.7315	$40,183
2046	62.7	63.7	100%	$39,684	$54,933	$54,933	0.7207	$39,589
2047	63.7	64.7	100%	$39,684	$54,933	$54,933	0.7100	$39,004
2048	64.7	65.7	100%	$39,684	$54,933	$54,933	0.6995	$38,428
2049	65.7	66.7	100%	$39,684	$54,933	$54,933	0.6892	$37,860
2050	66.7	67.7	100%	$39,684	$54,933	$54,933	0.6790	$37,300
2051	67.7	68.7	100%	$39,684	$54,933	$54,933	0.6690	$36,749
2052	68.7	69.7	100%	$39,684	$54,933	$54,933	0.6591	$36,206
2053	69.7	70.7	100%	$39,684	$54,933	$54,933	0.6494	$35,671
2054	70.7	71.7	100%	$39,684	$54,933	$54,933	0.6398	$35,144
2055	71.7	72.7	100%	$39,684	$54,933	$54,933	0.6303	$34,624
2056	72.7	73.7	100%	$39,684	$54,933	$54,933	0.6210	$34,113
2057	73.7	74.7	100%	$39,684	$54,933	$54,933	0.6118	$33,609
2058	74.7	75.7	100%	$39,684	$54,933	$54,933	0.6028	$33,112
2059	75.7	76.7	73%	$39,684	$54,933	$39,836	0.5939	$23,657
							Total in 2024$	$1,517,771
							PV factor to convert to 2013$ at an effective net discount rate of 0.5%	0.6849
							PV of lost military retirement income in 2013$	$1,039,591
							Less personal consumption (25% prior to retirement at age 63.6 and 36% after retirement at age 63.6)	$429,545
							PV of net lost retirement military retirement income	$610,046

Table 18: Present Value of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 2 (full worklife to age 67)

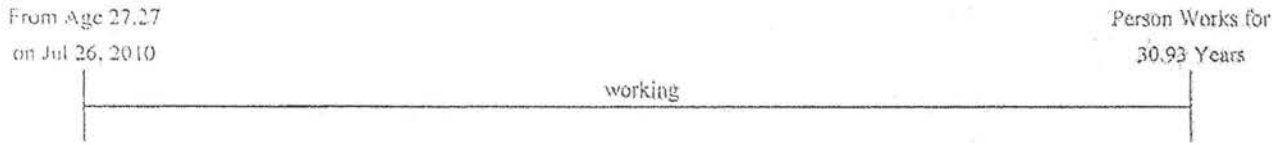
Year	from Age	to Age	% of Year	Annual Retirement Income Base in 2013$	Annual Retirement Income Base in 2024$ (3% growth)	Net Retirement Income Base in 2024$	PV Factor ndr = 1.5%	PV of Lost Retirement Income in 2024$
2024	41.0	41.7	72%	$39,684	$54,933	$39,404	1.0000	$39,404
2025	41.7	42.7	100%	$39,684	$54,933	$54,933	0.9852	$54,121
2026	42.7	43.7	100%	$39,684	$54,933	$54,933	0.9707	$53,321
2027	43.7	44.7	100%	$39,684	$54,933	$54,933	0.9563	$52,533
2028	44.7	45.7	100%	$39,684	$54,933	$54,933	0.9422	$51,757
2029	45.7	46.7	100%	$39,684	$54,933	$54,933	0.9283	$50,992
2030	46.7	47.7	100%	$39,684	$54,933	$54,933	0.9145	$50,238
2031	47.7	48.7	100%	$39,684	$54,933	$54,933	0.9010	$49,496
2032	48.7	49.7	100%	$39,684	$54,933	$54,933	0.8877	$48,764
2033	49.7	50.7	100%	$39,684	$54,933	$54,933	0.8746	$48,044
2034	50.7	51.7	100%	$39,684	$54,933	$54,933	0.8617	$47,334
2035	51.7	52.7	100%	$39,684	$54,933	$54,933	0.8489	$46,634
2036	52.7	53.7	100%	$39,684	$54,933	$54,933	0.8364	$45,945
2037	53.7	54.7	100%	$39,684	$54,933	$54,933	0.8240	$45,266
2038	54.7	55.7	100%	$39,684	$54,933	$54,933	0.8118	$44,597
2039	55.7	56.7	100%	$39,684	$54,933	$54,933	0.7999	$43,938
2040	56.7	57.7	100%	$39,684	$54,933	$54,933	0.7880	$43,289
2041	57.7	58.7	100%	$39,684	$54,933	$54,933	0.7764	$42,649
2042	58.7	59.7	100%	$39,684	$54,933	$54,933	0.7649	$42,019
2043	59.7	60.7	100%	$39,684	$54,933	$54,933	0.7536	$41,398
2044	60.7	61.7	100%	$39,684	$54,933	$54,933	0.7425	$40,786
2045	61.7	62.7	100%	$39,684	$54,933	$54,933	0.7315	$40,183
2046	62.7	63.7	100%	$39,684	$54,933	$54,933	0.7207	$39,589
2047	63.7	64.7	100%	$39,684	$54,933	$54,933	0.7100	$39,004
2048	64.7	65.7	100%	$39,684	$54,933	$54,933	0.6995	$38,428
2049	65.7	66.7	100%	$39,684	$54,933	$54,933	0.6892	$37,860
2050	66.7	67.7	100%	$39,684	$54,933	$54,933	0.6790	$37,300
2051	67.7	68.7	100%	$39,684	$54,933	$54,933	0.6690	$36,749
2052	68.7	69.7	100%	$39,684	$54,933	$54,933	0.6591	$36,206
2053	69.7	70.7	100%	$39,684	$54,933	$54,933	0.6494	$35,671
2054	70.7	71.7	100%	$39,684	$54,933	$54,933	0.6398	$35,144
2055	71.7	72.7	100%	$39,684	$54,933	$54,933	0.6303	$34,624
2056	72.7	73.7	100%	$39,684	$54,933	$54,933	0.6210	$34,113
2057	73.7	74.7	100%	$39,684	$54,933	$54,933	0.6118	$33,609
2058	74.7	75.7	100%	$39,684	$54,933	$54,933	0.6028	$33,112
2059	75.7	76.7	73%	$39,684	$54,933	$39,836	0.5939	$23,657
							Total in 2024$	$1,517,771
							PV factor to convert to 2013$ at an effective net discount rate of 0.5%	0.6849
							PV of lost military retirement income in 2013$	$1,039,591
							Less personal consumption (26% prior to retirement at age 67 and 36% after retirement at age 67)	$428,639
							PV of net lost retirement military retirement income	$610,952

Chart 1: Worklife Expectancy vis-à-vis Retirement

Worklife tables isolate the probabilities that the boxed areas will exist.
The time line below represents a person's age throughout her working life.

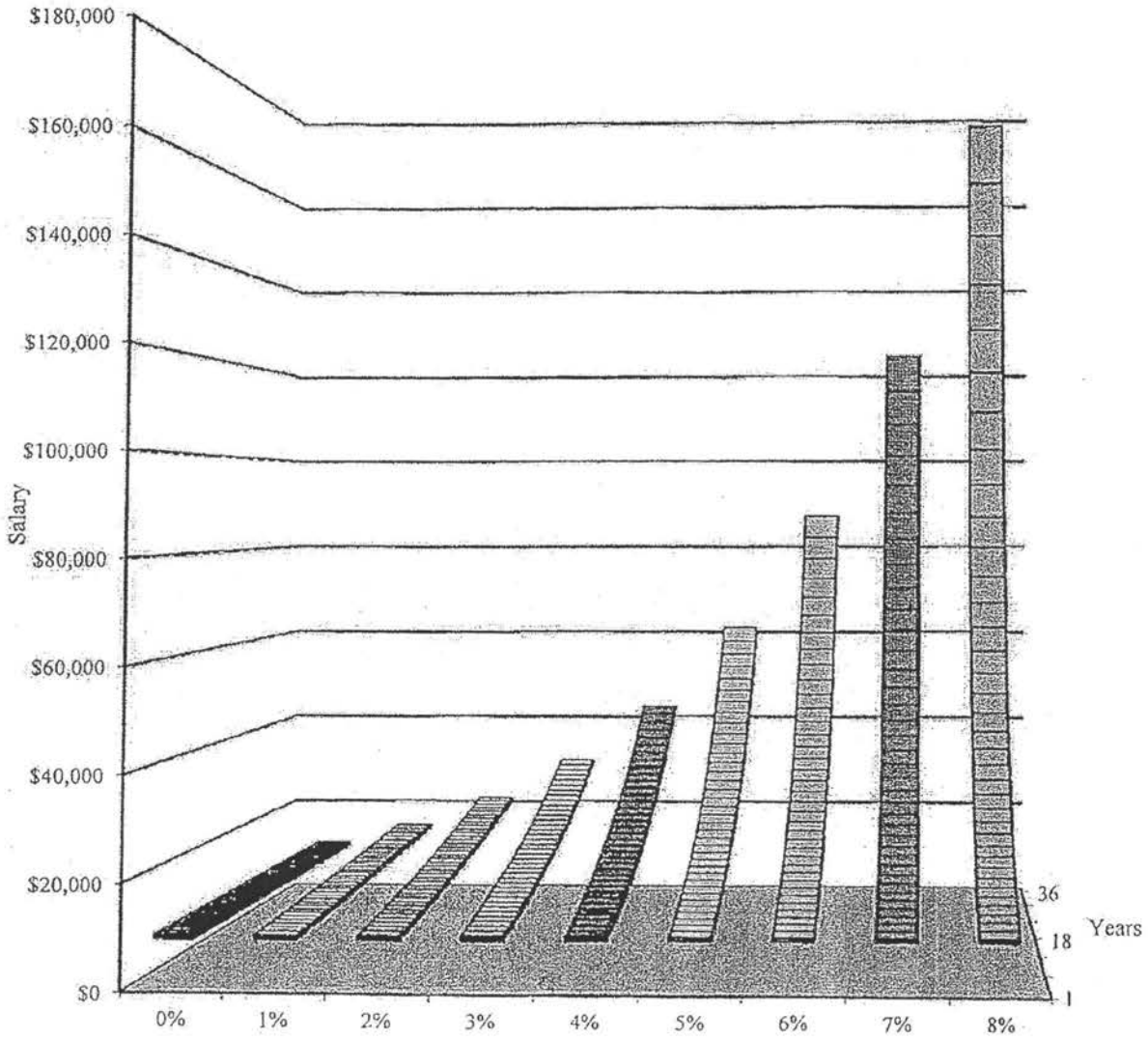


Worklife tables remove the boxed areas and express worklife expectancy as a function of constant employment.
The time line below represents the number of years a person is expected to work without interruption.



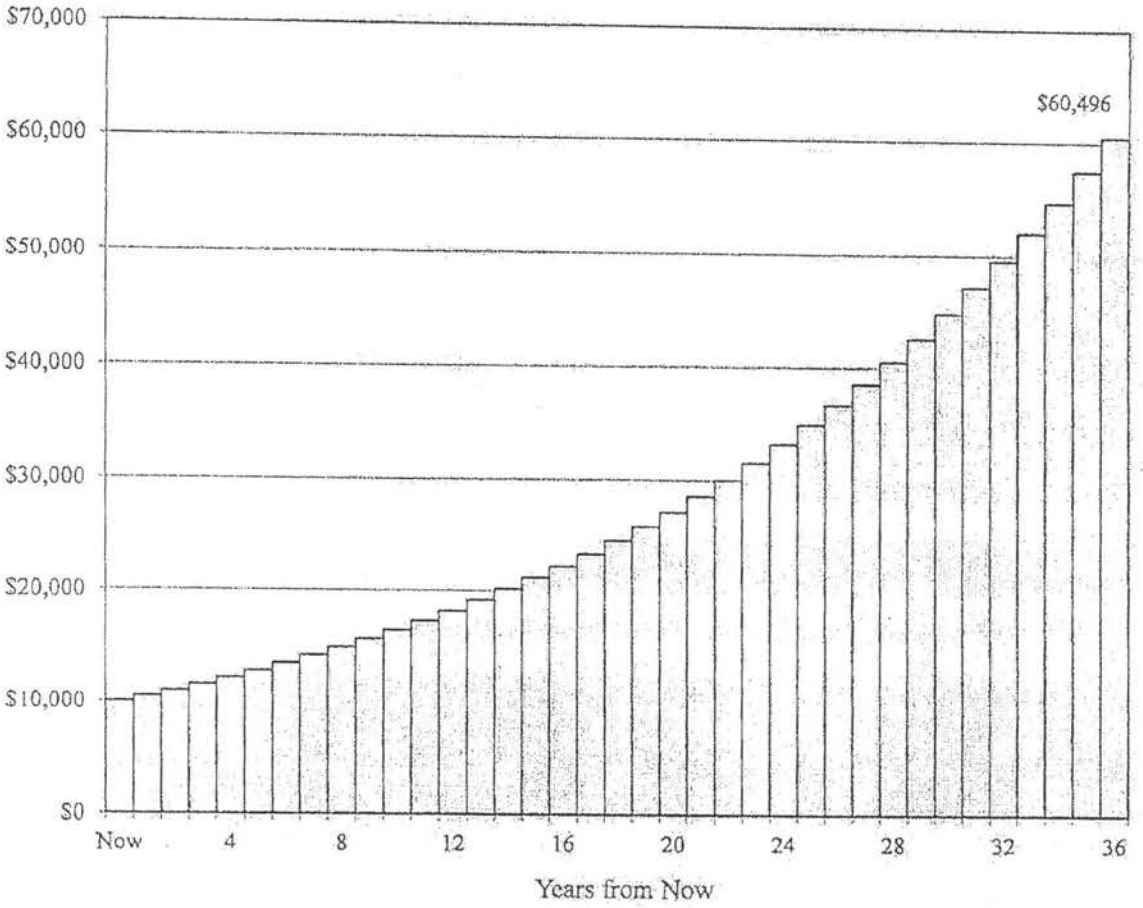
The normal retirement and worklife scenarios of this analysis assume that Ms. Ballard would have retired at age 63.6, the average retirement age of all females [12].
A normal worklife expectancy for someone with Ms. Ballard's socioeconomic characteristics is 30.93 years [14].
The worklife adjustment factor applied to each year of projected earnings is 0.85136.
[(30.93 year worklife expectancy) = (0.85136) x (36.33 year period from Ms. Ballard's age as of July 26, 2010 to age 63.6)]

Chart 2: Future Values of a $10,000 Salary Over 36 Years



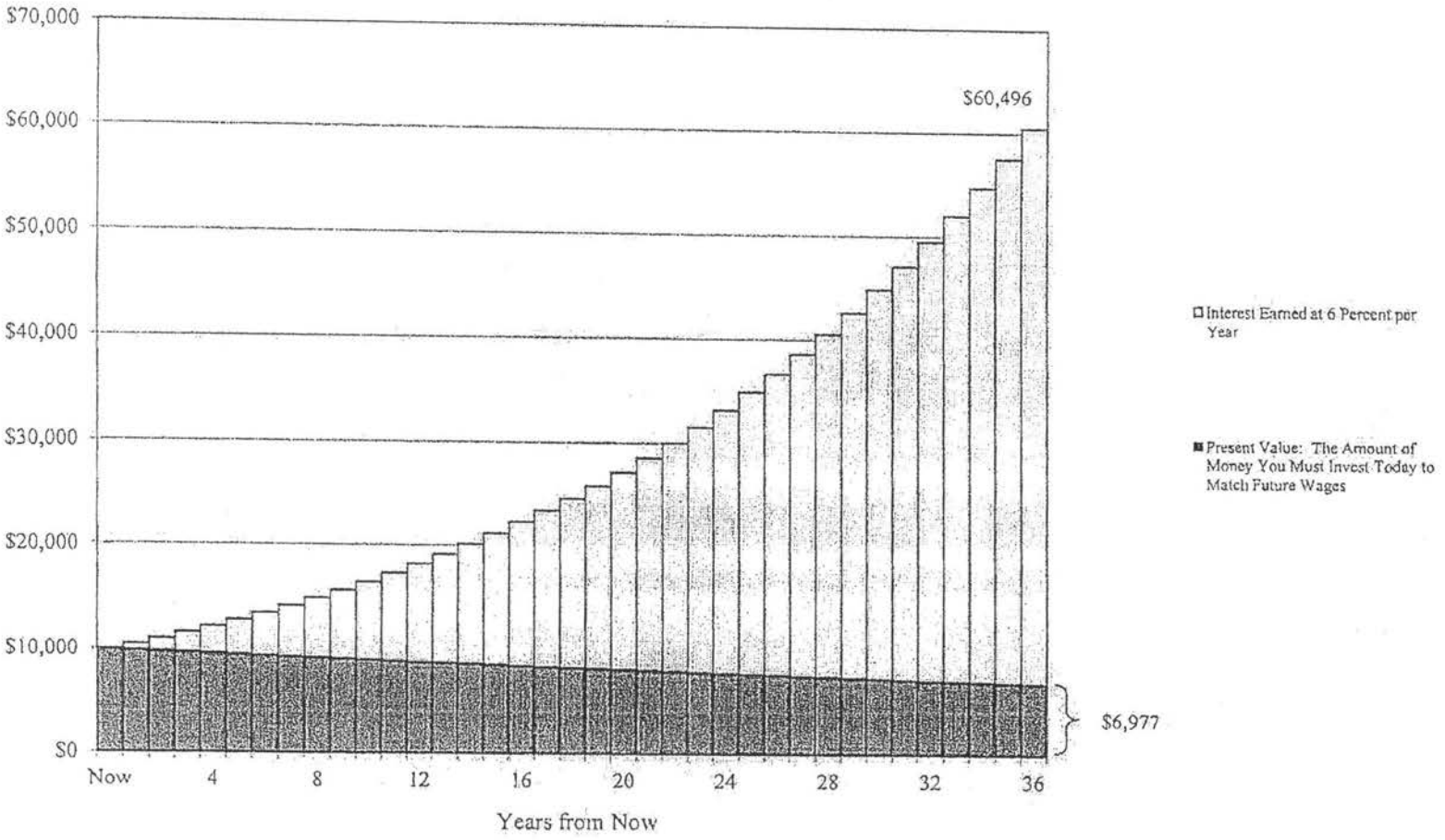
Note: If wages increase 5 percent each year, the annual salary at the end of 36 years is $60,496.

Chart 3: Future Values of a $10,000 Salary Increased 5 Percent Each Year Over 36 Years



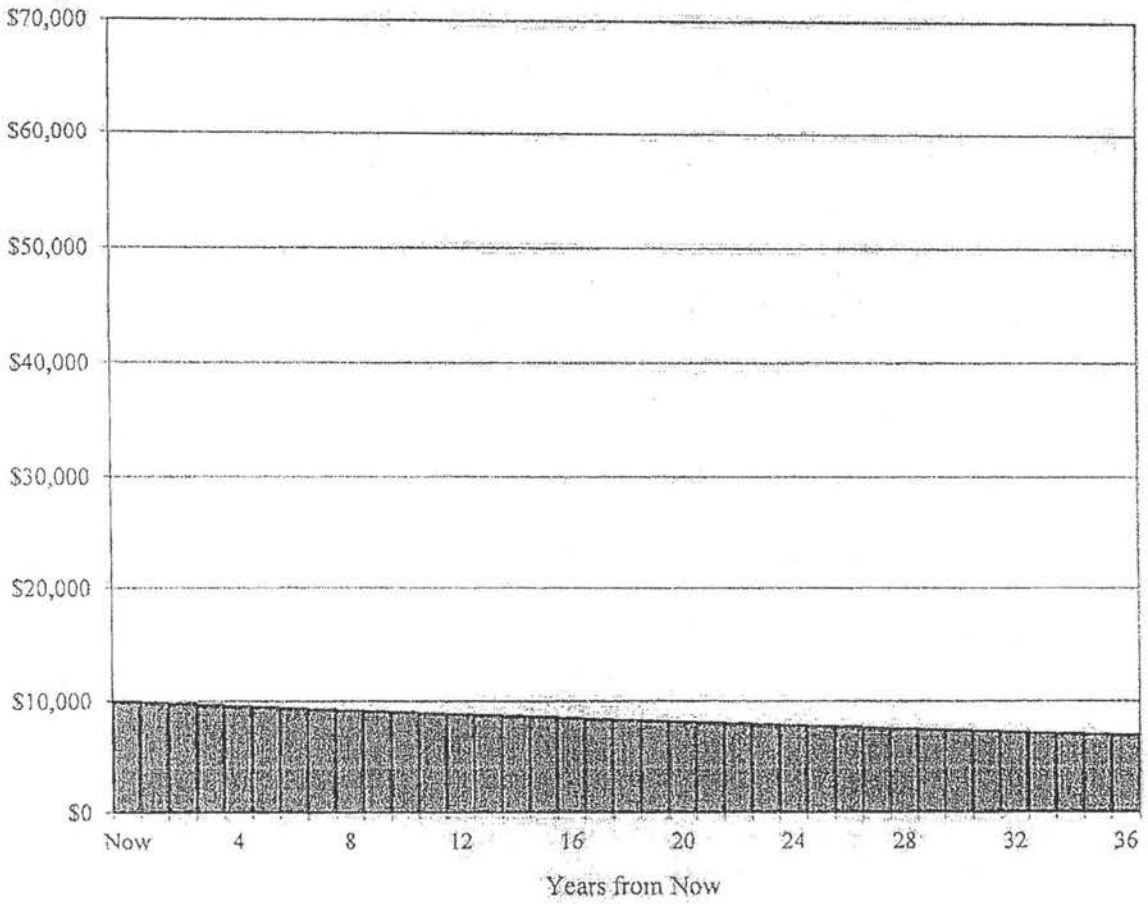
Note: If wages increase 5 percent each year, the annual salary at the end of 36 years is $60,496.

Chart 4: A Demonstration of Present Value
Increased for Wage Growth at 5% and Decreased for Interest at 6%



Note: If wages increase 5 percent each year, an annual salary of $10,000 today will be $60,496 in 36 years. However, with 6 percent annual interest, it only takes $6,977 today to exactly cover the $60,496 of annual wages 36 years from now.

Chart 5: Present Value Using the Net Discount Rate Method
Decreased for Net Interest at 1%



Note: The present value is the same whether you calculate it in two steps (add growth and subtract interest) or in one step (subtract the net interest).

Chart 6: The Net Discount Rate Determines Present Value

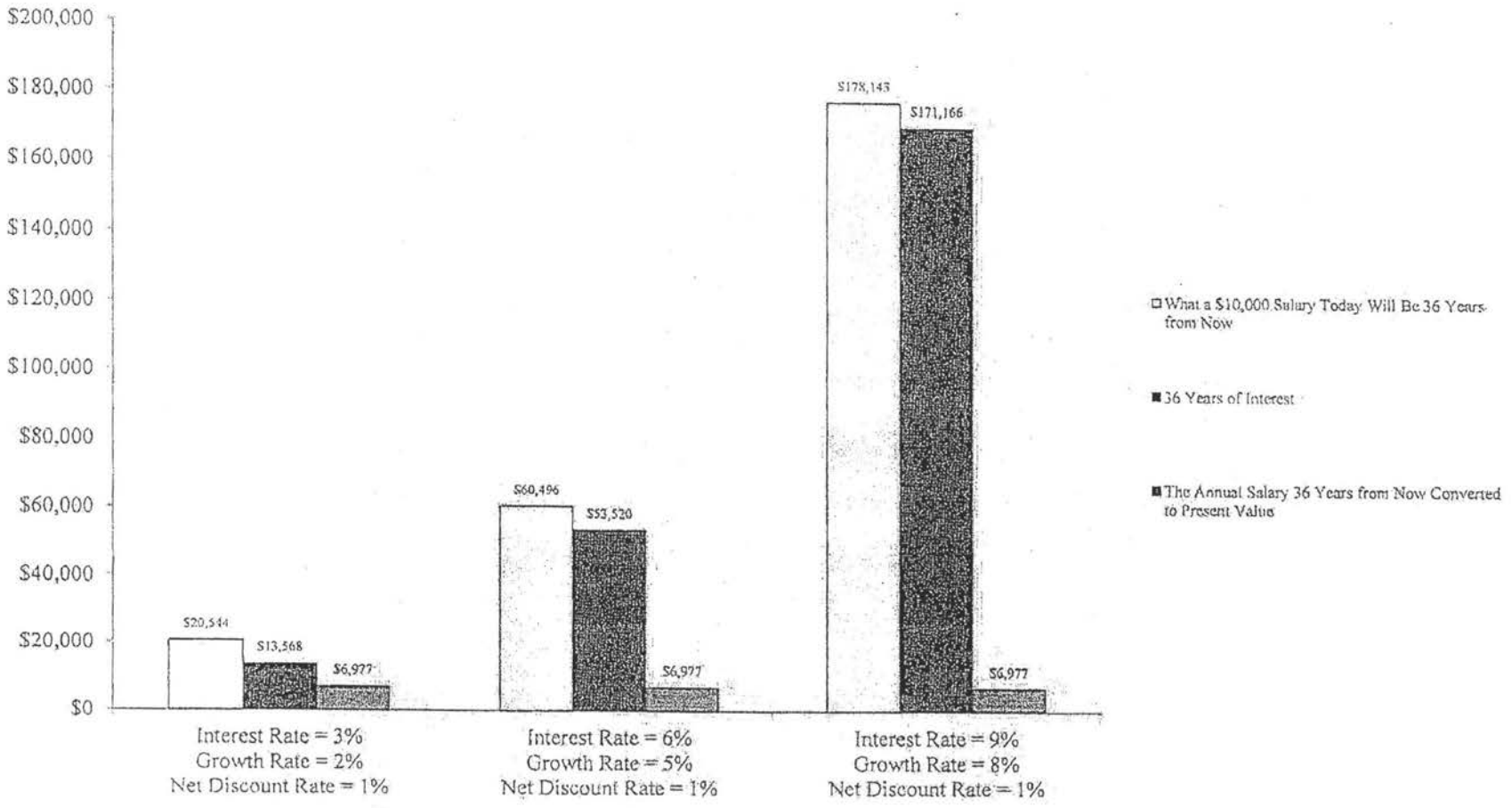


Chart 7: Assuming a Net Discount Rate of 0%, How Much Money Does It Take Today If You Need $10,000 in 10 Years?

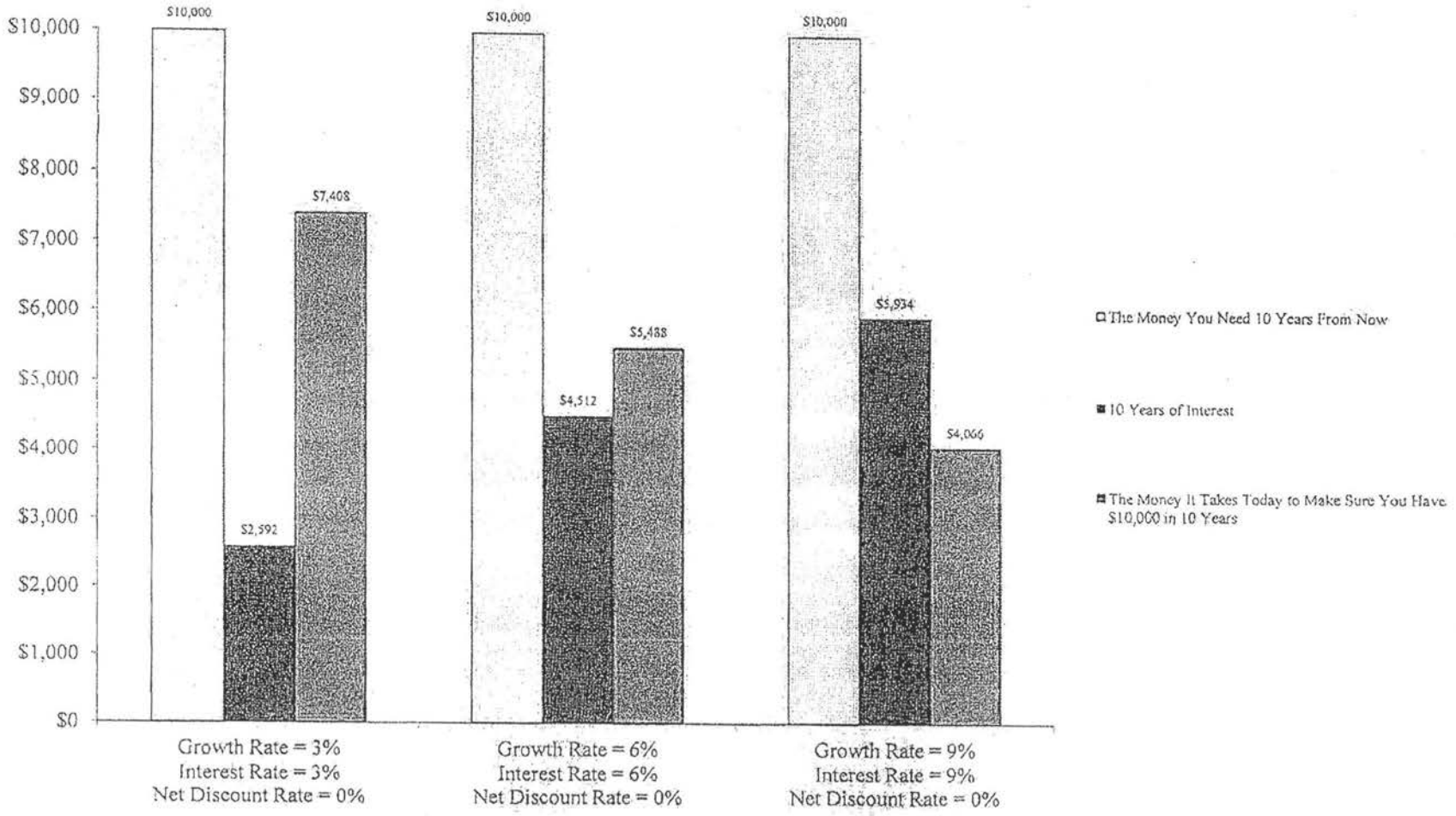
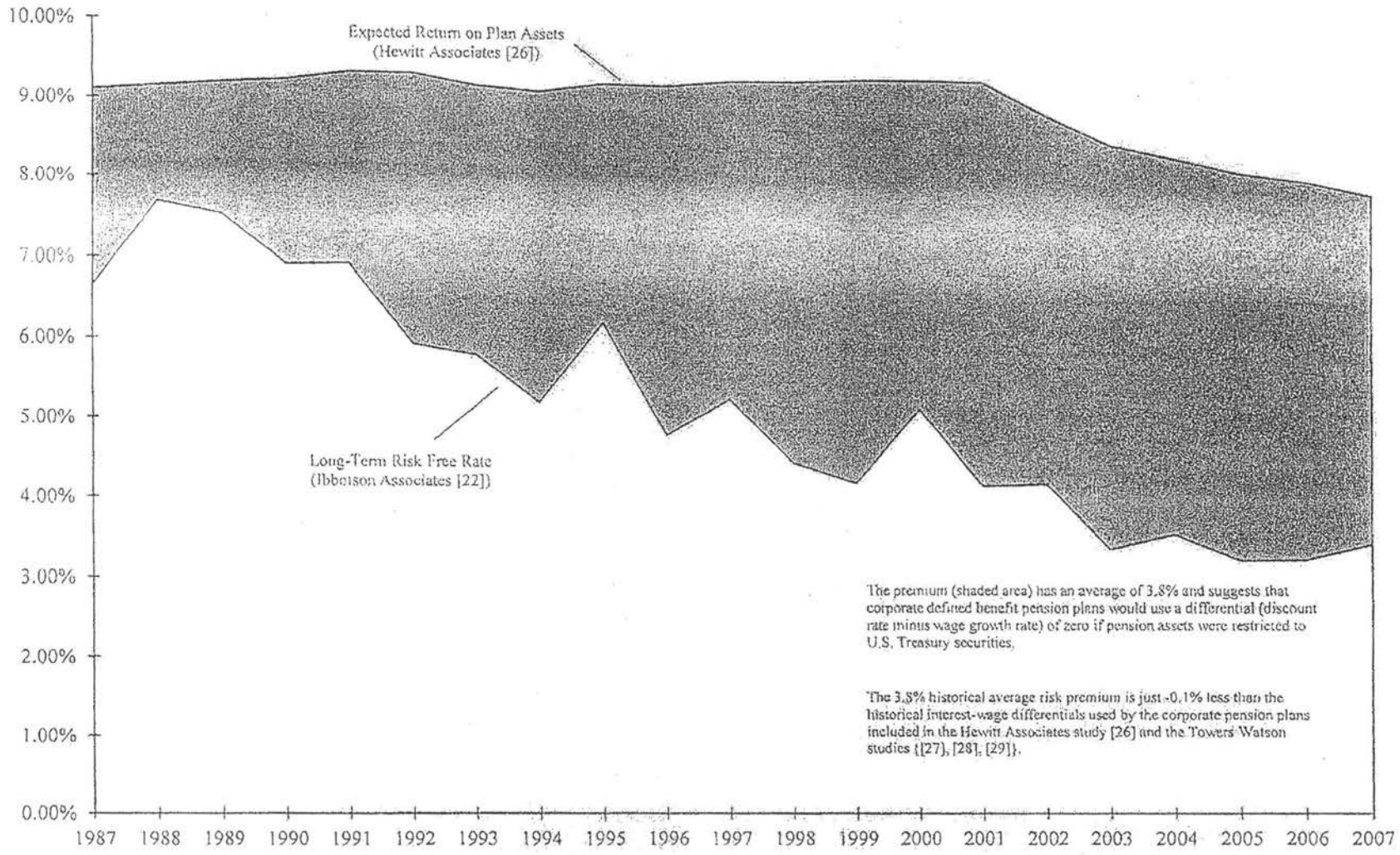


Chart 8: Expected Risk Premium of Corporate Pension Plans



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This analysis uses the ATUS time-diary data to determine the average number of household service hours provided per week and the hourly market value of those services. Data is extracted from 162 tables (Tables 1-24, 36-87, 99-140, 148-165, 173-182, 184-191, and 193-200) to run a multiple linear regression analysis predicting total weekly household service hours based on gender, employement status, marital status, employment status of spouse, age of person, the number of household members, and the number of children in the household, where total weekly household service hours are defined as the sum of weekly household production hours and weekly caring and helping hours provided to the household. Dummy variables are used to indicate gender (female = 0 or 1), employment status (full-time = 0 or 1, part-time = 0 or 1, homemaker = 0 or 1), marital status (married = 0 or 1), and spouse employment status (employed = 0 or 1). Transformations on the other variables in the analysis were performed to make the data more linear.

The regression analysis of the total weekly household service hours was run on gender (Female), employment status (Fulltime, Parttime, Homemaker), marital status (Married), employment status of spouse (SE), the natural log of age (ln-age), the natural log of household member (ln-hhm), square root of the number of children (sr-kids) and the square root of the total weekly household service hours (sr-hhshours).

The resulting regression equation for weekly household service time is sr-hhshours = 2.69 + 0.809 Female - 0.784 Fulltime - 0.369 Parttime + 0.761 Homemaker + 0.951 Married + 0.222 SE + 0.370 ln-age - 0.822 ln-hhm + 1.104 sr-kids, with an R-squared value of 92.2 percent. All predictor coefficients for the independent variables are significant at less than the 1 percent level, and, furthermore, the F-test (a measurement of the overall fit of the regression model or a test of the hypothesis that all regression coefficients, excepting that of the constant, are zero) is also significant at less than the 1 percent level.

The average hourly market value of household services across all 200 tables is $13.41 for males and $12.93 for females.

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These surveys are used to calculate the personal consumption associated with lost earnings. Consumption data for households with over $10,000 in annual income was extracted from Tables 25-44, 3600, 3610, 3620, 3630, 3640 and 3650 in each of the thirteen surveys to run a multiple linear regression analysis estimating the personal consumption of an individual's earnings based on age, income and the number of household members. Transformations of the data were performed to make the data more linear. In particular, the regression analysis was run on 2,259 sets of consumption data each including the natural log of household income (lnHHI), the natural log of household members (lnHHM), the square root of age (srAge) and the natural log of personal consumption (lnPC), where personal consumption is defined as (a) + (b), where (a) is defined as the sum of the expenditures allocated to household members 18 and older divided by household members 18 and older and where (b) is defined as the sum of all other household personal consumption expenditures divided by the number of household members.

The expenditures allocated to household members 18 and older under (a) include (alcoholic beverages), (transportation:other vehicle expenses:vehicle insurance), (transportation:other vehicle expenses:vehicle rental, leases, licenses, other charges), (tobacco products and smoking supplies) and (personal insurance and pensions:life and other personal insurance).

The expenditures allocated to all household members under (b) include (food), (housing:shelter:other lodging), (housing:utilities, fuels, and public services), (housing:household operations), (housing:housekeeping supplies), (housing:household furnishings and equipment), (apparel and services), (transportation:vehicle purchases net outlay), (transportation:gasoline and motor oil), (transportation:other vehicle expenses:vehicle finance charges), (transportation:other vehicle expenses:maintenance and repairs), (transportation:public transportation), (health care), (entertainment), (personal care products and services), (reading), (education), (miscellaneous) and (cash contributions).

The income and expenditures in each survey were adjusted to equivalent dollars based on the actual inflation (as reported by the Bureau of Labor Statistics in its CPI-U index) that has ocurred since the upper year of each survey. For example, the 2008-09 survey data was increased to current dollars based upon actual inflation since 2009.

After the data was converted to current dollars and transformed for linearity as noted above, the regression analysis was run. The resulting regression equation is lnPC = 4.63+(0.49*lnHHI)+(-0.72*lnHHM)+(0.0417*srAge), with an R-squared value of 95.3 percent. All predictor coefficients for the independent variables are significant at less than the 1 percent level, and, furthermore, the F-test (a measurement of the overall fit of the regression model or a test of the hypothesis that all regression coefficients, excepting that of the constant, are zero) is also significant at less than the 1 percent level.

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EXHIBIT C

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CV OC 1204792 CASE NO. **COMPLAINT AND DEMAND FOR JURY TRIAL**

COMES NOW Plaintiff, through his attorneys, and for causes of action against the above-named Defendants, states and alleges as follows:

I. PARTIES AND JURISDICTION

1. Charles Ballard is a former resident of Idaho and a current resident of Florida as an active-duty member of the United States Air Force. He is the surviving spouse of Krystal Melissa Ballard, deceased, who up until the time of her death was also an active-duty member of the United States Air Force.

2. Defendant Brian Calder Kerr, M.D. ("Defendant Kerr") is a licensed medical doctor who resides in Idaho and who practiced medicine in the City of Eagle, County of Ada, State of Idaho, at all relevant times in the Complaint, including on and after July 21, 2010.

3. Defendant Kerr was and is a partner in Defendant Silk Touch Laser, LLP at all relevant times in the Complaint.

4. Defendant Silk Touch Laser, LLP is an Idaho limited liability partnership with its registered address as 252 W. Meadows Ridge Lane, Eagle, Idaho 83616, in the County of Ada, State of Idaho.

5. At all relevant times in the Complaint, Defendant Silk Touch Laser, LLP, has operated an outpatient clinic where it provides cosmetic and plastic surgery services at 3210 E. Chinden Blvd., Suite 113, Boise, Idaho 83616 ("the Silk Touch clinic"). This Defendant has operated its business under its own name and under the trade names, or doing-business-as names, of Silk Touch Med Spa, Silk Touch Med Spa and Laser Center, and Silk Touch Med Spa, Laser and Lipo of Boise. All of these Defendants, trade names, and doing-business-as names, are collectively referred to herein as the "Silk Touch Defendants."

6. At all material times herein, Defendant Kerr was an employee of the Silk Touch Defendants acting within the course and scope of his employment.

7. Plaintiff has complied with Idaho Code § 6-1001, *et seq*, by filing an application for a Prelitigation Screening Panel with the Idaho State Board of Medicine which has returned its Report and Recommendation.

8. The amount in controversy exceeds the sum of $10,000, thereby meeting the minimum jurisdictional limits for filing with this Court.

II. FACTS

9. Plaintiff Charles Ballard is a Staff Sergeant in the United States Air Force and is now stationed in Florida. He was a Staff Sergeant at all times relevant to this Complaint. Prior to being stationed in Florida, Plaintiff was stationed and resided in Idaho with his wife, Krystal Ballard, up until the time of her death.

10. At the time of her death, Krystal Ballard was also a Staff Sergeant in the United States Air Force.

11. At the time of Krystal's death, Charles and Krystal Ballard were married and living together in Mountain Home, Idaho, while both were stationed at the Mountain Home Air Force Base in Mountain Home, Idaho.

12. Leading up to, and on July 21, 2010, Krystal Ballard was 27 years old and in good health.

13. At all times material herein, Defendant Kerr and the Silk Touch Defendants held themselves out to the public as individually and collectively competent providers of cosmetic and plastic surgery services.

14. Prior to the time he began providing cosmetic and plastic surgery services, Defendant Kerr was primarily engaged in providing anesthesiology services to the public.

15. On July 21, 2010, Defendants Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, performed cosmetic surgery on Krystal Ballard at the Silk Touch clinic.

16. The medical care provided by, including but not limited to the sterilization procedures and techniques implemented, used, and performed by, Defendant Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, while providing cosmetic surgery services to Krystal Ballard, fell below the standards of care owed to the patient by physicians and facilities providing cosmetic and plastic surgery services.

17. As a direct and proximate result of this care by these Defendants, including sterilization procedures and techniques falling below applicable standards of care, Krystal Ballard suffered during surgery, and/or developed and continued to suffer from afterward, a life-threatening infection and/or condition, and died.

18. The surgery and post-surgery care and monitoring procedures and techniques implemented, used, and performed by Defendant Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, while providing cosmetic surgery services to Krystal Ballard and monitoring and/or caring for her afterward, fell below the applicable standards of care owed to the patient by physicians and facilities providing surgery and post-surgery cosmetic and plastic surgery services.

19. As a direct and proximate result of these surgery and post-surgery procedures and techniques falling below the applicable standards of care, Krystal Ballard suffered during surgery, and/or developed and continued to suffer from afterward, a life-threatening infection and/or condition, and died.

20. In the early morning hours of July 26, 2010, Krystal Ballard died at St. Alphonsus Regional Medical Center in Boise, Idaho, as a direct and proximate result of the acts and/or omissions of Defendant Kerr and the Silk Touch Defendants, and upon information and belief, other agents, employees, and servants of these Defendants, in providing cosmetic surgery services, surgical monitoring services, and/or post-surgical monitoring services.

III. MEDICAL CAUSATION

21. Plaintiff realleges the allegations contained in all the prior and subsequent paragraphs of this Complaint.

22. The negligence and other wrongful conduct of the Defendants as alleged in this Complaint were a direct and proximate cause of Krystal Ballard's death.

23. The damages Plaintiff suffered and will suffer are a direct and proximate result of each of the Defendants' negligence and other wrongful conduct.

IV. CLAIMS

24. Plaintiff realleges the allegations contained in all the prior and subsequent paragraphs of this Complaint.

25. Each of the Defendants were negligent in the manner in which they treated Krystal Ballard. To a reasonable medical certainty, the care rendered by the Defendants fell below the applicable standard of care in the community in which it was provided.

26. Each of the Defendants were negligent in providing Krystal Ballard medical and cosmetic surgery care and services, surgical care and monitoring services, and/or post-surgical care and monitoring services (including up to the time of her death) that fell below the applicable standard of care in the community in which it was provided.

27. These acts of negligence were a direct and proximate cause of the special and general damages sustained by Plaintiff, which damages are described in the "Damages" section below.

28. Defendant Silk Touch Laser, LLP is responsible under the doctrine of respondeat superior for the acts and omissions of its employees, including Defendant Kerr and its nursing staff and/or others for whom it may be legally liable and for the acts and omissions of the same performed under the trade names, or doing-business-as names, of Silk Touch Med Spa, Silk Touch Med Spa and Laser Center, and Silk Touch Med Spa, Laser and Lipo of Boise.

29. The Defendants' misconduct was willful or reckless pursuant to Idaho Code § 6-1603(4)(a).

V. DAMAGES

30. Plaintiff realleges the allegations contained in all the prior and subsequent paragraphs of this Complaint.

31. As a direct and proximate result of Defendants' negligence, Plaintiff has sustained both economic and non-economic losses, which include but are not limited to, damages in the form of:

(a) The decedent's funeral expenses;

(b) Loss of wages and other benefits of employment which would have been earned by Krystal Ballard and shared with her husband, Plaintiff, during the course of her normal work life expectancy;

(c) The reasonable value attributable to the loss of service, care, comfort and society of Krystal Ballard; and

(d) As a result of Defendants' negligence and other wrongful conduct, Plaintiff has been forced to employ attorneys for the prosecution of this action and Plaintiff is entitled to recover reasonable costs and attorneys' fees pursuant to Idaho Code § 12-121, and Rule 54(d)(1) of the Idaho Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendants as follows:

1. For the recovery of all special and general compensatory damages sustained as a direct and proximate result of the negligence of the Defendants, all in a precise amount to be proven at the time and place of trial of this action, but which in any event exceed the jurisdictional limits of $10,000;

2. For the recovery of all reasonable costs and attorneys' fees pursuant to Idaho law; and

3. For such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues in accordance with Rule 38(b) of the Idaho Rules of Civil Procedure.

DATED this the 10th day of March, 2012.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

ORIGINAL

COMES NOW the Plaintiff Charles Ballard ("Plaintiff"), in accordance with Rule 33 of the Idaho Rules of Civil Procedure, and submits the following Supplemental Responses to Defendants' First Set of Interrogatories.

General Statements and Objections

A. Representations of fact and law herein are made in good faith without the benefit of complete discovery. These responses represent Plaintiff's best efforts at this stage of the litigation and are based on currently available, non-privileged, and non-work product information and documents.

B. Plaintiff objects to each and every request to the extent that it calls for information subject to the attorney-client privilege, the work product privilege, the privilege for critical self-examination, or any other privilege. To the extent that documents or information arguably subject to such privileges may be provided by Plaintiff, such privileges are not waived beyond the precise extent of the disclosure made, and no waiver of privilege may be implied in that no disclosure of anything which is actually privileged is intended.

C. Plaintiff objects to each and every request to the extent that it may be vague, ambiguous, confusing, nonsensical, incomprehensible, or involves usage of words other than those commonly and customarily used, or assumes matters contrary to fact.

D. Plaintiff objects to providing information not within its knowledge, custody, possession, or control, or which does not exist.

E. No objection, general or specific, which has been raised herein is waived by the provision of any response herein unless specifically stated to be waived by such answer.

RESPONSES

INTERROGATORY NO. 1: Please set forth the name and address of each and every individual known to you or your counsel who has knowledge or who purports to have knowledge of any of the facts of this case. By this Interrogatory we seek the names and addresses of all individuals who have knowledge or purport to have knowledge of the facts of this case which pertain to your claim for damages as well as matters pertaining to liability.

SUPPLEMENTAL RESPONSE:

New Address: Charles Ballard, 2590 Hidden Estates Circle, Navarre, FL 32566.

Persons with knowledge of the marriage between Plaintiff and Krystal Ballard and Plaintiff's loss of comfort and support from the untimely death of Krystal Ballard and Krystal Ballard's service to the United States as an enlisted member of the United States Air Force and her career plans, include but are not limited to:

Tearie Wilkins, 2275 Lexington Drive, Barksdale AFB, Louisiana 71110; and

Jonelle Cadiz, 1500 Sheridan Drive, Jacksonville, Arkansas 72076.

Persons with knowledge of Krystal Ballard's service to the United States and performance while an enlisted member of the United States Air Force include, but are not limited to:

MSgt. Rachel L. Tower, United States Air Force (currently deployed); and

Lt. Col. Michael R. Auel, United States Air Force.

The following individuals were involved in the care and treatment of Krystal Ballard beginning on July 25, 2010, until her death just after midnight on July 26, 2010. The knowledge and information possessed by each of these individuals, including opinions held, are set forth in the previously produced records associated with these individuals and referenced again below.

Elmore Ambulance Service, 895 N. 6th East, Mountain Home, Idaho 83647. (*See* Bates EAS000001 – EAS000034, previously produced.)

Cody Murphy, EMT; and

Wendy Vanderburgh, EMT – Paramedic.

Elmore Medical Center, 895 N. 6th Street, Mountain Home, Idaho 83647. (*See* Bates EMC000001 – EMC000029, previously produced.)

Karl Olson, MD - Emergency Department;

Bertrem Stemmler, MD - Medical Imaging; and

Edward Kim, MD - Laboratory, Pathologist.

Life Flight Network, 2779 S Liberty St, Boise, Idaho 83709 (*See* Bates LFN000001 – LFN000005, previously produced.)

Beth Studebaker, RN; and

Steve Mozingo, PM.

Saint Alphonsus Regional Medical Center, 1055 North Curtis Road, Boise, Idaho 83706 (*See* Bates SAMC000001 – SAMC000192, previously produced.)

Matthew Campbell, MD - Emergency Department;

Tisha Fujii, DO - Critical Care;

Billy Mrogan, MD - Surgical Consult;

Jeffrey Symmonds, MD - Vascular Examination;

Michael Kenner, MD - Heart & Vascular Center; and

Howard Schaff, MD - Gem State Radiology.

See also records for attending nursing and other staff to include David Atkinson, RN; Rob Hart, RN; Debra Servatius, RN; Kristin Prescott, RN: Tensie Tobenas, RN; Benjamin

Gagnebin, RN; Shirley Phillips, DTR (diet/nutrition); Ann Schaffer, CRT; and Wynne Proctor, RN.

The following individuals who participated or contributed to the autopsy and death investigation of Krystal Ballard conducted by the Ada County Coroner's office, 5550 Morris Hill Road, Boise, Idaho 83706. The knowledge and information possessed by each of these individuals, including opinions held, are set forth in the previously produced records associated with these individuals and the Coroner's office. (*See* Bates ADA000001 – ADA000011, previously produced.)

Erwin L. Sonnenberg, Coroner;

Glen R. Groben, M.D., Forensic Pathologist - in particular *see* Autopsy Report authored by Dr. Groben, dated September 24, 2010 (Bates ADA000004 – ADA000011), previously produced);

Robert Karinen, Forensic Lab Supervisor;

Barton L. Kline, Forensic Lab Technician; and

Kelly Cole, Coroner's Investigator - in particular *see* Investigative Report and Investigative/Narrative Report (Bates ADA000001 – ADA000003, previously produced.)

INTERROGATORY NO. 5: Please state the name and address of each person whom you intend to call as an expert witness at the trial, and for each such person set forth a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the testimony and a listing of any

other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

SUPPLEMENTAL RESPONSE:

Dean E. Sorensen, M.D.
Sorensen Cosmetic Surgery Center
250 Bobwhite Court, Suite 120
Boise, ID 83706

Dean Sorensen, M.D. is a physician who has practiced cosmetic medicine including plastic surgery in Ada County for over 20 years. He owns and operates the Sorensen Cosmetic Surgery Center of Idaho. Dr. Sorensen's facility serves the Boise and Eagle, Idaho areas. Dr. Sorensen also has staff privileges at St. Luke's Regional Medical Center in Boise. Dr. Sorensen is familiar with the standard of care applicable to defendants at the time Krystal Ballard was treated by Dr. Kerr at his clinic, Silk Touch MedSpa and Laser Center. He is familiar with the standard of care applicable to physicians such as Defendant Brian Kerr, M.D. practicing cosmetic medicine including cosmetic and aesthetic procedures and surgery in Ada County including Boise and Eagle at the time Krystal Ballard was treated by Dr. Kerr at his clinic in July 2010.

Dr. Sorensen's Curriculum Vitae is attached in supplemental response to Defendants' Interrogatory No. 6. By way of background, he received his degree in medicine from Loyola University in Chicago. Upon completion of his medical school training, Dr. Sorensen underwent an internship followed by a residency in general surgery at Highland Hospital in Oakland, California and the U.S. Naval Hospital in Portsmouth, Virginia. Subsequently, he undertook a two-year fellowship in plastic surgery at the University of Utah Medical Center in Salt Lake City. Following a facelift fellowship, Dr. Sorensen returned to Boise where his practice includes plastic, aesthetic and reconstructive procedures and services. Dr. Sorensen is board-certified by

the American Board of Surgery and the American Board of Plastic Surgery. He is a Fellow of the American College of Surgeons, a member of the American Society of Plastic Surgeons and the Aesthetic Society. He is a member of the AMA and Idaho Medical Association. He is past President of the Ada County Medical Society. He has served on the Idaho State Board of Medicine and the Idaho State Board of Medical Discipline. Dr. Sorensen is an inspector for AAAASF, which certifies ambulatory surgical facilities similar to that of the defendants for compliance with local and national standards of care, including the sterilization policies, procedures and protocols employed by such facilities. By virtue of his education, training and experience as described above, Dr. Sorensen is familiar with the standard of care for physicians and surgical facilities offering cosmetic and aesthetic services such as those performed by the defendants and which were performed on Krystal Ballard by the defendants, including the appropriate sterilization policies, procedure and protocols required by the standard of care in both the Boise, Eagle, Ada County and surrounding areas. Dr. Sorensen is familiar with the applicable standard of health care practice in the areas served by St. Luke's Regional Medical Center and St. Alphonsus Regional Medical Center, to include Ada County, Idaho and the cities of Boise and Eagle, which existed at the time and place of the treatment of Krystal Ballard on or about July 21, 2010 in Eagle, Idaho, and which was applicable to the class of health care providers to which the defendants Dr. Kerr and his clinic, Silk Touch Med Spa & Laser Center, belong, and in which he and the clinic were functioning, and which applied to similarly trained and qualified providers of the same class in the same community, taking into account their training, experience, and fields of medical specialization (hereafter "the applicable standard of care").

Dr. Sorensen has reviewed the pertinent medical records of Krystal Ballard, including the report of the post-mortem examination of Krystal Ballard. He has also reviewed the deposition transcripts of Dr. Kerr, Ms. Kerr and Donna Berg as part of his review in this case. As discovery proceeds, Dr. Sorensen will receive additional discovery materials as they become available and, therefore, his anticipated opinions are subject to modification and supplementation. All of Dr. Sorensen's anticipated opinions will be to a reasonable degree of medical certainty.

It is expected that Dr. Sorensen will testify that Krystal Ballard died as a direct and proximate result of conduct of the defendants that was not only negligent, but rose to the level of reckless misconduct, and which grossly violated the applicable standard of care. A review of the depositions reveal that Dr. Kerr and his clinic staff lacked adequate training in appropriate sterilization of a facility, its equipment and instruments. Further, Dr. Kerr and his clinic staff failed to properly avail themselves of information readily available to provide for appropriate sterility in carrying out their cosmetic and aesthetic practice. These standards are readily available from organizations that certify ambulatory and surgical facilities, the Center for Disease Control, the medical literature, and references within the user's manual of the machinery used during Krystal Ballard's surgery and medical treatment.

Specifically, but without limitation, it is expected that Dr. Sorensen will testify as follows:

1. Krystal Ballard died from septic shock as a result of bacteria which entered her body during the surgical procedure performed by Dr. Kerr on July 21, 2010 at the defendants' facility.

2. The infection was introduced into Ms. Ballard's buttocks during the procedure and was determined to be gram negative rods which are commonly found in stool. While a failure to appropriately prepare the patient for the fat transfer could have been the cause of the bacteria

being introduced into Krystal Ballard's body, most likely it occurred because the material obtained from the abdomen was contaminated because of the wholly inadequate, negligent, and reckless misconduct of the defendants in failing to sterilize the instruments and equipment used during the procedure.

3. The procedure room used for the liposuction on Ms. Ballard was not a clean environment by any reasonable surgical standards. It was used for other, non-surgical procedures and as a storage area for supplies and contaminated instruments used during procedures.

4. The instruments used in the liposuction and fat transfer procedures on Ms. Ballard were initially put in a basin in the procedure room and "washed" with Hibiclens and alcohol. Alcohol is not approved as a sterilization solution, nor is Hibiclens approved for sterilization of medical instruments, supplies or equipment.

5. The dirty instruments were taken from the procedure room not to an area designated for dirty equipment, but rather to a room where the autoclave was kept for allegedly sterilizing the equipment.

6. The defendants broke almost every rule of safe care of surgical instruments as measured by any reasonable standard in their treatment of Ms. Ballard. There were no protocols or procedures for cleaning of instruments, nor housekeeping and cleaning of the procedure room or the clean room. After the initial gross cleaning in the procedure room the instruments were placed in a Hibiclens/alcohol mixture not an approved proteolytic enzyme solution wash and were then transferred to the room where the autoclave was, which should have been but was not a clean room.

7. The autoclave used depends on the mechanical monitoring of sterilization. Gauges on the autoclave do not ensure sterilization. The defendants admit there was no maintenance and service checks of the autoclave, nor were any logs kept of any inspection of the autoclave.

8. Allegedly chemical indicators were used, but Dr. Kerr and his clinic staff do not wrap the cassettes and there are no records of what the chemical indicators revealed. There should be documentation of internal as well as external use of chemical indicators because chemical indicators cannot be used as means of ensuring sterility. Biological indicators must be used (spore tests) but were not. The failure to use biological indicators and spore counts is egregious.

9. The autoclave used by the defendants in their treatment of Ms. Ballard as an alleged means of sterilizing hollow chambers and cannulas must have both a negative or vacuum pressure as well as a gravity cycle. The former forces steam through the cannula for appropriate sterilization of the instruments.

10. The employees handling the instruments used to treat Ms. Ballard and responsible for cleaning and sterilization do not have an adequate medical background, nor adequate training in the safe handling, cleaning and sterilization of equipment, nor were there any protocols in place to provide that guidance, and Dr. Kerr himself lacks fundamental knowledge of appropriate cleaning and sterilization to provide the training and guidance to other staff.

Dr. Sorensen will testify that defendants including specifically Dr. Kerr violated the applicable standard of care by virtue of the above described treatment of Krystal Ballard. Dr. Kerr and defendants breached the applicable standard of care in the way in which they operated the facility at the time Ms. Ballard was treated, including through the complete neglect and failure to adhere to even the most basic standards required in the Boise, Eagle and Ada County

areas, and defendants' conduct was negligent, reckless and demonstrated a willful disregard for patient safety which lead directly to and proximately caused the death of Krystal Ballard.

Dr. Sorensen charges $500.00 per hour in connection with his consultation and services as an expert witness in this matter. He has not authored any publications within the preceding ten years and has not testified as an expert at trial or deposition within the preceding four years.

George Nichols, M.D.
739 Middle Way
Louisville, KY 40206

Dr. Nichols is a medical doctor who specializes in anatomical, clinical, and forensic pathology. A copy of Dr. Nichols' Curriculum Vitae, which outlines his education, training, and experience in his medical specialty is provided as part of Plaintiff's Supplemental Responses to Interrogatory No. 6. Dr. Nichols has reviewed the pertinent medical records of Krystal Ballard, including the autopsy report prepared in conjunction with the post-mortem examination, as well as recuts of the pathology slides from the post-mortem examination. As discovery proceeds, Dr. Nichols will receive additional discovery materials and, therefore, his anticipated opinions are subject to modification and supplementation. All of Dr. Nichols' opinions are expected to be to a reasonable degree of medical certainty.

It is expected that Dr. Nichols will testify that the bacterial infection from which Krystal Ballard died was a direct result of bacteria being introduced into her body during the procedure performed by Dr. Kerr on July 21, 2010, and as a result of a breach in sterility, as gram negative rods are proof to a reasonable degree of certainty that a breach in sterility occurred. As a result of bacteria being introduced into her body, Krystal Ballard was exposed to an exotoxin, which causes an inflammatory response (toxic shock) and blood vessels to dilate. As a result of the sepsis, Krystal Ballard's organs were underperfused, ischemia to the organs ensued, and Krystal

Ballard succumbed to multisystem organ failure. Dr. Nichols will testify that there is no other reason for Krystal Ballard's death other than as a direct result of bacteria introduced intra-operatively during the procedure, most likely as a result of contaminated equipment.

Dr. Nichols charges $400.00 per hour in connection with his consultation and services as an expert witness in this matter, with a minimum charge of $2,500.00, and a flat fee of $4,000.00 where an out-of-state appearance necessitates his missing an entire day's work.

A listing of any other cases in which Dr. Nichols has testified as an expert at trial or by deposition within the preceding four years is attached hereto[1], bates numbered **BALLARD000200 – BALLARD000207.**

Keith Barclay Armitage, M.D.
12600 Cedar Road
Cleveland Heights, OH 44106

Dr. Armitage is a medical doctor, who specializes in infectious disease. A copy of Dr. Armitage's Curriculum Vitae, which outlines his education, training, and experience in that medical specialty, is provided as part of Plaintiff's Supplemental Response to Defendants' Interrogatory No. 6. Dr. Armitage has reviewed the pertinent medical records of Krystal Ballard, including the autopsy report prepared in conjunction with the post-mortem examination. As discovery proceeds, Dr. Armitage will receive additional discovery materials and, therefore his anticipated opinions are subject to modification and supplementation. All of Dr. Armitage's opinions are expected to be to a reasonable degree of medical certainty.

It is expected that Dr. Armitage will testify that the bacterial infection from which Krystal Ballard died was a direct result of bacteria being introduced into her body during the procedure performed by Defendant Dr. Kerr on July 21, 2010, which occurred as a result of a

[1] All documents referenced in this Supplemental Response are contained on a compact disc attached hereto.

breach in sterility. The gram negative rod bacteria discovered at autopsy are proof to a reasonable degree of certainty that they resulted from operative sterility issues from instruments used during the procedure and introduced intra-operatively. As a result of the bacteria being introduced into Krystal Ballard's body during the procedure performed by Defendant Dr. Kerr, Krystal Ballard became septic and died.

A listing of all publications authored by Dr. Armitage within the preceding ten years is attached hereto, bates numbered **BALLARD000254 – BALLARD000260**.

Dr. Armitage, in connection with his consultation and services as an expert witness in this matter, charges $300.00 per hour to review records, discuss the case, and prepare any reports, $400.00 per hour to attend any deposition, and $1,500.00 per half day to testify at trial.

Cornelius A. Hofman
The GEC Group
5555 N. Star Ridge Way
Star, ID 83669

Cornelius A. Hofman is an economist. A copy of Mr. Hofman's Curriculum Vitae, which outlines his qualifications, professional experience, and background is provided as part of Plaintiff's Supplemental Responses to Defendants' Interrogatory No. 6. Mr. Hofman will present testimony on his opinions of net present value of lost financial support and lost non-financial support to Plaintiff, which is attributed to the untimely death of Krystal Ballard. Mr. Hofman has been provided information concerning the educational background, employment history, and wage earning and benefits history of Krystal Ballard, as well as the services Mrs. Ballard provided to her husband. Please refer to the materials attached hereto and bates numbered **GEC000001 – GEC000347**.

As discovery proceeds, Mr. Hofman will receive additional discovery materials, expected to include, but not be limited to, the tax return information for Mrs. Ballard and Plaintiff, economic and financial literature, college transcripts, and military benefits. Accordingly, his anticipated opinions are subject to modification and supplementation.

Mr. Hofman, in connection with his consultation and services as an expert witness in this matter, charges $3,900.00 for analysis and report preparation and $490.00 per hour to testify at any deposition or trial.

A listing of any other cases in which Mr. Hofman has testified as an expert at trial or by deposition within the preceding four years is attached hereto, bates numbered **BALLARD000224 – BALLARD000231**.

INTERROGATORY NO. 6: For each and every person you have identified in answer to Interrogatory No. 5, set forth the qualifications, professional experience and background of the individual.

SUPPLEMENTAL RESPONSE:[2]

The qualifications, professional experience and background of Dean E. Sorensen, M.D. are set forth at **BALLARD000233 – BALLARD000235**, attached hereto.

The qualifications, professional experience and background of George Nichols, M.D. are set forth at **BALLARD000190 – BALLARD000199**, attached hereto.

The qualifications, professional experience and background of Keith Barclay Armitage, M.D. are set forth at **BALLARD000236 – BALLARD000253**, attached hereto.

[2] As previously noted, the documents referenced in this Supplemental Response are contained on a compact disc attached hereto

The qualifications, professional experience and background of Cornelius A. Hofman are set forth at **BALLARD000208 – BALLARD000223**, attached hereto.

DATED this 26th day of March, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PLAINTIFF'S SECOND SUPPLEMENTAL ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

COMES NOW the Plaintiff, Charles Ballard ("Plaintiff"), in accordance with Rule 33 of the Idaho Rules of Civil Procedure, and submits the following Second Supplemental Answers to Defendants' First Set of Interrogatories.

General Statements and Objections

A. Representations of fact and law herein arc made in good faith without the benefit of complete discovery. These answers represent Plaintiff's best efforts at this stage of the litigation and are based on currently available, non-privileged, and non-work product information and documents.

B. Plaintiff objects to each and every interrogatory to the extent that it calls for information subject to the attorney-client privilege, the work product privilege, the privilege for critical self-examination, or any other privilege. To thc extent that documents or information arguably subject to such privileges may be provided by Plaintiff, such privileges are not waived beyond the precise extent of the disclosure made, and no waiver of privilege may be implied in that no disclosure of anything which is actually privileged is intended.

C. Plaintiff objects to each and every interrogatory to the extent that it may be vague, ambiguous, confusing, nonsensical, incomprehensible, or involves usage of words other than those commonly and customarily used, or assumes matters contrary to fact.

D. Plaintiff objects to providing information not within its knowledge, custody, possession, or control, or which does not exist.

E. No objection, general or specific, which has been raised herein is waived by the provision of any answer herein unless specifically stated to be waivcd by such answer.

ANSWERS

INTERROGATORY NO. 5: Please state the name and address of each person whom you intend to call as an expert witness at the trial, and for each such person set forth a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the testimony and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

SECOND SUPPLEMENTAL ANSWER:

Plaintiff previously disclosed Cornelius A. Hofman with the GEC Group in response to this interrogatory. Mr. Hofman is an economist. Plaintiff supplements his prior response to this interrogatory concerning Mr. Hofman and produces herewith Mr. Hofman's report dated May 8, 2013, styled "Assessment of Economic Loss" prepared in connection with this case and the death of Krystal Melissa Ballard, bates numbered **GEC000351 – GEC000395**.

Additionally, we provided Mr. Hofman with Krystal's transcript from Embry-Riddle Aeronautical University and her transcript from University of Maryland University College. Those documents are bates numbered **GEC000348-GEC000349** and **GEC000350**, respectively, and are attached hereto.

Plaintiff previously disclosed Keith Armitage, M.D., in response to this interrogatory. Dr. Armitage specializes in infectious disease medicine. In addition to the previously disclosed opinions of Dr. Armitage, which are incorporated by reference herein, it is expected that Dr. Armitage will testify concerning the lack of effect the antibiotic prescribed by Dr. Kerr would have on the gram negative bacteria cultured at autopsy. Dr. Armitage is expected to testify that

the antibiotic prescribed by Dr. Kerr in follow up to the procedure he performed on Krystal Ballard would not be effective in treating gram negative bacteria. Further, the prescribing of a Medrol Dosepak by Dr. Kerr would suppress the body's own immune system and have a deleterious effect on a patient with an infection. Further, Dr. Armitage will testify that the time interval between the cosmetic procedure and Krystal Ballard's death is such that the introduction of the fatal bacteria occurred intraoperatively. Had the infection occurred post-operatively, Krystal Ballard would not have exhibited signs of sepsis until much later. Additionally, the bacteria responsible for post-operative infections are gram positive bacteria, usually from skin flora, not gram negative bacteria. As such, the gram negative bacteria is not a typical post-operative infection but rather one coming from peritoneal cavity flora which must have been transferred to the buttocks during the fat transfer.

Further, Plaintiff saith not.

DATED this 14th day of May, 2013.

Respectfully Submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By: _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

EXHIBIT E

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792
	DEPOSITION OF DEAN E. SORENSEN, M.D., F.A.C.S.
	AUGUST 21, 2013

REPORTED BY:

BARBARA BURKE, CSR No. 463

Notary Public

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Q. Anyway, the point is, it's in the Disclosure --
A. Okay.
Q. -- those terms.
A. Okay.
Q. Now, my next question to you is, what does "standard of care" mean to you -- if it means anything?
A. Well, let me paraphrase that by saying that for 40 years I have been operating in an outpatient surgery center; in Hawaii for two years we had our own outpatient surgery center; and I have spent the last eight years inspecting surgery centers around the Northwest which were owned by combinations of OB/GYNs, neurosurgeons, cosmetic surgeons of all types.

So my impression of standard of care is probably greatly influenced by my facility inspection of different facilities around the Northwest -- including Spokane, and Reno, and various sites.

That's where my basis of my standard of care comes from -- what I see other people doing in other places, including Boise.
Q. Well, is that your definition of "standard of care," what others do?
A. My definition of "standard of care" is what would be in the realm of patient safety, as I see it, from my experiences as a facility inspector.

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Q. Do you have an opinion as to what "standard of health care practice" means?
A. It means to me, my own personal definition is that it's the standard of practice of what cosmetic surgeons would do in my community -- not so much in other communities.
Q. So that's your definition of "standard of health care practice"?
A. For cosmetic surgeons.
Q. Right. That's what I mean.
A. Um-hmm. (Nodding head.) Yes.
Q. Well, you have told me previously you have never spoken with any of the cosmetic surgeons or plastic surgeons doing surgeries in Boise and Eagle in the year 2010. You have told me that in this deposition already; correct?
MR. HADDAD: Object to form. That was not what you asked him.
Q. (BY MR. QUANE) Go ahead and answer.
A. No, that's not correct.
Q. Well, did you talk to them about what was going on in July of 2007?
A. About standard of care, you mean?
Q. Yes.
A. Oh, absolutely.

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Q. Who did you talk to in July of 2007 -- who did you talk to who knew what was going on in July of 2010? Name me names.
A. Dr. McKim, Dr. Wigod -- two local people here because I inspected their facilities in that time frame.
Q. Anyone else?
A. Well, there's Dell Smith down in Twin Falls -- who I inspected his facility, so I talked to him about it.
Q. Well, but that's -- I'm talking about knowing what's going on in Boise.
A. Yes. Those are the only two that I can recall.
Q. Okay. When did you talk to them about what was the standard going on in July of 2010 in Boise? When did you talk to them about that.
A. Well, the first time was probably in 2006 and 2007, which you have to realize I have inspected their facilities twice, so the dates are -- I couldn't give you the dates.
Q. Well, did you talk to them subsequent to having reviewed this case about that subject?
A. No.
Q. So your discussion with them about what was going on in Boise with those two doctors related to what was going on in 2007; correct?
MR. HADDAD: Objection; mischaracterizes --

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Q. (BY MR. QUANE) Isn't that true?
A. And later.
Q. Well, how could it be later? When did you talk to them later?
A. Well, because I inspected, for example, Dr. Wigod's office twice -- probably in 2007 and again in 2011. Every four years is the cycle that they have to be re-inspected, so that's what happens is every four years I go back and see them.
Q. Are you telling me then under oath that you talked to that doctor about what was going on in July of 2007 and the year 2011?
MR. HADDAD: Objection; confusing --
Q. (BY MR. QUANE) Are you telling me that?
MR. HADDAD: I don't think that even makes sense, but you can answer if you understand.
MR. QUANE: Well, just answer my question.
THE WITNESS: There's two doctors. Okay?
Q. (BY MR. QUANE) Okay.
A. Dr. McKim, only once in 2007 or that area in there. Dr. Wigod, twice, 2007 and probably in 2011 or something like that.
Q. Okay. When you talked to Wigod in 2011, did you ask him about what the standard was in July of 2010?
A. I didn't talk about 2010, no.

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Q. Okay. So those are the only two doctors you talked to?
A. Locally, yes.
Q. And when you talked to -- Wigod? How do you say his name?
A. Wigod, W-i-g-o-d.
Q. Wigod. Is he a plastic surgeon?
A. Yes. I reviewed his office records every six months -- he's required to do that -- random choices of office records every six months.
Q. Who establishes the standard of care or standard health care practice? Who decides what it is?
A. Well, there are different groups.
I happen to work with one, the American Association of Ambulatory Surgery Centers -- the American Association of Accreditation of Ambulatory Surgery Centers, AAAASF.
Q. You say they set these standards?
A. They have their set of standards, yes. I think they're based on -- a lot of it is based on development through the years. I couldn't tell you how they developed their standards.
Q. Well, don't the local doctors set the standards?
A. Not for accrediting organizations, no.
Q. But do they for other types of organizations

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that are non-accredited?
A. I have no idea.
Q. Okay. Have you ever heard the term the "standard of health care practice" in Idaho means how a particular doctor in a particular specialty typically practices medicine?
A. Yes.
Q. Where did you hear that?
A. I have no idea, but it's one of those common knowledge things, I would guess.
Q. Were there any other doctors in Idaho, to your knowledge, in July of 2010 who had practices similar to Dr. Kerr?
A. I would have no idea.
Q. When you talked to Dr. Wigod, did you ever bring up the type of practice of Dr. Kerr with him?
A. No.
Q. When you talked to Dr. McKim back in 2007, did you ever discuss with him the type of practice of Dr. Kerr?
A. No.
Q. You mentioned a California organization that asked you to review the case; correct?
A. Yes.
Q. Okay. I got a professional statement concerning your fee for this deposition --

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A. Um-hmm. (Nodding head.) Yes.
Q. -- that directed me to pay them a fee of $750 an hour to pay -- to pay them, not you.
A. Correct.
Q. Okay. Is that your fee or is that the fee they decided on?
A. That's the fee they decided on.
Q. It is not your fee?
A. No, no.
Q. Well, how much is your fee?
A. $500 an hour for a deposition.
Q. Okay. Well, do they then take a cut out of the $750 that -- I had to send them $1,500. Do they take a cut out of that?
A. Yes -- a third, apparently.
Q. Okay. But that's not your fee?
A. No.
Q. And yours is $500 an hour for deposition testimony?
A. Yes.
Q. Okay. To your knowledge, did Mr. Haddad arrange for that organization to contact you? Did he work with them to get you involved through them?
A. He did not.
Q. Who did?
A. You would have to ask Counsel. I don't know

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how -- I can give you my assumption, but I don't -- not as a basis of fact, but this is what I think happened:
He contacted them. He didn't know who I was from "Adam." They contacted me. I have no idea why.
Q. Okay. But you don't know for a fact that's how it came about?
A. No.
Q. Okay. In that communication you got from them by telephone initially we've discussed, it is my understanding that they never mentioned to you that Mr. Haddad would be contacting you.
A. In the initial consultation, no, they said nothing about that.
Q. Okay. So out of the blue one day you got a call from Mr. Haddad -- his office?
A. Yes. Not Mr. Haddad, but his office.
Q. Okay. Now, we've discussed the fact that in your liposuction procedures you have never experienced, to your knowledge, a postoperative infection; correct?
A. Correct.
Q. Okay. Have you ever experienced a postoperative infection in other kinds of surgeries you've performed?
A. Yes.
Q. Okay. And would that vary from the type of procedure to the type of procedure, the infection rates?

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A. Yes.
Q. Okay. Do you keep tabs on the infection rates?
A. I do.
Q. Okay. Why don't you tell me what you know on the infection rates for various procedures of yours since you became a plastic surgeon.
A. It's very easy because I've only had one infection with breast surgery.
No infections with liposuction.
No infection with facelifts or any facial surgeries.
One minor infection with a tummy tuck, and that's about it.
Q. So, according to your data that you recall, you have had two?
A. Yes.
Q. And one was with the tummy tuck?
A. That was very minor. It was a stitch that was infected that came out.
Q. Well, it was an infection?
A. Sure.
Q. Okay. Then the other one you mentioned with the breast procedure?
A. Yes.
Q. Okay. Was the tummy tuck thing that you call an "infection" an infection or a cellulitis?

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A. Well, let me tell you about that. I can remember the case clearly.
It was a patient from Sun Valley who was a diabetic who had drains in. The material in the drains became cloudy, and I cultured it. It cultured out some bacteria, so I put her on antibiotics.
I never really saw redness of the skin, or fever, or anything. I was treating what I thought was turbid looking fluid coming out the drains.
So it wasn't the kind of infection where you saw much, let's put it that way.
Q. Well, would you characterize it as a cellulitis?
A. No. It didn't rise to that.
Q. Okay. While we're on the subject of cellulitis -- what is "cellulitis"?
A. It's usually an inflammatory tissue -- soft tissue event.
Q. Okay. Absent infection?
A. There's got to be some inflammatory reaction to cause the cellulitis.
Q. True, but it's an inflammatory process?
A. Yes.
Q. Okay. In your practice do you have patients sign Consent For Procedure documents that specify the potential complications and risks associated with the

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procedure?
A. Absolutely.
Q. Why do you do that?
A. Because I think patients need to be informed of any adverse effect up to and including death that could occur from any procedure.
Q. Do you use a standard form for that purpose?
A. Yes.
Q. Okay. Where did you get the form -- or did you invent it yourself?
A. No. I used to. I used to get them from other people, but now I get them from the American Society of Plastic Surgeons. They're much better than the one I had before. They're more detailed.
Q. But during the last ten years, let's say, have you been using that form?
A. Yes.
Q. Okay. Does that form include infection as a potential complication and risk factor?
A. Yes.
Q. And you have your patients sign that form?
A. It's not just a form. It's pages of material. Yes.
Q. And why do you use that form and have the patient sign it?

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A. So that they are well aware of the risks, and they're informed about what could happen during the procedure.
Q. Is infection a potential complication, a risk factor associated with all surgery?
A. Yes.
Q. You probably never thought of this before -- but maybe you have -- but let me explain it as a part of my question:
In that form when infection is listed as a possible complication or risk factor associated with the surgery, do you interpret that to mean that that can happen in the absence of malpractice?
A. Yes.
MR. HADDAD: Object to form.
THE WITNESS: Certainly.
Q. (BY MR. QUANE) What? I didn't hear you. He butted in.
A. Yes.
Q. Do you subscribe to the view that if an infection does develop after a surgical procedure, the surgeon or operator must have committed malpractice?
A. No.
Q. Do you subscribe to the view that under the best of circumstances and the highest degree of the

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is, but answer the question.
THE WITNESS: The question is two-part:
She had an elevated BUN and creatine, which would indicate renal failure -- or, you know, progressing renal failure.
Then she had a gross examination, a microscopic examination of the kidneys themselves which were negative, as I recall.
Q. (BY MR. QUANE) To the extent the exam permitted, that's your conclusion?
A. Yes. I mean, there was no evidence of pyelonephritis or any huge infectious disease in the kidneys, as I understand.
Q. Okay. Do you have an opinion as to why kidney function was substandard or impaired?
A. I think she was in Septic Shock and there was organ failure, and that was the first system to go.
Q. What caused creatine to rise?
A. Well, when the kidneys start to fail, your creatine rises because the blood --
Q. Well, what makes the kidneys fail?
MR. HADDAD: Wait a minute. He's not finished with his answer. You're interrupting him before he's finished.
Please read the last question as posed to him.

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(Record read by the Reporter.)
THE WITNESS: Well, the BUN and the creatine were both elevated, and they're blood exams that indicate impaired renal function. That's as far as I can say, I guess.
Q. (BY MR. QUANE) Creatine and BUN are the consequences of renal failure.
A. Yes.
Q. I didn't ask that.
I asked you what causes the renal failure in the first place?
A. You know, in Septic Shock it's not well understood.
Q. But you attribute it to the condition known as "Septic Shock"?
A. Absolutely.
Q. Okay. But that's about the extent of what you can tell me as to the cause in her case of the renal failure?
A. Yes.
Q. Okay. If a physician experiences no postsurgical infections whatsoever over a four-year period --
A. A patient has no surgical infections, you say? What did you say --
Q. I'll start over again.
If a doctor who performs surgical procedures has no postoperative patient infections over a four-year

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period, what does that say about his sterile technique, procedures, disinfection procedures, et cetera?
A. I don't think it says anything about any of those things. I think it says --
Q. It doesn't?
A. No, not in my mind.
Q. It doesn't have anything to do with the quality of his sterile procedures?
A. They're not directly related.
Q. In this case you claim that -- in the first paragraph of your Disclosure -- do you still have that with you?
A. My personal or his?
Q. The one I handed you. Didn't I hand you one?
A. Yes, you did.
MR. HADDAD: I don't think that's the one he handed you. (Indicating document.)
THE WITNESS: Maybe I put it in this pile. (Indicating Exhibit 1.)
MR. QUANE: I handed him mine.
MR. HADDAD: I know what he's looking for. I just don't --
MR. QUANE: Did you give it back to me?
THE WITNESS: I might have put it in that pile.
MR. QUANE: I don't have it.

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MR. HADDAD: I know what you're looking for.
MR. QUANE: It includes all of your experts, not just Dr. Sorensen.
THE WITNESS: I don't have it. I pretty much put everything in that pile.
MR. QUANE: Well, I handed it to you.
MR. HADDAD: But I don't know if it went back or what happened to it, Jerry.
(Discussion held off the record.)
Q. (BY MR. QUANE) Before I read from this Disclosure --
A. Okay.
Q. -- which is the one that Mr. Haddad sent to me --
A. Okay.
Q. -- and that you looked at and approved it.
A. Okay.
Q. It is the court document, is what it is.
Have you had any experience whatsoever in trying to decide the cause of death of patients?
A. No.
Q. Okay. You state here under what is enumerated as "Paragraph 1," "Krystal Ballard died from Septic Shock as a result of bacteria which entered her body during the surgical procedure performed by Dr. Kerr on July 21, 2010, at the Defendant's facility." You say that.

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A. Yes.
Q. What do you base that on?
A. Two things -- maybe three.
The first is that she was a 27-year-old active duty healthy person. We know that she was healthy when she went to see Dr. Kerr.
The second thing is the only thing that happened between then and the time she died was the intervention with the liposuction and the fat transfer. So it had to be the proximate cause of what happened after that.
The third thing is the reports with my decision about Septic Shock from Elmore, and Saint Al's, and the Autopsy Report. I mean, anybody can read those and make those conclusions.
Q. That's what it's based on, that bacteria got into her body during the procedure?
A. What other cause could it be?
Q. Well, there's lots of them.
A. I don't think so.
Q. Well, that's your opinion, but you're not an expert on causes of death, are you?
THE WITNESS: No.
MR. HADDAD: Object to the form.
Q. (BY MR. QUANE) Who is the best expert, a pathologist?

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A. Somebody that probably deals with it a lot. A pathologist would certainly be one of them.
Q. Do you know Dr. Groben?
A. No.
Q. You have no idea how many times he does autopsies to determine causes of death?
A. No.
Q. Do you know Dr. Chuck Garrison from Pocatello?
A. No.
Q. Do you have any idea how many times he does autopsies to determine causes of death?
A. No.
Q. So you have told me the basis for your conclusion that I just read to you from your Disclosure -- you have told me what it's based on; right?
A. Yes.
Q. Okay. So you're assuming, aren't you, that bacteria did enter her body during the proceeding?
A. Yes.
Q. What kind of bacteria?
A. Gram-negative rods.
Q. Oh.
A. That's what it looks like.
Q. That's just an assumption on your part, isn't it?
A. It's an assumption based on the findings at

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autopsy, in part, because that's what they saw.
Q. But it's an assumption, isn't it?
A. Yes.
Q. There's no proof by any means of the fact at the time of the surgery these gram-negative bacteria went into her body, is there?
A. No.
Q. Okay. Have you formed an opinion as to what is the best evidence that a doctor utilizes appropriate sterile conditions during surgery, disinfectant procedures with equipment, operating room, and the entire area where the procedure is done, cleansing of instruments -- what's the best proof that that is being done appropriately? What would be the best proof?
A. I think lack of complications would be the best answer.
Q. Right. Did you ever hold any committee assignments or positions at St. Luke's -- or ever?
A. You know, yes, but it's been so long ago, I can't remember. You know, I did a lot stuff I just don't remember.
Q. Okay. Let's say the last five years. Have you held any --
A. Do you mean chairmanships or just being on a committee?

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Q. No. Chairmanships.
A. No. I have one coming up, though.
Q. What?
A. I'm Chairman Elect of the Plastic Surgery Department at St. Luke's.
Q. You're on a number of committees, though --
A. Just --
Q. -- surgery?
A. Just the Plastic Surgery Committee.
Q. Okay.
A. And the next -- I'm due to rotate on the Surgical Supervisory Committee next year. I believe that's it.
Q. Do you have to take call?
A. No, I do not --
Q. Okay.
A. -- thank God.
Q. Do you have any knowledge of the antibiotic most effective against gram-negative rods?
A. Well, there's -- yes. Tobramycin, for one; Gentamicin, another; third-generation Cephalosporins which I use like Cephaloridine. Those are the main ones.
Q. Okay. What does "prophylaxis" mean in medicine?
A. Basically, it means if you give something to prevent something, in my view, or you do something to

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prevent something.
Q. Not knowing what might happen, in other words?
A. To try and prevent an occurrence.
Q. Prevent something?
A. Yes.
Q. Okay. It isn't a -- it doesn't mean, "I know this is going on, and this is why I'm doing it"?
A. Correct.
Q. Have you ever treated a patient for a urinary tract infection?
A. I'm sure I have, but I can't remember. It hasn't been in the last 20 years.
Q. Okay. Do you have any reason to -- as you try to recall things -- whether a female who has a backache is compatible with a urinary tract infection?
A. I have no knowledge of that.
Q. Okay. You will admit that Dr. Kerr knew more about Krystal Ballard's condition when he saw her than you do?
A. Absolutely.
MR. QUANE: I know you're going to be disappointed -- (Laughter.) Why are you smiling?
THE WITNESS: Because I think it's going to be good, you know?
MR. QUANE: Let me talk to my folks a second,

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Greg. I may be done.
MR. HADDAD: Sure.
(Discussion held off the record.)
(Recess taken.)
MR. HADDAD: We can go back on the record if everybody is ready.
Are you finished?
MR. QUANE: Yes.

EXAMINATION
QUESTIONS BY MR. HADDAD:
Q. Just a couple of things -- just really kind of more of a clean-up.
You were asked a lot of questions by Mr. Quane dealing with the issue of what facilities you may have inspected as part of your role as an inspector before or after 2010.
Do you remember those general questions?
A. Yes.
Q. Okay. Beyond when you might have inspected a particular facility in Ada County, beyond that, were you actually involved in the practice of aesthetic and cosmetic surgery in Ada County in July 2010?
A. Yes.
Q. I think you had mentioned that you had the

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opportunity at one point -- before he retired -- of Dr. Bass practiced with you?
A. Yes.
Q. You had some kind of loose partnership, I think, is the way you explained it?
A. Yes.
Q. I take it during that time frame of July 2010 was Dr. Bass practicing here in Ada County, as well?
A. Yes.
Q. And did you have opportunity to observe him in terms of how he provided care and treatment to patients in Ada County by virtue of you being in this association with him?
A. Yes.
Q. In addition, Doctor, is it fair to say that while you might not have any formal -- strike that.
Would you oftentimes go to local Ada County Medical Association meetings?
A. Yes.
Q. And I take it that some of those physicians that were part of the Ada County meetings are physicians that practiced aesthetic and cosmetic medicine?
MR. QUANE: Objection; leading.
Q. (BY MR. HADDAD) Well, it is leading, but go ahead.

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A. Yes.
Q. Would you have discussions with those doctors at these Ada County meetings about the way medicine, and cosmetic surgery, and aesthetic medicine is practiced?
MR. QUANE: Objection; leading.
THE WITNESS: Yes.
Q. (BY MR. HADDAD) Doctor, you have been asked questions -- sometimes very general questions, sometimes very specific questions -- on topics related or believed to be related in some fashion to this case by Mr. Quane.
In terms of the Disclosure that's identified in Plaintiff's Supplemental Response to Defendants' First Set of Interrogatories, this is the document that identifies your education, training, and experience as well as the opinions that are set forth and attributed to you about this case; is that right?
A. Yes.
Q. Is there anything that has been asked today that changes those opinions?
A. No.
MR. HADDAD: That's all I have.
MR. QUANE: You're going to be disappointed, Dr. Sorensen, when I tell you I don't have anymore questions.
(Discussion held off the record

EXHIBIT F

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE; Defendants.	Case No. CV OC 1204792

VIDEOTAPED DEPOSITION OF THOMAS J. COFFMAN, M.D.

August 20, 2013

VOLUME 1
Pages 1-108

Reported by
Patricia J. Terry
Certified Shorthand Reporter No. 653
Registered Diplomate Reporter
Certified Realtime Reporter

say.
MR. QUANE: Tisha may not have been there either.
THE WITNESS: I'm sorry?
MR. QUANE: When that document -- she's a transient.
MR. HADDAD: I don't know where she is know, Colorado or something.
MR. QUANE: She's in Colorado now.
THE WITNESS: Is she?
MR. QUANE: But she's locum tenens. She moves around.
THE WITNESS: Yeah.
Q. BY MR. HADDAD: In the cellulitis, do you necessarily see pockets of pus?
A. Well, there's separative cellulitis where there is pockets of pus, and then there's non-suppurative or nonpurulent I guess is the phrase for it. And most cases are nonpurulent, and they're usually due to beta-hemolytic strep. And you won't find pockets of pus. And then cellulitis is caused by other organisms, usually staph. There usually are pockets of pus.
Q. Okay.
A. And so that's due to purulent/

nonpurulent.
Q. And non-suppurative is s-u-p-p?
A. Yes.
Q. I mean, when we touched upon this in terms of Dr. Nichols' opinions that you reference as disagreeing with, what specifically do you disagree with in terms of Dr. Nichols' opinions?
A. Well, let's look at them again.
MR. QUANE: Here's that. That's their disclosure, Nichols.
THE WITNESS: Well, I guess I'm not certain how he knows there was a breach in sterility that Gram-negative rods were introduced into the wound.
Again, they mention toxic shock, but it's septic shock. But it's a fine point.
So I guess that's the main -- it's a fairly brief thing, so.
Q. BY MR. HADDAD: I just wanted to make sure based on what you were given what you might disagree with.
There's a reference in the disclosure that the autopsy failed to identify specific organisms. And while there's -- because no cultures were done?
A. Well, the cultures were done but

nothing grew.
Q. On autopsy?
A. Yeah.
Q. It's not unusual given the circumstances, the antibiotics that were given?
A. The antibiotics I think probably contributed, yes.
Q. I mean, that's not a criticism in the way the autopsy was performed?
A. No.
Q. This was a rather broad statement in disclosure. I don't know how to get through it but to ask it. There was a section of the disclosure that said you may testify as to how different bacteria are susceptible to different cleaning techniques. Help me out. What are you going to testify to on other than different bacteria are susceptible to different cleaning techniques? I mean, are you going to get any more specific as to what bacteria may be susceptible to these type of products that are used in the cleaning and disinfecting of reusable medical equipment? And I'm just trying to figure out how far you're going to go so I can figure out if I need to follow up on it.

A. I guess what question -- I'm not sure what questions will be asked regarding that. But you know, some bacteria are susceptible to different kinds of agents, and some aren't. Bacitracin, for instance, kills lots of bacteria. It doesn't kill staph, so.
Q. I guess that's -- again, it's in the disclosure, so I didn't know what you were anticipated to say about Gram-negative rods, for instance, since that was obviously something that was found at the time of autopsy, how Gram-negative rods, their susceptibility to different cleaning techniques.
A. Usually very broad. There typically is not a lot of resistance in Gram negatives to topical cleansing agents.
Q. Like what topical cleansing agents?
A. Name one. Ivory soap. I mean, they're very sensitive to all kinds of cleaning agents.
Q. I mean, does -- is there -- for instance, the CDC has guidelines on sterilization and cleaning of equipment. Have you seen those before?
A. For sterilization of equipment? Yeah. For autoclaving, um-hmm.

Q. And what solutions are appropriate or approved, that kind of thing?
A. Um-hmm.
Q. Is that a yes?
A. Yes.
Q. Okay. Is that something you familiarized yourself with because of your being an infectious disease specialist and that being at least an authority you go to to try to figure out how to appropriately manage infection control within a hospital?
A. Yeah. Primarily it comes from the different divisions of the hospital, either housekeeping that goes to clean hospital rooms in the OR, things like that, the different products they can use. It's kind of an alphabet soup of different products that we have available. There are a lot of different manufacturers. And they have to do with, you know, the time of how long you leave the material on the surface to sterilize it. Is it caustic to the people using it? You know, we can't use too high of a concentration of bleach, for instance, because the chlorine irritates everyone, and also it's hard on the equipment. So there are a whole different bunch

of parameters that we follow depending on what piece of equipment we're trying to clean or disinfect.
So we review those products usually twice a year. And there's a laundry list of things that they use at both hospitals.
Q. When you review them, I mean, are you able to tell me what they were using in 2010 for various --
A. No, not that long ago.
Q. When you did review them, I take it you would have confirmed that the solutions that they used in the cleaning and disinfecting process were solutions that were approved by the CDC?
A. Well, by the FDA, yeah.
Q. What -- I mean, there's a reference to the fact that -- and I've written it down, so I'm hoping it's actually in your disclosure, and since you've looked at it this morning, you might have a better memory of it -- that you may testify as to the differing infection rates at the hospitals that you've had privileges.
A. Okay.
Q. I mean, is that something you anticipate testifying on?

A. I don't know. If I get asked it, I can.
Q. I mean, it's obviously infection rates are going to be dependent on exactly what is going on in the hospital. For instance, what kind of surgeries they may carry out.
A. Mostly what kind of surgery.
Q. Okay. I mean, obviously if you're doing open heart surgeries, you're going to have higher infection rates than if you're doing just minor procedures; correct?
A. Actually, our open heart cases are incredibly good now.
Q. How about orthopedic cases?
A. Orthopedic cases are not quite so good.
Q. You know, this has nothing to do with this case, but they're one of the worst infection rates; aren't they?
A. Yeah.
MR. QUANE: Well, dirty surgeries are like --
MR. HADDAD: Bowel and all that kind of stuff.
THE WITNESS: Yeah. I mean, bowel surgeries, that's all over the place. But you

know, you can talk to Dean Sorensen about it. We used to have -- Dean and I used to see a lot of patients together back in the day for serotomy infections. And we go years and years and years now without any. It's amazing.
Q. So to compare infection rates at a hospital that might have orthopedic procedures, abdominal procedures, bowel procedures and comparing it to a facility like Silk Touch that may do liposuction and fat transfer is kind of like comparing apples and oranges in a sense; correct?
A. Yeah. We would only -- we don't really try to compare hospital-wide stuff. We look at specific surgery types. So we'd look at joint replacements. We look at spine fusions versus simple laminectomies, mastectomies, breast reconstructions, intra-abdominal cases. And we look at those separately. We don't try and group everything together because the rates are so variable.
Q. Have you -- do you have some memory or do you have a -- about infection rates at any of the facilities where liposuction or fat transfer may have been done?

A. Well, again, I don't know that they do it at either hospital I'm at. I wouldn't be surprised if they do, but I don't know about it for sure. I've not seen any infections related to it. But that doesn't mean that it's because they don't do them or do do them. I just don't know.

THE VIDEOGRAPHER: Excuse me. I need to change tape right now. Okay. We are off the record.

(Recess.)

THE VIDEOGRAPHER: So the camera is rolling, and we are back on the record.

MR. HADDAD: I think we just want to clarify something as to what exhibits we have. Dr. Coffman's file materials -- which would include correspondence, e-mails, medical records -- are going to be cumulatively marked as Exhibit No. 1.

MR. QUANE: Okay.

MR. HADDAD: The notes, the one-page notes that he made that we've referenced is going to be Exhibit No. 2.

We are going to mark the pages of the disclosure that Dr. Coffman made corrections to, just those pages as Exhibit No. 3.

And then the one page from Saint Alphonsus which was labeled as, quote, "Abstract" as Exhibit No. 4.

Q. BY MR. HADDAD: Doctor, would you -- you ready to go?

A. I am.

Q. Okay. I just didn't want to put you to sleep during the housecleaning part of this process.

Would you agree that based upon looking at the autopsy report, that where the Gram-negative rods were found in Krystal Ballard was where the fat had been injected into her buttocks?

A. On the right side, correct.

Q. Do you know how deep into the tissue that those Gram-negative rods were?

A. No.

Q. You'd agree with me it wasn't a superficial injection of fat; it was a deep injection of fat?

A. Well, I'm not sure. Deep would imply below the muscle. I don't think they go below the muscle for this.

Q. When you say superficial, when you talk about superficial skin procedures, you're not

saying that this liposuction and fat transfer procedure were superficial skin procedures; correct?

A. Well, essentially they are. They're in the skin and subcutaneous tissue, so I guess skin dash subcutaneous because they don't go down below the fascia.

Q. Okay. Would you consider this to be superficial?

A. Yeah. They're not going into an organ space.

Q. Okay. Have you seen where this type of procedure or a liposuction procedure and a fat transfer is described as superficial or is that just your --

A. It's my perspective.

Q. -- perspective?

A. It's my perspective.

Q. If -- I mean, how deep -- if you're talking about a three-and-a-half-inch needle, which is what that 18-gauge was, is that your understanding that's the needle that was used to inject the fat into Krystal Ballard's buttocks?

A. Correct.

Q. Okay. Is three and a half inches below

the -- from the surface of the skin into the tissue into the muscle?

A. It would -- well, I don't know how big a woman she was. It would probably be through the muscle. But I don't think it is inserted perpendicular to the skin. It's done in a tangential fashion. Because I do this in HIV patients.

Q. You do what?

A. I do injections in HIV patients like this with a product known as -- it's polylactic acid. The patients with HIV have this terrible problem of lipodystrophy where they lose their buccal fat pads and look like they just came out of a concentration camp. They won't go in public. And so we inject their faces with this product, and you numb up the skin laterally, and then you go in like spokes of a bicycle tire, back and forth like this (indicating) and this and this and this and this and fill their face back up with tissue.

And so I use a two-inch needle, but I don't go two inches like this (indicating). I go two inches like this (indicating) just under the skin, which is what he describes as a -- he

EXHIBIT G

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER and/or SILK TOUCH MED SPA, LASER, AND LIPO OF BOISE, Defendants.	)	Case No. CV OC 1204792

30(b)(6) DEPOSITION OF SILK TOUCH LASER, LLP

January 31, 2013

Boise, Idaho

Reported by:
Andrea J. Wecker, CSR #716, RMR, CRR, CBC

the one doctor that wanted to start this business. Initially, I wasn't going to be that involved in it but got more involved in it down the road. Really enjoyed it, loved --

I love learning, and so started to go to all the CME courses with my husband, gained more education through that, a lot of reading on my own, my own interest in cosmetic stuff. I was getting older, so I was interested in it as well.

And then just over time, just going to those courses, just being in the room with Dr. Kerr and hearing and reading all the materials that he had, so --

Q. Okay. So really from '99 to the present --

A. Uh-huh.

Q. -- your employment has surrounded Silk Touch in some respect?

A. Yes.

Q. Okay. No employment outside of Silk Touch from '99 to the present?

A. No, I had a --

Well, let's see. Did I? I had a swim school that I created for -- in the summers for, like, '97, '98, and I think I did it a little bit

in '99. Because our business was so small at the beginning, so I was able to do both.

But then I stopped doing that, I think, after three or four years. So that's about it.

Q. Do you have any type of certification or licensure in any health-related field?

A. No.

Q. Do you personally perform any type of procedures at Silk Touch?

A. Now?

Q. From the inception of Silk Touch in '99 to July of 2010.

A. Yes, I have.

Q. Okay. What procedures do you perform?

A. I did perform. I don't now.

I did perform laser hair removal. I was certified in that. Microdermabrasion, IPLs, which is intense pulsed light lasers. So all the lasers that were non-ablative, I was certified and was able to do; under Dr. Kerr's direction, I can do those.

Peels, chemical peels. That's probably -- that's --

Those are the basics of what I knew how to do, yeah.

Q. Okay. The certifications for the procedures you performed, is there any -- do you have to be licensed in any particular -- or get licensure from the State to do any of those procedures?

A. No.

Q. Between yourself --

Are you a co-owner of Silk Touch?

A. Yes.

Q. Is there a --

What's the percentage? Is it a 50/50, or is it spelled out?

A. It's 50/50.

Q. Okay. Do you handle primarily the back-office functions?

A. Yes.

Q. All right. I'm going to go through -- we're going to continue on here in a minute. But I've got my notes, and I'll lose them.

Just kind of going through those areas that I think during Dr. Kerr's deposition today, he thought you might have some information about and then some areas that he didn't say that, but I thought maybe you did.

First of all, he mentioned some aseptic

wipes that he uses to clean off the handpiece to the Vaser, and he couldn't remember either the brand or the main active ingredient of that aseptic wipe.

Do you know what either the brand name is or what the primary active ingredient in that aseptic wipe is?

A. No.

Q. Where do you order your materials from? Or at least in 2010, where did you order your --

If you had to order aseptic wipes, where did you get them?

A. I don't remember the exact -- it's been a number of companies over the years, so I wouldn't know for sure right offhand.

I know what I order from now today, but I don't recall.

Q. Okay. And within the documents that were produced --

And first of all, we got 700-plus pages of documents that were produced already. There appears to be some order forms from a company called OBGYN Direct.

A. Uh-huh.

Q. Did you help compile those documents

that were produced to us as part of this discovery?
A. No, I did not compile them.
Q. Okay. Do you know who it was that pulled those order forms concerning various medical equipment and supplies?
A. Those, I believe, came from the Keller instruction that we got. They were in a binder that we got from him as a suggestion of a company you could use.
I don't remember -- I think we did order from them initially and found other companies that were better, that we found were better over time. So I'm not sure we ordered from them very long.
Q. Okay. Yesterday there was a discussion -- Mr. Quane had represented that you had compiled data on the number of liposuctions that had been performed, I think, through July 20 of 2010 as well as the number of fat transfers that had been performed by Dr. Kerr through July 20, 2010.
Did you compile that data?
A. Yes.
Q. Okay. Where did those numbers come from? I know one was 199, I think, liposuctions and 33 fat transfers --

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A. Yes.
Q. -- if my memory serves.
A. Uh-huh.
Q. Where did that information come from?
A. Just from our database.
Q. What kind of database do you maintain that would compile that information?
A. The database that we run our transactions through.
Q. Kind of explain that to me. How would you know --
If you've got this database and you're trying to find out how many liposuctions, how do you make a query into your database to identify which procedures were liposuction procedures?
A. So they would be named "liposuction" or "fat transfer." So we would be able to pretty much -- pretty accurately be able to figure out a number of lipos, number of fat transfers.
Q. Do you keep some kind of running total as part of your business operations?
A. No, we don't keep a running total.
Q. Okay. Did you have to look --
A. I would have to go back and look.
Q. Okay. I mean, are these within the data

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for each patient and you'd have to look at each patient and say, "What did we do for them," or is it a separate database that would only reflect on a given day, like a calendar, what was done?
A. Okay. You'll have to break that one up because that was a little bit too much.
Q. When you look at this database, is it a database that you had to retrieve information like a liposuction procedure by looking at each patient's medical chart?
A. No.
Q. Is it a database where you would look at some type of scheduling calendar that you might have had to see what procedures were scheduled for a given day?
A. No.
Q. Okay. I'm just trying to think of where --
How do you input information into your database such that you can retrieve the number of liposuctions?
A. So there's a category, "lipo." There's a category, "fat transfer." And so when we run a transaction through it, it will keep track of the number of fat transfers and the number of lipos.

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Q. Okay. What's the purpose of keeping that data?
A. Well, you'd want to know so that if you needed to go back and figure out what you did that day, then you'd be able to figure that out.
Q. Do you do any type of advertising such that you want to demonstrate the number of procedures Dr. Kerr has performed?
A. I don't know that we've ever put a number out there of number of procedures, like an exact number. I don't recall ever doing that. In fact, I don't think we've ever done that.
Q. Okay.
A. Because I -- yeah.
Q. Within the documents that have been produced, there were a number of certificates that would indicate your attendance at certain seminars.
A. Uh-huh.
Q. Have you seen those?
A. Yeah.
Q. Okay. Are all the seminars that you personally would have attended --
A. Uh-huh.
Q. -- contained within Exhibit No. 1?
A. Is this --

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Q. Meaning would it identify not only Dr. Kerr went, but it might also identify when you went to the seminar as opposed to simply accompanying him to the location?
A. Which one is --
Is this Exhibit No. 1?
Q. I'm sorry. Yes, that is Exhibit No. 1 that we used for Dr. Kerr's deposition today.
A. Okay. This one does not have --
I -- I broke mine out separate than his because he did some that were different than mine.
Q. Okay. Do you have a separate document that reflects your seminars that you've attended?
A. Yes, I do. I think it --
MR. HADDAD: Do you have that, Mr. Quane?
THE WITNESS: And it would be exactly the same as this other than I wouldn't have done ACLS. I wouldn't have done --
MR. HADDAD: Well, we're going to make it simple because I think he has it, and then you won't have to --
MR. QUANE: Hand that to him.
THE WITNESS: There you go.
MR. QUANE: That's the only one I have, but you can use it.

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Are you going to mark it as an exhibit?
MR. HADDAD: I am.
MR. QUANE: Okay.
Q. (BY MR. HADDAD) Mrs. Kerr, Mr. Quane has handed me a four-page document that appears to be in the same tabular format as Exhibit No. 1, which identified seminars and training that Dr. Kerr had, except it's got your name at the top.
A. Correct.
Q. Did you prepare this document?
A. I did, yeah.
Q. Why don't we go ahead, and since this is somewhat of a continuation of a 30(b)(6) deposition, we'll mark that as 2 as a continuation.
(Deposition Exhibit No. 2 was marked.)
Q. (BY MR. HADDAD) Is there any of the seminars that you attended that are reflected --
First of all, is this a reflection of all seminars you've attended current back to 1999?
A. Uh-huh.
Q. Is that a "yes"?
A. Yes.
Q. Is there any of the seminars that are reflected in Exhibit No. 2 which is the seminars you attended where the scope of those seminars

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dealt with infection control in healthcare facilities such as Silk Touch?
A. In a general way, yes.
Q. Okay. Without saying, "This is the one that might have touched upon it," I understand you may be talking about laser hair removal and there may be some aspect of making sure -- how to make sure you don't cause injury or cause an infection.
But is there anything specific that you remember about infection control that may have been involved in any of the seminars you attended?
A. Not under that category.
Q. Okay. How about --
And "not under that category," I appreciate that distinction.
Let me ask you this: At any of the seminars you've personally attended, has a topic discussed been how to, for instance, clean, disinfect, and sterilize reusable medical instruments?
A. No. That's not my -- my area that I would --
No, not that I recall.
Q. All right. There was some discussion about accreditation, and I think Dr. Kerr earlier

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today said that he does not believe that there was any efforts to become accredited prior to July of 2010.
Do you have any knowledge that you or anybody else on behalf of Silk Touch made any efforts to get accreditation for Silk Touch at any point prior to July 20, 2010?
A. I did not try to get it. I looked into getting it.
Q. All right. You obviously --
Am I correct that Silk Touch was not an accredited center as of July 20, 2010?
A. Correct.
Q. Okay. When you looked into it, was there a reason why you elected not to pursue accreditation?
A. Yes.
Q. What was it?
A. Our limits of our physical facility. You can't --
You have to be able to adapt your facility a certain way to accreditation, so we couldn't do it in the location that we were at.
Q. Okay. Explain that to me.
A. So with accreditation, they require you

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EXHIBIT H

To: ELMORE MEDICAL* m: St. Als Regional Medical Cen

ELMORE MEDICAL CENTER HOSPITAL DISTRICT MOUNTAIN HOME ID 83647

Patient: BALLARD,KRYSTAL
DOB: [redacted]
Site: ELM
Ref. Prov: KARL H. OLSON MD*
Add. Providers: TRIWEST* ELMORE MEDICAL*

EMPI: 04828667 Visit/Acct: 251680/251680
PT/MOD: ER/XR MRN: 228168
Exam: ELM251680 Room/Bed: /

EXAM DATE: 7/25/2010 3:09 Contrast:

PROCEDURE: CHEST RADIOGRAPH, 2 VIEWS, FRONTAL AND LATERAL

INDICATIONS: Shortness of breath. History of recent liposuction.

COMPARISON: None.

FINDINGS:
LUNGS: Perihilar opacities including bronchial wall thickening. Additional bibasilar heterogeneous opacities.
CARDIAC: Normal size cardiac silhouette.
MEDIASTINUM: Normal.
PLEURA: Normal.
BONES: Normal for age.
OTHER: Bilateral nipple piercings.

CONCLUSION: Bronchitis and bibasilar subsegmental atelectasis or scarring. Minimal superimposed pneumonitis, aspiration, or bronchiolitis is not excluded. Similar findings may be seen in setting of fat embolism.

Dictated by: Bertram Stemmler, M.D. on 7/25/2010 at 3:30
Approved by: Bertram Stemmler, M.D. on 7/25/2010 at 3:30

JUL 26 2010

FURTHER ACTION NEEDED?
YES ____ NO ✓
DATE ____ DATE 7.26.10
REVIEWED BY ____

EXHIBIT I

PATIENT:	BALLARD, KRYSTAL				
MR #:	000807064	Hosp. Serv:	ER - IPA	Dict. Prov:	BILLY R. MORGAN, MD***
VISIT #:	[redacted]	Room/Bed:	3104-01	Att. MD:	TISHA K FUJII DO**
Date of Birth:	[redacted]	Admit:	07/25/2010	DOS:	07/25/2010
EMPI:	[redacted]	Disch/Transfer:			

Job Number: 684099 **Version:** 1

CONSULTATION

SURGICAL CONSULT

CONSULTING FOR:
Dr. Fujii, critical care.

CHIEF COMPLAINT:
Sepsis, ARDS, hypotension, status post liposuction and transplant of fat to the buttocks.

HISTORY OF PRESENT ILLNESS:
This is a 27-year-old black female who apparently underwent liposuction with transplantation of the fat from the anterior abdominal wall to the buttocks on both sides. This apparently occurred on 07/21/2010. She apparently had it done at a MediSpa somewhere. Apparently they contacted a physician several times and subsequently she became increasingly ill on Friday, complaining of increasing pain in the transplantation site on her buttocks. She had no drainage from any of the wounds. She did not have a fever, no chills and apparently yesterday apparently passed out and early this morning was taken to the Elmore Emergency Room where she was seen and evaluated and subsequently transferred here. She arrived here at approximately 7:20 this morning and after a vigorous resuscitation she barely had a blood pressure, had significant findings on her chest x-ray and her CT is consistent with significant RDS in both lower lobes posteriorly. The patient had marked hypoxemia with a pO2 in the 40s and was admitted to the Coronary Care Unit by Dr. Fujii and she asked me if I would evaluate the patient. CT also showed that she has some stranding in the anterior abdominal wall anterior to the fascia consistent with her liposuction. She also has some subcutaneous air in the left posterior buttocks area in the soft tissues, but not in the muscle itself and not associated with the fascia according to my review of films.

LABORATORY VALUES:
In Elmore, showed a WBC of 14.7. Her hemoglobin was 10.3 and her hematocrit was 32.0. She had 189,000 platelets. She had 92 segs, 5 lymphs and 3 monos. Her CK-MB was 3.2. Her myoglobin was 277 and her T and I was 0.079 and her CK was 51. Again inconsistent with a necrotizing fasciitis. Her sodium is 142, potassium is 3.4, chloride is 102, her CO2 was 13, glucose was 93, BUN was 31, creatinine was 3.2. Her albumin was low at 2.4, total bilirubin was 1. Her total protein is 6.2 and her globulin was 3.8. Her alk phos was 73, AST was 19, ALT was 24. Her blood gas from the Elmore Emergency Room showed a pH of 6.99. Her pCO2 was 36. Her pO2 was 21 and her base excess was -22 and her bicarbonate was 8.7. Her O2 saturation, and her O2 saturation was minimal. She was seen in the Intensive Care Unit.

Patient: BALLARD, KRYSTAL
EMPI: 4828667

CONSULTATION

Chest x-ray from Elmore County shows bronchitis and bibasilar subsegmental atelectasis or scarring, minimal superimposed pneumonitis, aspiration of bronchiolitis not excluded and findings possibly a similar fat emboli syndrome. The patient is on a ventilator in the Intensive Care Unit.

OBJECTIVE:
VITAL SIGNS: Blood pressure at the time of my arrival is 105/60, heart rate in the 120s. Her O2 sat is not reading. CVP is 18. She does have a left femoral arterial line in.
HEENT: Shows that her pupils are sluggish and equal. She has bilateral mild proptosis and her sclerae are unremarkable. I see no petechial hemorrhages in and around the area of the sclerae or the upper and lower lids.
NECK: Supple, nontender, no step-offs or deformities. She has no jugular venous distension.
LUNGS: Clear to auscultation and percussion. Breath sounds are bilateral and equal in the upper lobes and marked rales in both bases. The cardiac exam shows a rapid rate and rhythm without murmurs or gallops.
CARDIAC: Echocardiogram done at the time of my evaluation shows that she has markedly hypokinetic segments in the apex and in both ventricles with an ejection fraction estimated by the tache at around 17-20%.
ABDOMEN: She has 4 Steri-Strips wounds in the anterior abdomen, 2 on each side with no subcutaneous emphysema or crepitance or redness or any sign of infection.
EXTREMITIES: Her extremities show 1+ edema times all four extremities.
BUTTOCKS: The patient's buttocks show 2 wounds 1 on the posterior superior iliac crest on each side with no crepitance to the subcutaneous tissue. No evidence of redness or inflammation and no drainage from the insertion sites for the fat transplants. The patient's current blood gas shows a pH of 6.84. Her pCO2 is 42. Her pCO2 is 38 and she has a bicarbonate of 7.2. Her calcium is 0.77 in ionized performed. Her O2 sat is 30%. The patient's EKGs are essentially show slight ST elevation in all leads.

IMPRESSION:
This most likely represents an unfortunate young black female who underwent liposuction with subsequent transplant of the fat into the buttocks on both sides 4 days ago. She now has what appears to be a probable fat emboli syndrome with significant ARDS, massive hypoxemia, unresponsive to ventilator modes from a surgical standpoint, I feel in light of the ejection fraction of 17% and a marked hypoxemia and a marginal cardiac output that she would not tolerate a trip to the Operating Room. I doubt very seriously that this represents necrotizing fasciitis in light of the CT scan, which only shows a small amount of air and no fluid anterior and/or posterior to the fascia in the buttocks. I have discussed these findings with Dr. Fujii, and will be available to continue to follow the patient and should there be any surgical needs.

Dictation electronically signed by
BILLY R MORGAN, MD***
on 07/26/2010 02:41:18

BILLY R MORGAN, MD***

Patient: BALLARD, KRYSTAL
EMPI: 4828667

CONSULTATION

BRM:lml
D: 07/25/2010 13:07:21
T: 07/25/2010 21:10:08
J: 684099
T: 3741605
cc:
JANA L PERRY, RN*

EXHIBIT J

Saint Alphonsus
Department of Medical Imaging

Gem State Radiology

Patient: BALLARD, KRYSTAL
DOB: 4/19/1983 **EMPI:** 04828667 **Visit/Acct:** 1020600274/1020600274
Site: SARMC **PT/MOD:** ER/XR **MRN:** 000807064
Ref. Prov: IRVIN SACKMAN* MD **Exam:** 43952233 **Room/Bed:** / ER
Add. Providers: EMERGENCY ZZPHYSICIAN

EXAM DATE: 7/25/2010 8:06 **Contrast:**

PROCEDURE: CHEST RADIOGRAPH, 1-VIEW FRONTAL PORTABLE

INDICATIONS: Abdominal pain and shortness of breath.

COMPARISON: Elmore Medical Center, XR. XR CHEST 2 VIEWS PA AND LAT, 7/25/2010, 3:09.

FINDINGS:

LUNGS:	Bilateral diffuse patchy airspace disease significantly progressed since the prior study.
CARDIAC:	Normal size cardiac silhouette.
MEDIASTINUM:	Normal.
PLEURA:	Normal.
BONES:	Normal for age.
OTHER:	Negative.

CONCLUSION: **Significant interval development of bilateral diffuse patchy air space disease. Given the patient's history of recent liposuction and rapid interval development of pulmonary airspace disease, findings may represent fat embolism, pulmonary edema, and/or adult respiratory distress syndrome.**

Dictated by: Howard Schaff, M.D. on 7/25/2010 at 8:24
Approved by: Howard Schaff, M.D. on 7/25/2010 at 8:24

EXHIBIT K

In The Matter Of:

BALLARD vs.

KERR, M.D., et al.

CHARLES GARRISON, M.D.

September 23, 2013

Video Deposition

T&T Reporting, LLC

477 Shoup Avenue, Suite 105

Idaho Falls, Idaho 83402

Min-U-Script® with Word Index

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A. The most common -- the most common that one would expect under those circumstances would be escherichia coli, but that's based on commonality.
Q. Why do you think she had SIRS?
A. I think she had SIRS because she fits the classification of SIRS. When I -- when I look at the whole case --
Q. Why do you think she fits the classification of SIRS?
A. If you look at fat embolism syndrome and you look at SIRS, they -- there's a gray crossover between the two. And if you look at symptomatology that she had in terms of Systemic Inflammatory Response Syndrome, the criteria that are set out for that with tachypnea, with the heart rate, the CO2, the -- probably ought to get my notes out and look at some of those.
But the primary things would be the CO2, the heart rate, the respiratory rate, the white count, and the platelet counts, and things of that sort.
Q. Can sepsis cause SIRS?
A. Sepsis was originally associated with SIRS through basically --
Q. My question is: Can sepsis cause

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SIRS?
A. I just said that it did, that it was originally associated with that.
Q. Okay. Do you have an opinion as to where the bacteria found in her buttocks came from?
A. The only opinion I can give is that it was secondarily placed there either through bacteriuria, because we know she had bacteria in her urine, then developing a bacteriemia and subsequent sepsis, and the sepsis was the cause of the bacteria in the buttocks.
Q. The bacteria in her urine, Doctor, have you done any research regarding the validity of the urinalysis done at Elmore?
A. On the validity of the urinalysis, no, sir, I have not looked at research in that regard.
Q. You agree, don't you, Doctor, that the presence of epithelial cells on urinalysis would reflect a contaminated specimen?
A. Potentially, yes.
Q. You would agree that if E. coli is the most primary cause of gram negative bacteria, gram negative rods most prevalent, that is a nitrite-producing bacteria?

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A. That's correct.
Q. And we know that her urinalysis at Elmore's was nitrite negative?
A. That's correct.
Q. And we know she had a negative leukocyte esterase test at the urinalysis at Elmore?
A. That's correct.
Q. Do you know what the significance of a negative nitrite and a negative leukocyte esterase test is with respect to ruling out a urinary tract infection?
A. It would imply that there is no urinary tract infection.
Q. Okay. If you have a negative nitrite and a negative leukocyte esterase test and a fifteen to twenty epithelial cells on urinalysis, would you agree with me that more likely than not, a patient does not have a urinary tract infection?
A. I would.
Q. Doctor, do you have available to you E-mails by and between yourself and Mr. Quane regarding this matter?
A. The E-mails that I have primarily are just regarding the appointments and whether I want -- when I can give a deposition.

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Q. Did you E-mail him substantively about your opinions in this case?
A. No, sir, I did not.
Q. Did you E-mail him concerning your belief that Miss Ballard had a fat emboli?
A. I did not. I confine those things to confron -- personal discussions rather than E-mail.
Q. And when is it, Doctor, that you told mister -- Mr. Quane that you thought she had a fat embolism?
A. It was yesterday when I saw him that I told him that I thought she had a fat -- not that I thought, that I know she had a fat embolism.
Q. The article that Mr. Quane had printed out with him, is that an article you E-mailed him or handed to him in a hard copy today?
A. Yesterday.
Q. Do you agree that sepsis was a contributing factor to Miss Ballard's death?
A. I think sepsis probably contributed. I certainly cannot exclude it.
Q. Now, you had asked Dr. Groben a question about whether or not he saw anything relevant to an infection, and I think you said during what part of

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the autopsy?
A. The question that I had revolved around the wound itself. Did it look infected, or was there infection grossly evident when the wound was opened?
Q. What wound are you talking about?
A. Either one, right or left, for the abdomen.
Q. Right or left what? Flank?
A. Buttocks.
Q. Were you aware that Ms. Ballard had been prescribed a corticosteroid by Dr. Kerr?
A. Medrol dose pack, yes, sir.
Q. Okay. And Medrol dose pack will not fight an infection, you'll agree with that?
A. That's correct.
Q. But it would limit the body's inflammatory response to an infection; would you agree?
A. Potentially, yes.
Q. And it will immunosuppress a patient, won't it?
A. Potentially, yes.
Q. And when we talk about immunosuppression, that means they have an

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infection, their body's ability to fight that infection will be diminished, correct?
A. As potential, yes.
Q. Have you spoken to any other expert in this case?
A. No, sir.
Q. Do you know Dr. Thomas Kaufman, who's an infectious disease expert?
A. No, sir, I do not.
Q. Have you been told what he testified to with respect to his review of this case?
A. Say that one more time, please.
Q. Have you been told what Dr. Kaufman testified to?
A. Not specifically, no.
Q. Well, what general discussions have you had?
A. I'm sorry?
Q. What general discussions have you had concerning Dr. Kaufman's testimony?
A. None.
Q. And the reason I ask that, when I asked what were you told you said nothing specific, so I didn't know if there were general discussions you might have had about his testimony?

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A. No, sir.
Q. Have you told Mr. Quane that any of the disclosure of opinions that reflect opinions you were supposedly going to give was inaccurate?
A. Repeat that one more time, please.
Q. You have reviewed at least two disclosures that Mr. Quane made reflecting what your opinions are, correct?
A. That's correct.
Q. Did you ever tell or E-mail Mr. Quane that any representation he made in that disclosure was inaccurate?
A. I did on the first one.
Q. What did you tell him?
A. Without looking it up, the things that I underlined were that I had not seen a circumstance wherein a gram negative rod resulted in sepsis followed by death of the patient. Certainly I have. I've seen that. That was incorrect.
He will discuss the autopsy report including the fact the tissue samples do not identify with any degree of specificity where they were taken from, which further compounds the relevance findings of gram negative rods. That sentence was removed.

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Let's see, comments that I made was relative to things about bacteria, where they reside, things of that sort, but as far as I know, they were left in there. I just felt --
Q. Doctor, I apologize, but you talked about where -- were all the changes that you made reflected on the sheets of paper that you have in front of you?
A. That's correct.
Q. And the last thing you referenced, what change do you think was left in that you told him was inaccurate or needed to be corrected?
A. There were -- I don't -- without looking at my original E-mail, I would have to go back and review that, if I could.
Q. Certainly. Let's go off the record, and you can do that.
A. Okay.
THE VIDEOGRAPHER: We're now off the record.
(Discussion off the record.)
THE VIDEOGRAPHER: We're now on the record. We're now on the record.
Q. (BY MR. HADDAD:) I want to make sure I'm clear as to what you advised Mr. Quane may be

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inaccurate in the disclosure that was made.
A. The two sentences that --
Q. The first thing dealt with the fact that you had seen a gram negative rod causing sepsis death, correct?
A. That's correct, I have.
Q. Now, what else did you advise Mr. Quane may need to be changed either in an E-mail or verbally?
A. That I won't -- that discussing the autopsy report, including the fact that tissue samples do not identify with any degree of specificity et cetera, et cetera.
Q. Is there anything else that you looked at in that disclosure that you thought needed to be changed or corrected?
A. Not to the best of my knowledge, no, sir.
Q. And just so I'm clear, Doctor, the presence of a negative nitrite, negative leukocyte esterase, and the presence of the fifteen to twenty epithelial cells, in your experience, would make the -- would make a urinary tract infection nonexistent to a reasonable degree of medical probability?

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A. It would not likely be there.
Q. Okay. So you said that much better than I did.
In terms of the computer that you have at home, Doctor, does it have additional articles on it that you have not referenced here today?
A. I believe there are on Systemic Inflammatory Response Syndrome.
Q. Did you -- in terms of journals from which those articles came from, do you have a recollection of where those articles came from?
A. Not right offhand. The one major article is the one in which SIRS was originally defined because I went to the original article and I went from there. So I do have that original article. I can't tell you which journal it was in.
Q. And the original article -- okay.
And that SIRS, the original article regarding SIRS, did that relate to SIRS to a septic etiology?
A. SIRS was originally defined with sepsis, but subsequently defined without sepsis as well.
MR. HADDAD: Mr. Quane, do you have any problems of doctor -- Dr. Garrison, producing those

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articles that he has on his home computer to us?
MR. QUANE: No, if he can find them.
Q. (BY MR. HADDAD:) Doctor, where -- Doctor, if you would, as soon as you can, get those articles to Mr. Quane.
And, Mr. Quane, I believe that if he can't find them, just simply let him know, he can't find them, and he doesn't intend on relying on anything other than the ones he referenced.
A. I will make every effort to find them.
Q. Have you been given any materials by Mr. Quane that you have not reviewed?
A. No, sir, not to the best of my knowledge.
Q. Give me a second, Doctor. I'm just looking at my notes to make sure I don't miss anything.
Doctor, did you bring with you that summary or compilation of cases that you were provided by Mr. Quane regarding the surgeries performed at Silk Touch?
A. I did -- Well, it would be on my computer in my E-mail.
Is it in here?
MR. QUANE: Yeah.

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THE WITNESS: I don't know where it is. If I have it here, I'm not sure where it is.
Q. (BY MR. HADDAD:) Is there anything else you're leafing through that is not medical records in this case?
A. No, sir. Everything is just a stack that was given to me.
Now, the only things that I have here from Dr. Kerr's office are the records on Crystal Ballard. I don't have those others with me.
Q. (BY MR. HADDAD:) Okay. Is there any investigation that you've done concerning this case that you have not testified about?
A. Other than the reviewing of the slides looking for fat emboli, I think I mentioned that not specifically, but I did.
MR. HADDAD: Let's take a short break. I might be done.
THE VIDEOGRAPHER: We're now off the record.
(Discussion off the record.)
THE VIDEOGRAPHER: We're now on the record. We're now on the record.
Q. (BY MR. HADDAD:) Doctor, can you hear me?

EXHIBIT L

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PLAINTIFF'S FIFTH SUPPLEMENTAL ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

COMES NOW the Plaintiff, Charles Ballard ("Plaintiff"), in accordance with Rule 33 of the Idaho Rules of Civil Procedure, and submits the following Second Supplemental Answers to Defendants' First Set of Interrogatories.

General Statements and Objections

A. Representations of fact and law herein are made in good faith without the benefit of complete discovery. These answers represent Plaintiff's best efforts at this stage of the litigation and are based on currently available, non-privileged, and non-work product information and documents.

B. Plaintiff objects to each and every interrogatory to the extent that it calls for information subject to the attorney-client privilege, the work product privilege, the privilege for critical self-examination, or any other privilege. To the extent that documents or information arguably subject to such privileges may be provided by Plaintiff, such privileges are not waived beyond the precise extent of the disclosure made, and no waiver of privilege may be implied in that no disclosure of anything which is actually privileged is intended.

C. Plaintiff objects to each and every interrogatory to the extent that it may be vague, ambiguous, confusing, nonsensical, incomprehensible, or involves usage of words other than those commonly and customarily used, or assumes matters contrary to fact.

D. Plaintiff objects to providing information not within its knowledge, custody, possession, or control, or which does not exist.

E. No objection, general or specific, which has been raised herein is waived by the provision of any answer herein unless specifically stated to be waived by such answer.

ANSWERS

INTERROGATORY NO. 5: Please state the name and address of each person whom you intend to call as an expert witness at the trial, and for each such person set forth a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the testimony and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Supplemental Answer: Without waiving the objections to the late disclosure of opinions of Dr. Garrison regarding fat embolism syndrome, the plaintiff supplements his expert witness disclosures to meet this untimely disclosed opinion to the extent that the Court permits that opinion to be rendered at the trial of this action.

Dean Sorensen, M.D. Dr. Sorensen will testify that the patient clinically did not have fat embolism syndrome. Further, all of the signs, symptoms and other diagnostic tests, including the autopsy, support that Krystal Ballard did not die as a direct or indirect consequence of fat embolism syndrome. To the contrary, Dr. Sorensen will testify that the patient had the signs and symptoms of sepsis, which was confirmed pathologically by Dr. Groben at autopsy. Dr. Sorensen will testify that the only bacterial source causing the sepsis was from the fat injected into her buttocks, which bacteria entered her body because of the breach in the standard of care by Dr. Kerr at Silk Touch as outlined in his original disclosure of opinions. Further, to the extent that there were fat emboli found on the pathology slides as testified to by Dr. Garrison, these are incidental findings at the time of autopsy and are not the cause or a contributing factor to Krystal

Ballard's death. Fat emboli from lipolysis are an extraordinarily rare occurrence and typically only manifests when the liposuction is combined with another procedure, such as an abdominoplasty. To the extent that there are small fat emboli that entered the circulatory system through lipolysis, they do not clinically create any issues for the patient. Further, to the extent that the defendants plan on asserting that fat emboli caused or contributed to Krystal Ballard's death, Dr. Kerr did not discuss this risk with Krystal Ballard as evidenced by the documents of Silk Touch regarding the informed consent. Dr. Sorensen will challenge and rebut any opinions rendered by any of the defendants' experts to the extent that they were not set forth in their written answers to interrogatories or supplements thereto outlining their opinions.

Dr. Keith Armitage will testify, consistent with his initial disclosure, that the patient died from sepsis as a result of bacteria which was introduced into her body during the liposuction procedure. Dr. Armitage will testify that the signs and symptoms that the patient, Krystal Ballard, presented with are all consistent with sepsis from a bacterial source. There were no other bacterial sources for the infection identified clinically or pathologically other than the gram negative rods found at the time of autopsy at the fat injection sites in the buttocks. Dr. Armitage will rebut any opinions from any other expert, to the extent that those opinions are within his expertise as an infectious disease specialist.

Dr. George Nichols will testify concerning Dr. Garrison's opinions about fat embolism syndrome. Dr. Nichols has reviewed the pathology slides of Krystal Ballard and will testify that the patient did not have fat embolism syndrome at the time of autopsy. As a board-certified forensic pathologist, Dr. Nichols examines the clinical record as part of his overall review in determining cause of death. Dr. Nichols will testify that the patient did not clinically present

with fat embolism syndrome, but to the contrary, the signs and symptoms and diagnostic tests performed support that the patient had sepsis from a bacterial source. Dr. Nichols will testify that the only bacterial source was from the bacteria introduced into her body during the fat transfer and ultimately found at the injection site of the fat and nowhere else. Dr. Nichols will also testify, consistent with his education, training, experience and research into the issue of fat emboli as identified in his curriculum vitae, that the patient did not have fat embolism syndrome. However, fat emboli do manifest themselves as part of the resuscitation efforts on patients. Krystal Ballard was resuscitated numerous times and, therefore, to the extent that there are arguably fat emboli found on certain tissue samples taken at the time of the autopsy, these are a consequence of the resuscitation efforts at or near the time of her death and not present earlier. In patients that are resuscitated, there is a high likelihood of fat emboli found at the time of autopsy as a result of the resuscitation efforts, which do not clinically cause the patient's death, but rather are incidental to the resuscitation efforts. Dr. Nichols will rebut the opinions of any of the defendants' experts to the extent that they are contrary to his theories as expressed in his original disclosure and any supplemental thereto.

Dated this 18th day of October, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
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James B. Perrine

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE OF SERVICE OF DISCOVERY**

Pursuant to the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice to the Court and the Defendants that a copy of *Plaintiff's Fifth Supplemental Answers to Defendants' First Set of Interrogatories*, together with a copy of this *Notice of Service of Discovery*, has been served upon counsel indicated on the certificate of service below.

DATED this 18th day of October, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
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P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2013, a true and correct copy of the foregoing ***Notice of Service of Discovery*** was served upon the following via facsimile:

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Scott McKay

EXHIBIT M

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD;

Plaintiff,

vs. Case No. CV OC 1204792

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

DEPOSITION OF GEOFFREY STILLER, M.D.
TAKEN ON BEHALF OF THE PLAINTIFF
AT MOSCOW, IDAHO
JULY 19, 2013, AT 9:09 A.M.

Reported by Nancy K. Towler, CSR, Notary Public

Q. Well, let's go -- has it changed since you've started Linea?
A. No.
Q. Okay.
A. It has not changed, to answer that question. As far as the machine, I don't know what the machine name is. I think it's a -- I believe it is -- I'm blanking. I apologize. The liposuction machine, I don't know what its name is.
Q. Okay. What type of machine? I mean, how does it -- I know there's different types. There's an ultrasound.
A. Well, that's not -- they're not liposuction machines. They're just an energy source to do an aspect of liposuction.
Q. Okay. What kind of -- what liposuction procedures do you perform?
A. I do laser-assisted liposuction and traditional or Tumescent liposuction.
Q. Okay. And what type of procedure did Dr. Kerr perform on Krystal Ballard?
A. From what I understand, he used ultrasound or the vaser, and then did a liposuction, and then did a fat grafting.
Q. Okay. Do you use ultrasound?

A. I do not use the vaser. I have tried the vaser, but I do not use the vaser.
Q. Okay. Where have you tried it?
A. I believe it was in Charlotte, in North Carolina. We had them come in. The rep brought it in, and we tried it, but I don't use it.
Q. Okay. So your only experience is a rep tried to sell the machine, he came in to do a presentation. You --
A. My only experience of hands-on use, correct.
Q. Okay. Did you ever actually use it on a patient?
A. We did.
Q. Okay. Did you ever read the manual?
A. I don't remember. Probably did.
Q. Now, explain the difference. I mean, when you're talking about ultrasound, that's to break up the fat, correct?
A. Loosen the fat off the stroma or the surrounding tissue.
Q. The liposuction part is actually the --
A. Harvesting.
Q. -- aspirating of fat or harvesting it from -- taking it out of the body into some type of collection tube?
A. Correct.

Q. In terms of the machine that you all have used since March of 2012, you don't know who the manufacturer is?
A. I don't remember.
Q. Okay. Do you know what the manufacturer recommends in terms of how to clean and disinfect and sterilize that equipment?
A. The equipment, itself, is just an engine to pull tissue. It doesn't have any contaminants to it.
Q. Okay.
A. So everything going to it is disposable.
Q. What about the hand piece?
A. The hand piece is my liposuction cannulas.
Q. Okay. Okay. The hand piece, as you understand it, that Dr. Kerr used was because he used ultrasound?
A. Correct.
Q. Okay. Have you been provided the manual from the manufacturer of the machine Dr. -- the vaser machine Dr. Kerr used on Krystal Ballard?
A. I have not.
Q. Okay. Now, at some point in time, Doctor, during the -- when you were asked to -- to review this case, I know there was some correspondence from Mr. Jones' office about contacting Dr. O'Neil so that you could talk to him, Dr. O'Neil, about the standard of practice

as it exists in Boise, correct?
A. At the time of this incident, correct.
Q. Okay. Because you had not practiced in Boise or the sounding area, correct?
A. I had practiced in Boise and the surrounding area up until 2005.
Q. As a general surgeon?
A. Correct.
Q. Okay. But they wanted you, as I understand it, to talk to Dr. O'Neil about the standard of practice during the time that Krystal Ballard had her procedure for cosmetic procedures?
A. Correct.
Q. All right. Do you know when you spoke to Dr. O'Neil?
A. End of May, beginning of June.
Q. I mean, do you have any -- first of all, do you have any notes that you've made in your review of any materials?
A. I do not.
Q. Do you have anything that you've kept in any type of electronic format concerning notes about your case review?
A. I have not.
Q. What type of -- what type of practice does

Dr. O'Neil have?
A. A cosmetic physician, I believe.
THE REPORTER: I'm sorry?
THE WITNESS: A cosmetic physician, I believe.
BY MR. HADDAD:
Q. What type of background does he have?
A. I don't know offhand.
Q. Okay. Do you know whether he had any kind of surgical residency?
A. I do not know offhand.
Q. Okay. I mean, when you say you don't know offhand, did you ever -- before you spoke to him, did you ever try to find out what type of background Dr. O'Neil had in terms of his practice?
A. No.
Q. When you were talking to him, did you ask him how he was trained, both in -- through medical school, residency and in cosmetic procedures?
A. No. I asked him about the standard of practice in Boise at that point in time.
Q. Okay. We'll get to that. Did you ask Dr. O'Neil what type of machine he used at his office? For instance, do you know whether he used the vaser?
A. I did not ask him, and I do not know.

Q. Do you know if Dr. O'Neil's practice is such that he has -- strike that. Do you know whether Dr. O'Neil personally performs the cleaning, disinfecting and sterilizing of equipment and supplies that are reusable at his office?
A. I don't know.
Q. Do you know what type of cleaners Dr. O'Neil uses?
A. I do not know.
Q. Do you know what type of disinfectants Dr. O'Neil uses?
A. No.
Q. Do you know if Dr. O'Neil uses an autoclave?
A. No.
Q. Do you know whether Dr. O'Neil takes spore counts?
A. I do not.
Q. Did you ever ask him any of those questions?
A. I did not.
Q. I mean, how long was your conversation with Dr. O'Neil that you utilized to gain an understanding as to the standard of practice for a cosmetic physician at the time Krystal Ballard had her procedure? How long was your call?
A. About 20 to 40 minutes.

Q. (Indicating).
A. Twenty to 40 minutes.
Q. Twenty to 40 minutes. All right. I want you to recount for me everything you discussed with Dr. O'Neil.
A. That will be a very -- a 20-minute to 40-minute conversation to discuss that. Do you want me to go through every aspect of it?
Q. Well, let me break it down. Then I'll ask you kind of a catchall question. And if it takes time, it takes time.
A. Sounds good.
Q. Do you know whether Dr. O'Neil does cosmetic procedures in his own office?
A. Yes.
Q. All right. Do you know whether Dr. O'Neil has specifically dedicated staff who do the cleaning, disinfecting and sterilizing?
A. I don't know.
Q. Do you know whether Dr. O'Neil has written policies and procedures in his office dealing with cleaning, disinfecting and sterilizing equipment?
A. I do not. I did not ask.
Q. All right. What were the general topics, and then we might get into specifics, that you discussed

with Dr. O'Neil?
A. We discussed the care of the patient.
Q. Okay. I'll stop you there. Did -- did Dr. O'Neil have the medical records of Krystal Ballard, to your knowledge?
A. I believe he said he reviewed them. I don't -- I don't know what in total he had.
Q. Okay. So he had -- at least based on your conversation with him, he had been supplied with medical records?
A. I believe so.
Q. Concerning Krystal Ballard?
A. Correct.
Q. Okay. So when you discussed the care of the patient, tell me what it is you and Dr. O'Neil discussed.
A. The -- the procedure, itself. We discussed the follow-up of the patient.
Q. What else?
A. We also discussed what it was like practicing in Boise at that point in time, how many cosmetic physicians were there. And we discussed the sterilization that was -- the deposition of the sterilization by Dr. Kerr on what his opinions regarding the adequacy of that, of sterilization.

Q. Okay. How many -- I mean, what was it like practicing in Boise, was that just kind of a general conversation, or what --
A. Absolutely.
Q. Then what was the point of -- I mean --
A. How many physicians there were --
Q. -- it may not have any relevance, but I just want to know, does asking him, gee, what was it like practicing? How many cosmetic physicians in Boise? How did that lead you to have an understanding as to the standard of practice in Boise?
A. As far as the standard of practice in Boise, which physicians, what kind of physicians perform -- were performing and where they were performing their procedures.
Q. Okay. What type of physicians in Boise were performing cosmetic procedures?
A. As -- Dr. Kerr was doing it, as well as Dr. O'Neil was doing it. And I think he said there was an -- not an ophthalmologist, but an ER doc. Again, these were all non-plastics people and who was doing it. And there was five in total. There might have been an OB that was doing it as well, as far as I remember.
Q. Okay. To your recollection, there were only five physicians in Boise doing cosmetic procedures?

A. No. There were five cosmetic physicians doing procedures.
Q. Okay. To your knowledge, all five were nonsurgical trained?
A. I don't know if they were surgical trained.
Q. Now, when you say you discussed the sterilization and the adequacy of the sterilization as described, are you talking about as Dr. Kerr described in his deposition?
A. Yes.
Q. Okay. Tell me specifically what it was you and Dr. O'Neil talked about in terms of the adequacy of the sterilization as described in Dr. Kerr's deposition.
A. Sure. We talked about his cleaning of the instruments. We talked about the sterilization of his instruments.
Q. Okay. Is that it? I mean, can you be any more specific? When you say you talked about the cleaning, what did you all talk about in terms of cleaning the instruments?
A. We discussed what Dr. Kerr had said he did.
Q. Okay. What did Dr. Kerr say he did?
A. Well, he mentioned, at some point in time, that he did both the Hibiclens and the alcohol, as well as he also talked about using a chemical, which he didn't know

the name of.
Q. Okay. Now, how is -- okay. I'm sorry, I interrupted you --
A. No worries.
Q. -- and I shouldn't do that.
A. No worries.
Q. You said alcohol, Hibiclens --
A. Uh-huh.
Q. -- and some unknown chemical Dr. Kerr couldn't remember the name of?
A. Correct.
Q. Okay. Anything else dealing with the cleaning of instruments that you all talked about, other than the types of solutions Dr. Kerr described he used?
A. Not that I can tell you right now, no.
Q. Okay. Do you know in your practice whether you use alcohol to clean instruments?
A. Do we use alcohol to clean instruments? I will use alcohol to clean instruments on the field if I need to, yes.
Q. When you say "on the field," what does that mean?
A. My surgical field.
Q. Okay. But as far as once they go back with Ms. Blake, do you know what she uses?
A. She uses a -- a -- a hospital-grade cleaner, as

well as the -- the disinfectant.
Q. Okay. I mean, saying a hospital-grade cleaner, what's --
A. There's -- well --
Q. -- what's the active ingredient?
A. An acetylene, something, something something. I don't know.
Q. All right. Okay. Let me ask you this. You talked about alcohol, Hibiclens; and, obviously, you couldn't have much discussion about the appropriateness of some unknown cleaner, correct?
A. Correct.
Q. All right.
A. Well, we also talked about his autoclave, the steam autoclave, and the fact that he did use a chemical marker.
Q. All right. That's more the sterilization side.
A. Correct.
Q. I look at it differently, but --
A. Well, the sterilization side is important.
Q. Okay. It is. We were going to get to that, but I was breaking them down. But we can deal with them all together --
A. No worries.
Q. -- if it's easier for you. Do you know whether

or not alcohol has been proven to be an appropriate solution, 70 percent isopropyl, because that's what Dr. Kerr used, right?
A. Mixed with Hibiclens.
Q. Okay. Do you know whether or not isopropyl alcohol is an appropriate solution to use in the cleaning and disinfecting and sterilization of medical equipment and supplies?
MR. JONES: Object to form.
THE WITNESS: You -- again, you're masking -- or you're putting all three together. And Hibiclens isn't a sterilization. It's not a disinfectant. It's a cleaner.
BY MR. HADDAD:
Q. Okay.
A. And so is alcohol.
Q. All right. Do you know whether or not it's approved, whether alcohol is -- first of all, do you know -- when I say the Centers for Disease Control, are you familiar with that organization?
A. I am familiar with that organization.
Q. Have you ever read any of their publications dealing with the appropriate cleaning, disinfecting and sterilizing of medical equipment and supplies?
A. At some time -- at some point in my training, I'm

sure I have.
Q. Do you know what they said about alcohol being used, 70 percent isopropyl alcohol being used to clean or disinfect medical equipment and supplies?
A. Again, it's not a disinfectant. It's a cleaner.
Q. Do you know what they say about it being used as a cleaner?
MR. JONES: Object to form. Assumes facts. And lack of foundation. You haven't established that the CDC sets any standards in Boise, Idaho.
BY MR. HADDAD:
Q. Go ahead.
A. Again, going back, it's not just using alcohol. It's using alcohol and Hibiclens, is what he used. So it's not just selecting one.
Q. Do you know whether Hibiclens is approved by the FDA to clean or disinfect, one or the other, medical equipment and supplies?
A. I don't know if the FDA actually approves anything for cleaning. The FDA doesn't have to do with that. It's the CDC. And the CDC, again, as we said, doesn't have the -- doesn't -- or doesn't tell us what the standard of practice is.
Q. Okay. Do you know whether or not the CDC has published information for physicians to use that says

whether Hibiclens is an appropriate solution to use?
A. I have not researched it.
Q. What concentration -- I mean, what is the active ingredient --
THE WITNESS: Just a moment.
MR. HADDAD: Sure.
THE WITNESS: Sorry.
MR. HADDAD: We're still good?
THE WITNESS: Yeah.
MR. HADDAD: All right.
BY MR. HADDAD:
Q. What is the active ingredient of Hibiclens?
A. I don't know.
Q. Do you know what -- now, did Dr. O'Neil tell you he uses alcohol?
A. As far as him using alcohol?
Q. To clean medical equipment or supplies.
A. To clean medical equipment, again, it's not the mixture -- it's not alcohol. It's the mixture of alcohol and Hibiclens. And alcohol and Hibiclens is what I use to cleanse patients as far as a cleaner and disinfectant. That being said, again, it's not a disinfectant. It's to sterilize the -- it's used to clean the tissue. So...
Q. Did you ask Dr. O'Neil whether or not he used a

alcohol-Hibiclens solution, mixture, to clean medical equipment and supplies?
A. I asked him whether that was an adequate cleaning at that point in time in Boise with Dr. Kerr. And he agreed that he didn't see any issues with that.
Q. Did he say he did it? He used -- that Dr. O'Neil specifically said, I used alcohol and Hibiclens in a mixture to clean medical equipment and supplies? Did you ask him that?
A. I did -- I don't remember.
Q. Did you ask Dr. O'Neil whether or not he took spore counts?
A. I did not ask him.
Q. Did Dr. O'Neil tell you that other physicians in Boise that do cosmetic procedures did or did not do spore counts? Or did that not come up?
A. It did not come up.
Q. Again --
THE WITNESS: No. Just my wife.
MR. HADDAD: Sometimes that can be more important than any other call you get.
BY MR. HADDAD:
Q. The various places that you practice -- or have practiced -- I'm going to back up so I can kind of get them here. And we'll go in most recent. In March, 2012

to the present, do you have a -- is there a dedicated clean room where instruments are taken to be sterilized?
A. It's a clean-dirty room.
Q. When you say "clean-dirty room," what do you mean?
A. There's a wall -- there's a wall on the counter separating the clean supplies from the dirty supplies, but it's in the same room.
Q. How is it separated?
A. There's a wall.
Q. I mean, other than a wall. I mean --
A. That's it.
Q. Okay. When you say "there's a wall," is it --
A. It's a partition, I should say, rather than a wall. A partition.
Q. And this is the ambulatory surgical --
A. No. This is my office.
Q. Okay. So your office uses a clean-dirty room?
A. Correct.
Q. Do you put -- are the instruments, the dirty instruments, left in a sink adjacent to where the autoclave is located?
A. It's a couple feet away, but yes.
Q. Have you ever had -- first of all, is your -- is Linea, as a separate entity, accredited?

A. No.
Q. Is the ambulatory surgical center accredited?
A. It is.
Q. Who accredits that?
A. AAAHC.
Q. At Shape, was it accredited?
A. Initially, no, but it became accredited.
Q. Uplift, was it accredited?
A. It was not.
Q. Genesis?
A. It was.
Q. Do you know whether or not Dr. O'Neil's cosmetic practice is accredited?
A. I don't believe it was.
Q. Did you ask him, or are you just --
A. I believe it came up in conversation.
Q. Okay. Do you know whether other physicians in Boise, how many of those that practice cosmetic surgery and have their own surgery centers, have accredited versus non-accredited centers?
A. As far as at that time, I don't believe any of the cosmetic physicians had it. And we did discuss that, that being said.
Q. And you're talking the five --
A. Correct.

Q. -- physicians that he mentioned that did cosmetic procedures in Boise?
A. Correct.
Q. Okay. You said one was an ER doctor?
A. I believe it was.
Q. One was an OB?
A. I believe so.
Q. What were the others?
A. I think it was Dr. O'Neil and Dr. Kerr. And I don't remember what the last one was. Again, but they were all outside of the main surgical specialties.
MR. JONES: Dermatology was one.
THE WITNESS: Dermatology. There you go.
BY MR. HADDAD:
Q. All right. Just so that I'm clear, is it your understanding, in speaking with Dr. O'Neil, that during the time in July of 2010 that Krystal Ballard had her procedure --
A. Uh-huh.
Q. -- there were a total of five physicians in Boise, Idaho, doing cosmetic procedures?
A. No.
Q. Okay.
A. Not what I said.
Q. What did you say?

A. I said there were four -- five -- there were five cosmetic physicians that were doing cosmetic procedures, not including the surgical subspecialties.
Q. Okay. Now, do you know how many surgical specialists were doing cosmetic procedures?
A. As far as the plastic surgeons versus the ENTs versus the ophthalmologists that all do cosmetics, I do not know.
Q. Okay. Did Dr. O'Neil discuss with you what the nonsurgical-trained cosmetic physicians -- strike that. Did Dr. O'Neil discuss with you what the surgically trained cosmetic physicians did or did not do with respect to cleaning, disinfecting, sterilizing equipment?
A. No.
Q. Before you go in to do a procedure in your -- inhouse, your own office, the liposuction, do you do fat transfers in your own office?
A. I do.
Q. Okay. How do you go about cleaning your hands? What do you use?
A. Avagard.
Q. Avagard? What is the active ingredient?
A. I don't know what it is. It's what I use in the hospitals.

Q. Okay. Did you ask Dr. O'Neil whether or not using alcohol to clean your hands before a procedure was or was not something that other Boise nonsurgically trained physicians did?
A. I did not.
Q. Do you do regular maintenance, or have somebody do regular maintenance, on your autoclave?
A. I do.
Q. Okay. How often do they come and check the autoclave to make sure it was working appropriately?
A. I think it's once a year they come by.
Q. The other facilities that you worked in, or were involved with, do you have an understanding that they, likewise, had routine maintenance and upkeep of their autoclaves?
A. I don't know.
MR. JONES: Object to form. Vague.
BY MR. HADDAD:
Q. I mean, do you know if at any other place, when you were at Palouse back in '05 to '08, do you know whether the -- somebody came and checked the autoclave to make sure it was functioning properly?
A. They were the hospital's, so I did not check.
Q. All right. Were you trained at Southeast -- or Southcenter Cosmetic Center and Hair Restoration, did

they have an autoclave?
A. Yes.
Q. Do you know if somebody did routine servicing and maintenance of the autoclave?
A. I don't know.
Q. At Genesis, do you know whether they had somebody to come in and do routine servicing and maintenance?
A. I don't know.
Q. At Uplift, that's yours, did you have somebody come in and do routine servicing?
A. I did not.
Q. Of course, you weren't there for a year, correct?
A. Correct.
Q. All right. At Shape, do you know if they had somebody come in to do routine maintenance and servicing of the autoclave?
A. I know the autoclave broke twice while I was there, so it was fixed from that standpoint. Whether they did any other servicing, I don't know.
Q. Fair. And at your place, every year somebody -- at Linea, somebody comes in every year and makes sure it's operating -- the autoclave's operating appropriately?
A. Correct.
Q. Do you know what they do when they come and check

it out? Have you --
A. They put a sticker on it. That's all I know.
Q. They come and say, I've inspected it?
A. Exactly.
Q. All right. When instruments are taken from the procedure room that you use at Linea, and then you go in and you put them in a basin to soak; is that correct? Do you do that process?
A. I don't do that process.
Q. Okay. Do you know how it's done?
A. I know they're put in a basin to soak.
Q. Do you know what kind of solution is used?
A. Again, it's a cleaning solution.
Q. Okay. When you were talking to Dr. O'Neil, did you ask him whether or not instruments taken from the procedure room are put in -- in a basin to soak?
A. I did not ask him that, no.
Q. Okay. Did you ask him -- we'll leave it at that. In looking at the medical records, is it -- do you have the general opinion that Krystal Ballard died as a result of sepsis?
A. Krystal Ballard died as a result of shock. I don't know if it was sepsis.
Q. Okay. If you were to give a differential diagnosis as to what caused the shock in Krystal

Ballard, would sepsis be on the differential?
A. It would be low.
Q. What would be on the differential?
A. What would be on the differential? Completely?
Q. Well, I'm -- I'm -- you're -- well, first of all, are you going to render the opinion as to the cause of Krystal Ballard's shock?
A. Am I going to render an opinion regarding the -- if I'm asked for an opinion, I guess I can give an opinion. That being said, (indicating).
Q. I don't know what that means.
A. If -- if I'm asked an opinion, I can render an opinion regarding what I think happened. And with that, sepsis is low on that opinion.
Q. Okay. Have you looked at the areas that you were anticipated to give expert testimony on?
A. That list, yes.
Q. Okay. Is it going to be -- have you formed an opinion in your mind, as you sit here today, that you believe you can testify to a reasonable degree of medical probability as to why Krystal Ballard went into shock?
A. Is there -- again, ask your question. I apologize.
Q. Sure. Have you formed an opinion, to a

EXHIBIT N

Deposition of
Gregory N. Laurence, MD

Date: October 2, 2013

Case: Ballard v. Kerr, Silk Touch

Case No: CV OC 1204792

Reporter: Andrea J. Wecker, CSR#716, RMR, CRR, CBC

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Pages: 1 to 172

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of those days.
I don't remember if liposuction was involved, but I believe that during that procedure, she was with my administrative staff just talking about administrative issues.
Q. Okay. Did Ms. Kerr, to your knowledge, ask or inquire or observe the manner in which your practice cleaned, disinfected, or sterilized any of the medical equipment and supplies?
A. I don't remember --
Can you ask that question again?
Q. Yeah. I didn't know whether you are aware whether or not Ms. Kerr, when she was at your facility, you know, observed or asked about any aspect of the cleaning, disinfecting, and sterilizing of reusable medical equipment and supplies.
MR. JONES: I'm going to object to form to the extent it lacks foundation. You haven't established he was with her during that time.
THE WITNESS: Yeah, I was just going to say I wasn't with her the majority of the time.
She certainly could have observed my staff were using our disinfecting, sterilizing, you know, procedures every day practically. So she

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could have observed that.
I don't recall if she asked me any particulars about how we did what we did.
Q. (BY MR. HADDAD) Okay. So your not being personally involved, you don't know one way or the other whether or not Ms. Kerr asked or obtained any information concerning how your offices go about cleaning, disinfecting, and sterilizing medical equipment and supplies.
Is that fair?
A. That's correct.
Q. All right. Now, when Dr. Kerr approached you at this national society of cosmetic physicians meeting, what did he tell you about the lawsuit?
A. I don't recall how much detail he gave me. I -- I would have just told you after that meeting that I knew he was involved in a lawsuit that pertained to liposuction and a patient death, but that's all that I can remember that we talked about.
Q. Did Dr. Kerr ask you at that time when you were at this meeting whether or not you would review the case and render an opinion on his behalf?

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A. No, he did not. I think I would have remembered that.
Q. All right. In terms of the practices that you have --
And I'm going to, I guess, focus on Germantown Aesthetics because that's the only practice that does liposuction as part of the services provided, correct?
A. Correct.
Q. Now, the Vaser was used by Dr. Kerr in the procedure done on Krystal Ballard.
Are you aware of that?
A. I am.
Q. Do you use the type of equipment that Dr. Kerr used in your practice?
A. I've used Vaser before, but I've never purchased Vaser. And so it's not something that I use regularly. I'm familiar with its use.
Q. Okay. When you said you've used it before, in what circumstance have you used a Vaser machine?
A. In rotating with other physicians -- spending time, I guess I should say, in other physicians' offices that use Vaser.
Q. Okay. So you've never used a Vaser

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machine in your practice, correct?
A. That's correct.
Q. There may be occasions where you may have visited other physicians that practice cosmetic surgery that use a Vaser and you've seen that machine in use, correct?
A. Correct.
Q. Okay. Do you know how many occasions you have observed in this part of visiting these other physicians a Vaser liposuction machine?
A. Yes. Three physicians' practices.
Q. First of all, are any of those physician practices in Boise?
A. No, they're not.
Q. Okay. Any of those physician practices in Idaho?
A. No.
Q. When you observed these three offices use the Vaser liposuction, did you actually use it yourself meaning place the handpiece in your hand and do any type of contouring of any patient at these offices?
A. I wouldn't say to the extent that I did contouring, but I did have the instrument in my hand to do several passes to get a feel for what it

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felt like. I was considering purchasing the -- the unit.
Q. Okay. In terms of fat transfers, is that a procedure that you perform?
A. That's correct.
Q. Okay. When did you start doing fat transfers?
A. I'd say about two and a half years ago.
Q. I'm trying to do the math. So it's sometime after 2011?
A. Yeah, yeah around 2011 or --
Yes.
Q. All right. When you do liposuction in your office --
And maybe we established approximately when that was. I think it might have been '04/'05.
Does that sound about right?
A. That's correct.
Q. Okay. What type of machinery do you use to perform the liposuction in your office?
A. Well, I've used just about every popular modality on the market that's used with tumescent liposuction.
So in terms of what that equipment is, you know, the idea is you apply some kind of

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vibration or energy or heat to the tissue to help process the fat or help with the contouring before you actually do the removal of the fat.
I've used just about everything that's out there.
Q. Okay. In terms of a cosmetic practice, have you spoken to any physicians that practiced in Boise, Idaho, in 2010 which is the time period that Krystal Ballard had a procedure about the standard of practice in Boise in 2010?
A. Yes, I did.
Q. Who did you speak with?
A. Dr. Kelly O'Neil who practiced in this area around that time.
Q. And I think within the materials that are either part of Exhibit 1 or Exhibit 2, whichever is the stack of your file --
A. Yeah, it's 2.
Q. -- there's reference to Dr. O'Neil.
And you remember speaking with him?
A. That's correct.
Q. All right. Is your discussions with Dr. O'Neil --
Well, first of all, did you rely upon Dr. O'Neil exclusively in order to understand what

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the standard of practice was in Boise, Idaho, in 2010 in performing similar procedures and services to patients in --
MR. JONES: Object to form; vague.
THE WITNESS: There were no other physicians that I spoke to who practiced in Boise, Idaho, around that time to whom I spoke or communicated in any way.
Q. (BY MR. HADDAD) Okay. And Dr. O'Neil is a physician that you were referred to by Mr. Quane to contact in order to avail yourself of what the standard of practice was in Boise in in 2010, correct?
A. Yeah, correct. I did not know him before.
Q. Okay. Basically, counsel for Dr. Kerr told you, "You need to learn what the standard of practice was in 2010, and here's the guy that can tell you what the standard of practice is," and they named Dr. O'Neil, correct?
MR. JONES: Object to form.
THE WITNESS: So, yes, I spoke to him after they referred me to him as someone who was reliable.
Q. (BY MR. HADDAD) Okay. Did you know

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Dr. O'Neil from any other circumstance other than the fact that counsel for Dr. Kerr told you to contact him about understanding the standard of practice?
A. I'd never run into him at a meeting or anything like that, correct.
MR. JONES: Counsel, we don't have the benefit of coffee or water or anything in this room like you do, so I'd like to take a break when you get to a point --
MR. HADDAD: Okay. It will be just --
Well, let's do it now. Let's go off the record.
(Break taken from 10:11 a.m. to 10:21 a.m.)
Q. (BY MR. HADDAD) Doctor, in terms of your conversations --
First of all, have you had more than one conversation with --
A. I'm sorry. The video skipped.
Q. I'm sorry. I was looking down, so that probably had something to do with it.
Dr. Kelly O'Neil, have you spoken to him on more than one occasion?
A. Two occasions.
Q. All right. What I see, Doctor, within

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the stack of materials that comprise your file is an e-mail from SuperDocG to Corina Ferris and a cc to Terry Jones.

I'm taking it SuperDocG is your e-mail address?

A. It is.

Q. And this e-mail is dated July 11th, 2013, that says, "I wanted to make sure everyone was aware that I have discussed standard of practice with Dr. Kelly O'Brian."

A. That's correct.

Q. First of all, is it Kelly O'Brian or Kelly O'Neil that you spoke with?

A. Oh, O'Neil.

Q. Your e-mail says O'Brian, and I wanted to make sure that wasn't somebody else I wasn't aware of.

A. No, that's correct.

MR. JONES: There's a lot of Irish people running around we like to talk to up here.

MR. HADDAD: Haven't met any of them, but --

Q. (BY MR. HADDAD) This e-mail was sent July 11th, 2013.

First of all, do you have any notes concerning your conversation with Dr. O'Neil?

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A. I -- I do take a lot of notes, and as you know, I handed over my notes that I took. And I --

I did take notes when I spoke with him, but at some point I misplaced them, either physically or electronically. I have not been able to find those notes, but I do recall the conversation.

Q. Okay. This e-mail dated July 11th, 2013, would that have been at or near the time that you spoke with Dr. O'Neil?

A. I -- I don't remember if I recalled a week later or so that I needed to -- to tell Mr. Quane that I had -- had spoken with the doctor.

But it may have been a day after; could have been a week or more after. I'm not sure.

Q. July 11, 2013, because that's the date of the e-mail that you were advising Mr. Jones and the people at his office you spoke with Dr. O'Neil, is it fair to say that you would have spoken with Dr. O'Neil within a week of that e-mail being sent to let them know that?

A. It's -- it could -- it could have been two weeks. I don't know.

Q. Okay. Well, what --

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First of all, you said you spoke with him on two occasions. Would you have taken notes concerning your conversations with Dr. O'Neil on each of those two occasions?

A. Well, with the shorter call, he was pressed for time. I remember just having an abbreviated conversation, and we made an agreement to try to get back in touch with each other in some form at whatever phone number he was going to be available.

I remember that it ended up being several days to a couple weeks before that follow-up finally occurred.

And then the second conversation was the longer of the conversations, and that's the one that I know I took notes on but which I could not put my hand on those notes.

Q. And it looks like the letter that was sent from Mr. Quane's office indicates that Dr. O'Neil was actually practicing in California at the time he wanted you to contact him but had practiced in Boise in 2010.

Is that your understanding?

A. It's my understanding that he relocated his practice, correct.

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Q. Did you do anything independently to determine whether, in fact, Dr. O'Neil practiced cosmetic surgery in 2010 in Boise other than based on the representation of counsel for Dr. Kerr?

A. Correct. I just -- I asked him if that was the time that he practiced, and he said yes, he was practicing at that time.

Q. Okay. And you said that there was a shorter call, that Dr. O'Neil might have been pressed for time.

Is that correct?

A. Correct.

Q. Do you have any recollection of what you and he discussed during that initial call?

A. I do not remember. It was mostly the case very superficially and just who he was and what his background was and how he came to, you know, transition from his surgical background to performing cosmetic procedures.

Q. Okay. I want you to tell me everything you can remember about this initial call with Dr. O'Neil, what you asked him, familiarize yourself with the standard of practice or what he told you in terms of his practice and how it evolved.

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A. You know, I'll be able to give you a lot more details about the longer conversation on that one.

It really was a fairly abbreviated telephone conversation. It was just enough for me to conclude that this was a guy that liked what he was doing, and I understood it made sense to me why they asked me to touch bases with him. He was obviously somebody that was familiar with these procedures.

But that's all that I can tell you with any detail.

Q. Okay. During the conversation -- the first or the subsequent conversation with Dr. O'Neil where you discussed this case, did Dr. O'Neil tell you that he had the medical records from Silk Touch?

A. He did not. I don't recall whether he told me he had actually reviewed medical records or not.

I had reviewed records at the time that I had talked with Dr. O'Neil.

Q. Okay. Was there anything Dr. O'Neil said during your conversation that led you to believe that he had reviewed any of Krystal

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Ballard's medical records?

A. Again, I don't know whether he had reviewed them or not, and I -- and I don't recall if there was anything in particular that he said that would have, by inference, made me be able to say that he had or had not.

Q. Okay. Is it fair to say that it was -- the longer telephone call is the one that you used as the basis by which you came to learn what the standard of practice was in Idaho in 2010?

MR. JONES: Object to form.

THE WITNESS: I think that a combination of the review of all the records and in combination with the conversation with him was what I relied upon to be able to say that Dr. Kerr was within the standard of practice for the area.

Q. (BY MR. HADDAD) Okay. Well, we'll get to that.

I understand you reviewed the medical records, but in terms of familiarizing yourself with the standard of practice in Idaho, is it fair to say that familiarizing yourself with what the standard of practice was in Boise, Idaho, in 2010 was really based upon the longer call with Dr. O'Neil?

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MR. JONES: Object to form; misstates his testimony, counsel. He said he relied on both his conversations and his review of the records in the case.

Q. (BY MR. HADDAD) Okay. Well, let me ask you this: Tell me everything, and I mean everything, you remember about your conversation with Dr. O'Neil, the longer call.

A. The main thing that was memorable about the conversation --

Again, I regret that I don't have any notes with this.

But it was clear after this 30- to 45-minute conversation that I had with Dr. O'Neil that he knew how other physicians in Boise practiced, that there were a combination of physicians with different backgrounds that performed similar procedures, and that the way --

And I don't remember whether he had independent knowledge or if I dis -- if I had to tell him, you know, what Dr. Kerr did in the process of performing liposuction.

But I was -- the impression that I had after that 30- to 45-minute conversation is the way that liposuction is performed in Boise is very

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similar to how it's practiced in my area. That's not true with several other procedures in which I've been involved in. Boise is much different than where I'm from.

But in the area of liposuction, my practice mirrors that of Dr. Kerr's substantially.

Q. You said that's the main thing, and I don't want to know just the main thing. I want to know everything that you recall, and then we'll try to put a little more substance behind the things that you mentioned just now.

What other things did you and Dr. O'Neil discuss about the standard of practice in Idaho?

A. One issue would be do doctors in this area of Idaho practice in the hospital primarily or in an office-based situation.

And as in the area where I practice, there's a really good combination. There's a lot of physicians that take their patients into a non-office base that is an ambulatory or hospital situation, and then there's a portion of physicians of many different specialties who perform these procedures in their office.

Q. Okay. What did he tell you about Boise, Idaho, physicians in 2010 in terms of where they

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carried out their cosmetic procedures?
A. Well, I would have -- I would have not have been surprised if he had said, you know, there's a lot of reconstruction-trained doctors who have started to do liposuction and some of them are using some of the new techniques and Dr. Kerr is the only non-reconstruction doctor who performs liposuction because there are some areas of the country in which that dynamic is somewhat true.
So I was surprised to hear a substantial number -- and I don't remember the number -- and he may have even given me names.
But apparently over -- during that time period, there were several physicians of multiple specialties, both in the immediate Boise area and in the state, that perform liposuction procedures.
Q. Okay. I think the question that prompted -- or your statement that prompted my last question was: Did doctors in Boise, Idaho, as you understood it, practice in primarily a hospital setting or ambulatory care center associated with a hospital in carrying out liposuction or did they practice in their private office settings to do that?
A. Dr. O'Neil related to me that both

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situations were fairly common.
Q. What else did you discuss --
First of all, did he tell you the names of any of the physicians in Boise, Idaho, that practiced cosmetic surgery?
A. He did.
Q. What are the names?
A. I don't recall those names, but he -- he mentioned the names specifically and what their specialty had been.
Q. Okay. Did he tell you what each of those physicians -- in terms of their specialty, their name, whether they practiced in a hospital setting, an ambulatory care setting, or an office-based setting to practice liposuction?
A. He, you know, voluntarily gave me a pretty good description of the landscape, and then I asked him a lot of specific questions about, you know, the -- "That particular doctor that you mentioned, does he continue to be in practice to this day? Does he have a fairly high-volume practice? How does he compare to, you know, the busiest hospital-based physician?"
I don't remember all those details, but I do remember I was impressed that it was a little

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bit more robust community. Boise is a fairly small area, and I guess it just has a draw.
But there was a fairly robust spectrum of different specialties that perform liposuction in both hospital and office-based situations.
Q. In terms of fat transfer -- because that's part of what was done on Krystal Ballard, correct?
A. Correct.
Q. Okay. Did Dr. O'Neil talk to you about --
Well, first of all, does he practice --
Was he, Dr. O'Neil, actually doing liposuction himself in July of 2010?
A. Yes, he was.
Are you talking about here? Yes, he was.
Q. I mean other than saying, "I had an office practice that did cosmetic procedures in 2010," did he actually specifically tell you he did liposuction in 2010?
A. I don't -- I don't recall whether he said in any particular month or any year whether his case list had been up or down. But he -- he -- this was a procedure that he performed, and he was

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in Boise and --
And so I think he meets the criteria for being able to tell me the standard of practice.
Q. Okay. You're presuming but you don't know whether or not Dr. O'Neil was actually performing liposuction in 2010.
A. I have --
Q. Fair?
A. I have some months and some years in which, you know, there's a bump of me doing five or ten procedures in a month and then the next month I do zero. And there's bumps in years, too.
So I didn't get an idea with Dr. O'Neil whether he was passionate about his liposuction; it was the key part of his practice or not. He was just somebody who was competent to relate to me what he related about the standard of practice.
Q. Again, going back to my question -- and I know you sort of answered it and maybe you completely answered it -- but as you sit here today, you don't know one way or the other whether or not Dr. O'Neil, in the calendar year 2010, actually performed any liposuction, correct?
MR. JONES: Object to form; misstates his testimony.

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Q. (BY MR. HADDAD) I mean, I think you presumed it, but you didn't specifically ask him, "During the calendar year 2010, did you do liposuction?"
A. I did not ask the number of cases he had done in any particular month or year, correct.
Q. Okay. In terms of fat transfer, did you talk to Dr. O'Neil at all about fat transfer?
A. I did.
Q. Did Dr. O'Neil tell you that he performed fat transfers in 2010?
A. We talked about fat transfer specifically.
Fat transfers are an area of liposuction where some doctors really, really are excited about it, and some do very little fat transfer. And I don't recall whether I asked him if fat transfer was something that he did routinely with every one of his liposuctions or with 10 percent. But he certainly was familiar with that aspect.
We talked very specifically about the -- the different options that the physician had with regard to the addition of PRP, the addition of -- whether the fat was spun down or just gravity was used to separate out.

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And so he -- he was clearly knowledgeable about fat transfer, but I don't know how much he did it.
Q. Based upon your discussions with Dr. O'Neil, was it your understanding that during the calendar year 2010, he had done any fat transfer procedures?
A. Would you ask that question again?
Q. Yes.
A. It sounded -- I'm sorry. It sounds like something that you had already asked, but maybe it's a little bit different.
Q. Maybe a little bit different.
Do you know one way or the other whether or not, during the calendar year 2010, Dr. O'Neil had performed any fat transfer procedures based upon your discussions with him?
A. Okay. So you're asking the same question about fat transfer that you were about liposuction. I understand.
The same answer. I'm not -- I did not ask him specifically what his caseload looked like.
Q. Okay. When Dr. O'Neil was talking about other physicians in Boise, did he tell you -- did you have a discussion about what other physicians

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did in their office practice as it relates to the fat transfer procedure?
A. Yes, we did.
Q. Did Dr. O'Neil tell you how he came to learn how other physicians in Boise might either do liposuction or fat transfer?
A. You know, no, he did not tell me how he knew other physicians did one thing or another.
Q. Okay. In your discussions with Dr. O'Neil, did he tell you that his facility was an accredited facility in 2010?
A. You're talking about Dr. O'Neil --
Q. Yes.
A. -- and whether his facility was or was not accredited?
We certainly did talk about the accreditation issue, and he related to me that -- that there were a variety of practice situations in Boise where these type of procedures were performed in both accredited and facilities that were not accredited. He did not --
He could have told me whether his facility currently or in Boise was or was not, but I don't recall.
Q. Did Dr. O'Neil tell you how he came to

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learn whether other facilities were accredited or non-accredited that did these type of procedures in an outpatient setting?
A. He did not.
Q. Doctor, just so I don't forget, I wanted to revisit one issue, so we're going to kind of digress into something that we plowed through a little bit earlier.
In terms of your associations, do you have -- what is your relationship or association with Financial Fortress Associates?
A. They were financial advisers to me at one point.
Q. Are you still associated or acquainted with them?
A. I'm not.
Q. Okay. When did that end?
A. Just guessing, somewhere around two to three years ago; maybe four years ago.
Q. Okay. Are you a member of the Patriot Movement?
A. I'm not.
Q. Any militia groups?
A. No.
Q. Any sovereign citizens groups or similar

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organizations?
A. No, I'm not.
Q. Tea Party?
A. No.
Q. Do you have a constitutionally based opposition to the income tax laws of the U.S. or the IRS?
A. I do not.
Q. In your practice, Doctor, when you are practicing at Germantown Aesthetics --
And that would be exclusively where you do liposuctions, correct?
A. That's correct.
Q. What type of machinery -- what kind of liposuction machine do you use in your office?
A. We touched on this earlier.
I told you that I was acquainted with -- had either used in somebody else's office or demoed in my office just about everything that was out there.
I use a very -- I have a laser in which I can do laser lipolysis; in other words, laser followed by the suctioning. And I do that very rarely, even though I have the equipment.
I mostly rely upon a -- a tumescent

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saline assisted -- I shouldn't say saline assisted. I should say tumescent liposuction.
Q. Okay. First of all, do you have, in your practice -- and let's go to -- use 2010.
Did you have other staff in your office at Germantown Aesthetics?
A. Did I have other staff in my office?
Q. Yes.
MR. JONES: You mean people that worked with him or other people that did liposuction?
MR. HADDAD: Good point.
Q. (BY MR. HADDAD) Did you have other people that worked with you in your office in 2010 at Germantown Aesthetics?
A. What I would call my administrative and surgical team, yeah, both.
Q. Okay. Were there any --
And I may have asked you this.
Were there any physicians other than yourself working at Germantown Aesthetics in 2010?
A. Yes. Again, on a part-time basis, we had mentioned Dr. Joe Hernandez earlier, and he has been in my office at least on a part-time basis for about five years.
Q. Does he do liposuctions in your office?

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A. He does.
Q. Okay. In terms of the administrative staff, what functions do they carry out that you would characterize them as administrative?
A. You know, I would say everything from taking care of payroll issues, scheduling, strategic planning. You know, we don't advertise with any kind of traditional advertising, but, of course, we do promotions and have a website presence.
So I think handling all of those type of issues.
Q. Okay. So the surgical people that worked with you in 2010, what type of surgical team did you have with you in 2010?
A. Well, unlike Dr. Kerr, consistent with what our rules are in our state, we utilize the services of a physician or -- or a nurse anesthetist or a nurse to provide conscious sedation to our patients during the liposuction procedure, which is actually somewhat rare.
Most practices tend to go more of a general anesthesia hospital route or a -- sort of a completely-awake, office-based route, and we're sort of a hybrid.

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So my staff has to include anesthesia personnel, always a circulator, and unlike other procedures that we do, I generally do not need a first assist during the liposuction procedure; however, about 50 percent of the time, I only perform about half of the liposuction because it's physically demanding.
Q. Okay. As far as the circulating nurse, when you would do a liposuction procedure in 2010, did you utilize a circulating nurse to assist you in some way?
A. Well, you said "circulating nurse." Generally, we think of the circulator as being a technical person, not a nurse.
I probably had some occasions in which I had a -- a nurse or a physician providing the anesthesia, and then the circulator was a nurse. But in general terms, our circulator would be somebody who knew how to set up the equipment, knew how to go get something if we needed to, you know, do -- do something a little bit different in the procedure; change the -- the cannula or something like that.
So the circulating person would generally not be a nurse.

EXHIBIT O

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, MD; Silk Touch Laser, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, DBA SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA and LASER CENTER, and/or SILK TOUCH MED SPA, LASER and LIPO of BOISE, Defendants.	)	NO. CV OC 1204792

VIDEOTAPED DEPOSITION OF JOHN P. LUNDEBY, MD

Deposition upon oral examination of John P. Lundeby, MD, taken at the request of the Plaintiff, before Danelle Bungen, CSR, and Notary Public, at the law offices of Ramsden & Lyons, 700 Northwest Boulevard, Coeur d'Alene, Idaho, commencing at 8:30 a.m. on July 26, 2013, pursuant to the Idaho Rules of Civil Procedure.

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A. No.
Q. A Gregory Laurence, L-A-U-R-E-N-C-E I think. He's out of Germantown, Tennessee, I believe. Do you know Dr. Laurence?
A. No.
Q. As part of your practice, do you do any preoperative testing of patients?
MR. JONES: Object to form. Vague.
Q. (BY MR. HADDAD) If you were doing a liposuction procedure on a patient, do you do preoperative testing? Specifically, do you do a preoperative CBC?
A. We do on some patients but not every patient.
Q. How about a preoperative urinalysis?
A. I do not do urinalysis on patients unless they have complaints or symptoms or if they've had a recent course of treatment. So not a routine test, but one rather in response to a condition or a history.
Q. Okay. That's fair. What patients of yours -- you said some patients you might do a preoperative CBC that are going to undergo liposuction -- what's -- how do you -- what criteria do you use to decide whether or not you're going to do a CBC on a patient?
A. For the most part, an entirely healthy patient under the age of 30 with no history of anemia or other concomitant medical problems who was going to have a

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relatively small volume procedure, I probably would not do a CBC on that person.
Q. What do you characterize as a small volume procedure?
A. Less than two liters of suction removed.
Q. And a urinalysis, you said you wouldn't do it unless there was some specific reason, in terms of their history, that you might get that; correct?
A. Correct.
Q. Okay. Doctor, in terms of some of the opinions that were identified as areas you may cover in your testimony, one of the things -- well, first of all, it says, "Dr. Lundeby will explain the process he undertook in order to familiarize himself with the standards and practices in Boise and the surrounding area for the types of procedures and treatments performed by Dr. Kerr in this case."
Have we covered that by discussing your conversation with Dr. O'Neil?
A. If, by that question, you mean is that what I did to familiarize myself, then yes.
Q. You rephrased my question a lot simpler than I asked it the first time; but, you're right, that's what I was asking for.
A. Okay.
Q. It also talks about "experiences in the peer review

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process associated with his hospital staff privileges at Kootenai Medical Center and Northwest Specialty Hospital, both in Idaho."
I mean what experience do you have in the peer review process associated with staff privileges at Kootenai Medical Center other than your own personally applying for and then reapplying for staff privileges?
A. Well, that during the course of one's hospital privileges, and I think it -- well, it's been true at each hospital that I've been an attending at -- you're required, as part of your medical staff membership, to review your associates and peers and their conduct of the practice of medicine to be sure that it meets your local standards of practice.
Q. For instance, if there was a quality assurance indicator concerning a patient, i.e., post-operative infection that came about, part of the peer review process would be a peer would look at your chart and determine whether or not this was related to some breach in the standard of practice; correct?
MR. JONES: Object to form.
THE WITNESS: Yes.
Q. (BY MR. HADDAD) All right. I mean do you undertake that type of peer review process, or does Shape have

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that type of peer review process?
A. Yes.
Q. How does it go about doing a peer review in circumstances where there might be a complication concerning patient care?
A. That peer review process has been different over the course of Shape. When there was two physicians present, the other physician would review that, there would be a discussion during a minuted meeting and we would talk about that.
Now that there is one physician, we contract with a firm that provides outside peer review; so those cases are sent out to be reviewed by a physician and then we receive input back.
Q. Did you ask Dr. O'Neil whether or not physicians practicing cosmetic surgery in Boise undertook a peer review process of patient complications?
A. I did not ask him that.
Q. It also indicates you will discuss your "experience in performing a large volume of liposuction and fat transfer procedures, his knowledge of how the Vaser ultrasonic liposuction procedure is performed."
First of all, you don't do Vaser ultrasound -- ultrasonic liposuction, correct.
A. I do not.

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Q. Okay. It says, "Dr. Lundeby will testify that the infection rates described by Dr. Kerr in his deposition and discovery responses are well below average for a cosmetic facility and are essentially zero" and it talks about some other things.
But as far as your knowledge of infection rates, have you been provided -- Well, first of all, do you have an understanding whether or not Dr. Kerr tracks his patient complications in some type of written documentation?
A. I'm thinking back to his deposition, and without reviewing it, I think that he said that they tracked it but not in written form.
Q. Okay. I mean have you been -- I mean I know you brought everything that you've seen. You've not seen Dr. Kerr's patient charts from other patients before or after Krystal Ballard's procedure, correct?
A. No.
Q. Have you been provided any written information on patient outcomes for Dr. Kerr before and after Krystal Ballard's procedure?
MR. JONES: Other than the depositions.
Q. (BY MR. HADDAD) Other than the testimony, have you seen anything written that is maintained by Silk Touch concerning patients undergoing procedures at

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Dr. Kerr -- by Dr. Kerr before and after Krystal Ballard?
A. No.
Q. There's a comment, "Dr. Lundeby will explain that the standard of health care practice for plastic surgeons is not the standard of health care practice in the same medical specialty as his and Dr. Kerr."
First of all, do you have an understanding that -- First of all, as it pertains to the standard of practice in Boise, in speaking with Dr. O'Neil, do you have an understanding that -- how one goes about cleaning, disinfecting and sterilizing reusable medical equipment and supplies is different based upon your medical background?
MR. JONES: Object to form.
Q. (BY MR. HADDAD) Meaning do you have an understanding speaking to Dr. O'Neil that general surgeons and plastic surgeons have a different standard of practice in cleaning, disinfecting and sterilizing medical equipment and instruments?
MR. JONES: Object to form. Lack of foundation.
THE WITNESS: I -- from talking with Dr. O'Neil, the practice that he utilized in Boise in 2010 is different from my practice now; and other than

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that, I don't feel like I'm really -- The standard of practice issue is a legal construct that I'm not sure I fully understand. But it seems like they may be different based on, like I say, what I do versus what Dr. O'Neil represented that he did.
Q. (BY MR. HADDAD) Okay. I mean you have a -- First of all, what kind of -- What's his first name? I forgot. Do you know -- do you remember what his first name was?
MR. JONES: Who are we talking about, counsel?
MR. HADDAD: Dr. O'Neil. I'm sorry. Dr. O'Neil. Do you remember his first name?
MR. JONES: Kelly.
THE WITNESS: Kelly. Yes, Kelly.
Q. (BY MR. HADDAD) Dr. O'Neil, Dr. Kelly O'Neil, is that -- do you have an understanding of what his medical background is?
A. I talked to him about that, and his residence, his formal residency training, was in family practice.
Q. Okay. Now, going back to it, did -- while Dr. O'Neill's practice in 2010, standard of practice, may have differed from yours in certain respects, do you have an understanding, as it pertains specifically to cleaning, disinfecting and sterilizing reusable

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medical equipment and instruments, that non-residency-trained physicians do things differently than surgical residency-trained physicians?
MR. JONES: Object to form. Vague.
THE WITNESS: I believe that's true.
Q. (BY MR. HADDAD) You believe what's true? They do it different?
A. That they do it differently.
Q. Okay. I mean tell me about how non-surgically-trained physicians -- what the standard of practice might be in Boise for cleaning, disinfecting and sterilizing medical equipment.
MR. JONES: Object to form. Overbroad.
THE WITNESS: I guess I -- I guess --
MR. HADDAD: Okay. That's fair. That's actually a fair objection.
Q. (BY MR. HADDAD) Let me -- let me try to refocus it. What's your understanding as to the differences that surgically-trained cosmetic physicians have in cleaning, disinfecting and sterilizing reusable medical equipment and supplies from that of non-surgically-trained cosmetic physicians in Boise in 2010?
A. I guess I'm still a bit confused. I would like to answer your question, but I'm not sure what your -- I

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mean I'm not sure what answer you want. I guess -- I guess I've told you what I learned from Dr. O'Neil, I've told you what I do, and I read your plaintiff's disclosure for your expert Dr. Sorenson; and it looked to me, from those perspectives, that Dr. O'Neil's standard of practice and Dr. Sorenson's standard of practice were different.

Q. Okay. Fair. Let me ask you this, and I might focus in on that little bit more: Is the basis upon which you have to believe there is a difference in the standard of health care practice for a plastic surgeon versus a non-surgeon cosmetic physician, in the cleaning, disinfecting and sterilizing of medical equipment and instruments, based on the differences that you perceive between the plaintiff's disclosure of experts and your discussions with Dr. O'Neil?

A. For this case in question, yes.

Q. Okay. It says you will testify that you have "performed cosmetic surgery with Dr. Kerr and witnessed his habits and customs in this regard in a surgical setting."

Is that based on the occasion, at least the one occasion, that you remember Dr. Kerr came to your facility to learn or observe your technique as it pertains to a particular type of cosmetic procedure?

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A. Yes.

Q. Okay. Did you have Dr. -- First of all, what type of procedure or procedures did Dr. Kerr actually participate in at your facility?

A. We did liposuction. I don't remember of exactly what areas. And the only thing I remember is thinking that he was competent.

Q. I mean he -- when you had Dr. Kerr, as part of his paid training, or education on your technique, how many patients did that involve?

A. I can't remember with utter certainty, but I think probably -- a typical training would see two and sometimes three cases done during that course of time.

Q. Do you basically hand him -- or allow him to do the entire procedure, as it pertains to liposuction, on a given number of patients? I mean does he do the entire thing start to finish?

A. No.

Q. Okay. How does that -- how did your training go, either by specific recollection or your practice and procedure, when somebody comes to your office to train?

A. The usual practice for that, and it varies on depending on the person's surgical kind of skill and experience with liposuction and what they may have

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done before, but the usual procedure for that would be we would do the procedure together. The regulations for training people specified, of course, that I had to be scrubbed, in the room, and immediately attentive to the needs of my patient, and then the person would basically be my assistant, do portions of the procedure, and learn in a hands-on fashion.

Q. Okay. Do you have -- I'm going to ask you, do you have a specific memory of the exact type of procedure done when Dr. Kerr was here?

A. No.

Q. Okay. When -- So I'm going to ask you you your general practice and procedure. You say you both participate in the procedure?

A. Yes.

Q. All right. Kind of explain to me -- I mean I guess you do certain -- you might do certain contouring on a patient -- First of all, what kind of equipment do you use?

A. We do Smart Lipo, which is a laser-assisted liposuction, and I use a tumescent technique with sedation.

Q. So you would do part of the contouring using the Smart Lipo, and then you would hand the instrument over to Dr. Kerr who would do part of it and you would just

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watch him.

A. Yes.

Q. Okay. How long does it normally take for you to do a liposuction procedure? For instance, we saw how much fat was removed from Krystal Ballard based upon the medical records at Silk Touch, correct?

A. Yes.

Q. Is the amount of fat removed a factor in determining how long it's going to take to complete the procedure?

MR. JONES: Object to form. Incomplete hypothetical.

Q. (BY MR. HADDAD) Let me ask you just generally, looking at Krystal Ballard's record, and recognizing that she had liposuction and fat transfer, how long does that typically take you to perform in a patient with the same amount of fat removed as Krystal Ballard and the same amount of fat injected into her buttocks?

A. For the -- I guess for the hypothetical you presented, if I were going to book that case in my facility, I would -- I would probably allow an hour and a half for the liposuction and 45 minutes for the fat transfer.

Q. Okay.

A. And -- but that presumes that the patient would have sedation. It takes longer if the patient does not have IV sedation. You have to be more gentle in your

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negative nitrite test and a negative leukocyte esterase test, what the negative predictive value is for that patient having a urinary tract infection?
A. I do not know a number for that.
Q. Do you see underneath you had referenced kind of the dipstick part separated from the microscopic by the line "Urine auto with micro," correct?
A. Yes.
Q. So underneath the microscopic portion, it indicates "Epi" and then a space "cell." Do you understand that to be in reference to epithelial cells?
A. Yes.
Q. And it indicates that the result is 12 to 20 in this particular microscopic analysis of Krystal Ballard's urine, correct?
A. Yes.
Q. Do you know what the significance of a -- the presence of 12 to 20 epithelial cells is with respect to whether or not bacteria found in urinalysis is actually because of a urinary tract infection versus a contaminated specimen obtained from the patient?
A. Epithelial cells make you wonder about the purity of the specimen, whether or not there were some cells obtained from outside the patient as opposed to true urine from only inside.

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Q. Do you have an understanding as to, in Krystal Ballard's case with a negative nitrite test, a negative leukocyte esterase test, and the presence of 12 to 20 epithelial cells on microscopic examination, what the likelihood is of whether or not bacteria found on microscopic examination of her urine is or is not a urinary tract infection?
A. So if -- to clarify, to understand your question, you're asking me if I think that this urinalysis represents evidence that she has a urinary tract infection.
Q. Versus just bacteria -- the bacteria being related to a contaminated specimen.
A. Right. I am not sure. And one of the reasons that I'm not sure is I'm not sure how this was obtained. Do you know how it was obtained?
Q. I can only tell you what the records might reflect. Do the records reflect how this was obtained?
A. I don't see how it was obtained or collected, so I don't know. If it was -- if it was a catch specimen, so a cup applied to the outside of the patient's perineum, with or without her assistance, I think that would be difficult. If it was a -- if it was a catheter urine, I would be much more -- I guess much more sure that the results suggested a urinary tract

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infection and not --
Q. Okay.
A. So I would like to know how it was obtained.
Q. Fair. Is there anything in the Elmore Medical Center records that indicate whether or not Krystal Ballard was catheterized during that hospitalization?
A. Can I take a second?
Q. Sure.
A. (Reading.)
Q. While you're doing that --
MR. HADDAD: -- how much time we have? Ten minutes?
Q. (BY MR. HADDAD) You know, why don't you look for that, and let's go ahead and take our break now to change tapes.
VIDEOGRAPHER: This will conclude Tape No. 2. The time is 10:28 A.M.
(Recess taken.)
VIDEOGRAPHER: This is the continued videotaped deposition of Dr. Lundeby in Tape No. 3. The date is Friday, July 26, 2013. The time is 10:34 A.M.
Q. (BY MR. HADDAD) Doctor, we took a break just so we wouldn't burn tape while you tried to see if there was an answer to my question based on the records. Were

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you able to determine whether or not it was a catch of the urine versus a specimen obtained through a catheter?
A. Yes. It says on the sheet that the source was from a void.
Q. Okay. Let me ask you: Are -- First of all, you've looked at the autopsy report, correct?
A. Yes.
Q. And you can certainly look at it. I'm just -- I don't know how much detail I'm going to get in.
A. Are we done with the Elmore records?
Q. Well, you can put them aside. We may refer back to them. Let me find it.
On the front sheet -- well, you might have a different front sheet --
A. It's a --
Q. Just a cover sheet?
A. The cover sheet, yeah.
Q. Okay.
-- listed at least in an order that I have them, and it may not necessarily be the right order, the front page says "Investigative Report" at the top. Is that what you have?
A. Yes.
Q. Okay. And then it goes on to a second page and the

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second page lists "Cause of Death"?
A. Yes.
Q. Okay. It says, "Sepsis with probable toxic shock syndrome." Is that the Cause A as identified by the Office of the Coroner?
A. Yes.
Q. Do you disagree with that, or have no opinion whether it's right or wrong? Well, strike that.
Do you agree, disagree, or have no opinion about the accuracy of that postmortem diagnosis?
A. That's --
MR. JONES: I'm going to object to the form to the extent you list that as the diagnosis.
But if you understand the question, you can answer.
Q. (BY MR. HADDAD) Let me rephrase the question. They list, "Sepsis with probable toxic shock syndrome" as Cause A, which you understand to mean Cause A for the cause of death?
A. Well, one of the causes of death, but that's -- I guess Cause A means to me their principal cause.
Q. We'll have to ask them. At least that's listed as a cause of death, correct?
A. Yes.
Q. Do you agree with that diagnosis, or do you agree with

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that cause, meaning "Sepsis with probable toxic shock syndrome"?
A. I reviewed this case and looked at it and -- well, I -- I guess that's a very broad question and I'm trying to figure out the best way to answer it for you.
I think the clinical picture that she presented would be consistent with sepsis. The toxic shock syndrome, from my medical recollection and training, is probably not used accurately here in that my understanding of toxic shock syndrome is not a gram negative sepsis, which seems to be the question in the medical record. But when I looked at this entire record, I was very -- it was difficult to figure out exactly why this patient died.
Q. Okay.
A. Like I say, the clinical picture would be most consistent with sepsis. I can see why the coroner's office and the medical examiner put that.
Q. You just haven't -- Let me see if I can rephrase what you said, and if I mess it up, you let me know. At this point in time, you don't know whether or not you have enough information to form an opinion as to the cause of this patient's death; is that fair?
MR. JONES: Object to form.

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THE WITNESS: I think forming an opinion as to the exact cause and having -- Yeah, I think -- I think that's fair.
Q. (BY MR. HADDAD) Okay. Based on the -- Do you have an understanding that tissue samples were taken from the area where the fat was injected into Krystal Ballard's buttocks for purposes of gram staining?
MR. JONES: Object to form. Vague when you say "area."
Q. (BY MR. HADDAD) Take a look at page 5. Let me see what you're looking at, doctor, to make sure we're on the same page.
A. (Indicating.)
Q. We are. Okay. Which at the top of the sheet, for purposes of identifying it, says "Microscopic," then underneath it says "Cassette A," and then it goes down B, C and D; correct?
A. Yes.
Q. Do you have an understanding that tissue gram stains of tissue were taken from Ms. Ballard's buttocks?
A. It says Cassette A, B and C were buttocks; and Cassette D, abdominal wall.
Q. Okay.
A. So, yes.

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Q. And, "The tissue gram stain revealed many gram negative bacterial rods in the surgical site specimen." That's what's reported by the pathologist, correct?
A. Yeah; that's separate, down from the report of each cassette.
Q. Are gram negative rod bacteria supposed to be in the area that he took tissue from for purposes of the microscopic sections?
MR. JONES: Object to form. Foundation. Vague.
THE WITNESS: When I reviewed this part, a question arose that I have not been able to see an answer to in the report, which was exactly -- The buttocks is a big area. I didn't know if this was taken at the surgical site, the puncture site, if it was taken deeper in the tissue. I don't know where it was from. And I would want to know where it was from before I said whether or not it could be present there.
Q. (BY MR. HADDAD) Okay. If -- That's fair. Right now, you can't tell, from the way in which the autopsy was reported, exactly where these tissue sections were taken from Krystal Ballard; is that fair?
A. That's true.

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Q. By the way, have you ever done a -- you probably have rotated on pathology back in med school, is that correct?
A. Pathology in medical school? I don't think I did a pathology rotation.
Q. Okay. Have you ever participated in an autopsy?
A. I've attended multiple autopsies. I don't know how many, but I've been present at a lot of autopsies.
Q. Have you ever been the person performing the autopsy?
A. I've not performed one.
Q. Have you ever been asked at any point in time to arrive at a cause of death based upon a postmortem examination? Meaning have you ever been given the data from a postmortem and say, "We want you to prepare a cause of death" or "to arrive at the cause of death"?
A. Not from --
MR. JONES: You mean like a reported cause of death?
MR. HADDAD: Yeah.
THE WITNESS: Not from a postmortem exam.
Q. (BY MR. HADDAD) As a treating physician, if you had somebody die, you would arrive at a conclusion, correct?
A. Yeah. So I filled out death certificates, of course,

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but not based on my conduct of a postmortem exam.
Q. You may use the postmortem examination to fill out the death certificate, correct?
A. If there's one performed.
Q. Do you agree or disagree that Krystal Ballard had sepsis?
A. I think the clinical picture was one of sepsis.
Q. When we say "sepsis," do we mean an infection, from an infectious cause?
MR. JONES: Object to form.
THE WITNESS: Yes.
Q. (BY MR. HADDAD) Do you think that the autopsy was incomplete because tissue samples of the bladder weren't taken?
A. I guess the short answer is I'm probably not qualified to answer that because I'm not a pathologist. I think it -- in light of the fact that the pathologist remarked in the report about erythema, redness of the bladder wall, I think it would have been appropriate to take those. But, again, that's -- I'm not a pathologist.
Q. So you have an opinion, but it's not based upon any expertise in the area of where tissue samples should be taken as part of a postmortem examination.
A. That's true.

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MR. JONES: Object to form. Foundation.
Q. (BY MR. HADDAD) There's a reference in the disclosure, your disclosure -- and I'll read part of it, and if you need to read more to put it in context, do -- it indicates, "Dr. Lundeby will also comment upon the significance from his perspective regarding how the patient did not present to Elmore Medical Center with any fever but had a white blood cell count of 14.7. He will discuss causes for an elevated white blood cell count including surgery, stress, and dehydration."
Do you recall that the CBC from Elmore indicated a neutrophil count of 91.9?
A. Yes.
Q. What is -- what are neutrophils?
A. Neutrophils are the type of white blood cell that is often found in the setting of bacterial infection.
Q. Okay. Can a white blood cell count be elevated in the face of stress and dehydration?
A. Yes.
Q. Would you have a neutrophil count of 91.9?
MR. JONES: I think it was 91.7.
MR. HADDAD: Is it? I hate to be inaccurate.
THE WITNESS: I think it's 1.9, but --
Q. (BY MR. HADDAD) Either 91.9 or 91.7, that's --

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doesn't -- shades of gray, really.
A. Yes.
Q. All right. If you have a neutrophil count of 91 or higher, in the face of an elevated white cell count, would you agree the most likely cause of the elevated white count is a bacterial infection?
MR. JONES: Object to form. Incomplete hypothetical.
THE WITNESS: I'd agree it's one of the potential causes.
Q. (BY MR. HADDAD) Do you still believe -- do you believe that stress can cause a neutrophil count to be 91 percent or greater?
A. I'm not a hematologist either, but stress, steroids, dehydration, sepsis, there's a bunch of causes of an elevated white blood cell count and it has to be taken in the context of the patient's clinical situation.
Q. Fair. I guess I can agree with that. Let me ask you specifically with Krystal Ballard. And when we say reasonable degree of medical probability, do you understand what that means?
A. As I understand it, it's more likely than not.
Q. You're -- at least we're talking on the same page. Whether we're right or not is another story. But I think I and you agree that medical probability means

Bail / Tang

10/31/13 JH

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S RESPONSE TO DEFENSE COUNSEL'S MISREPRESENTATION TO THE COURT RE MEDIATION

ORIGINAL

Counsel for the Defendants, in his "Certification of Defense Counsel Per the Amended Notice of Trial Setting and Order Governing Further Proceedings" received by the undersigned today, states at the outset of this pleading that Plaintiff, on October 22, 2013, brought up mediation for the first time. More specifically, defense counsel represents to this Court that on October 22, 2013:

> *For the first time in the history of the case, counsel for Plaintiff said that his client would agree to mediation, even though the trial is scheduled to start November 5, 2013.* Defense counsel had to decline the untimely suggestion of mediation due to the date the trial was to start, the impossibility of arranging mediation on such short notice and the fact that the bulk of the trial preparations had been completed and that defense counsel would be completely occupied with continued trial preparations.

Certification of Defense Counsel, p. 2 (emphasis added).

This representation by defense counsel is demonstrably false. By letter dated May 2, 2013, counsel for Plaintiff wrote to this same lawyer for the Defendants and stated as follows: "I write to inquire whether your clients are interested in exploring settlement in advance of trial. *If so, I suggest we do so through mediation and before significant additional resources are expended by the parties.*" Letter of May 2, 2013, from P. Gregory Haddad to Jeremiah Quane, attached hereto as Exhibit "A" (emphasis added). Defense counsel acknowledged receipt of the foregoing letter and indicated: "Your recent letter regarding settlement negotiations will be considered but [sic] the carrier for Dr. Kerr and his entities. The carrier would like you to tender a settlement offer and so would Dr. Kerr." Letter of May 14, 2013, from Jeremiah Quane to P. Gregory Haddad, attached hereto as Exhibit "B." Plaintiff's counsel by letter dated June 10, 2013, provided defendants with the requested settlement demand in a detailed, eight-page letter to which defendants did not respond until the October 22 conference when defense counsel acknowledge having received plaintiff's earlier demand.

DATED this 30th day of October, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2013, a true and correct copy of the foregoing was served upon the following via email and facsimile:

Jeremiah A. Quane
QUANE JONES McCOLL PLLC
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard
P.O. Box 1576
Boise, Idaho 83701-1576
Facsimile: 208-780-3930
Email: tsj@quanelaw.com; corina@quanelaw.com

Scott McKay

EXHIBIT A

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

May 2, 2013

VIA FACSIMILE ONLY

Jeremiah A. Quane, Esq.
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th Street, Suite 200
PO Box 519
Boise, Idaho 83701

Re: Estate of Krystal Ballard

Dear Mr. Quane:

The trial in this case is scheduled for September 24, 2013. I write to inquire whether your clients are interested in exploring settlement in advance of trial. If so, I suggest we do so through mediation and before significant additional resources are expended by the parties. Alternatively, if you would prefer to simply negotiate this without the assistance of a mediator, we can proceed in that manner.

Defendants should have the information they need to fairly evaluate their exposure and the relative strength of our client, SSgt Charles Ballard's claims. Plaintiff's expert disclosure makes clear that we are prepared to establish at trial through the testimony of respected and qualified medical experts that the applicable standard of care was violated, that this violation caused the death of SSgt Krystal Ballard and that this death caused significant damages to Krystal's surviving spouse, SSgt Charles Ballard. In other words, this is not a case that will be decided by the Court on summary judgment.

I don't presume to know whether confidentiality is important to your clients. With that said, you may anticipate that we would agree to a confidentiality provision as part of any settlement. Obviously, confidentiality will not exist in the event of a public trial.

We anticipate providing you in the near future the details of SSgt Ballard's economic loss as calculated by our economist. If you wish to proceed with mediation, we can work, in the meantime, on selecting a mutually agreeable mediator and finding a date that will work for all concerned. We would provide you with our damage calculation well in advance of the mediation.

Please let me know your position on the foregoing.

Sincerely,

P. Gregory Haddad, Esq.

PGH/flc

cc: Scott McKay, Esq. (via facsimile only)

612498

EXHIBIT B

Quane Jones McColl, PLLC
Attorneys at Law

Jeremiah A. Quane jaq@quanelaw.com
Temence S. Jones tsj@quanelaw.com
Matthew F. McColl mfm@quanelaw.com
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May 14, 2013

VIA FACSIMILE:
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

I will see when Brianna Kerr finishes school and get you dates for her deposition in Boise. In your letter of May 8, 2013, you say that you are out of the country from June 10 to June 30. Does this mean that her deposition will not be taken during this time frame or what? I am totally unavailable for her deposition during the rest of May and I have a trial starting July 1, 2013 in Idaho Falls, Idaho that is scheduled to last the entire month of July. There are several days in June, with the exception of June 4 through June 7, when I am available, if she is. I am also unavailable June 26, 27 and 28.

I have asked the Ada County Coroner for blood samples from the blood taken at the autopsy and the Coroner's office tells me that their policy is to only allow samples to be sent to a lab for testing if there is an agreement between the involved parties, meaning you and me. Will you agree to this if I provide you with the lab we want to use? If not, I will have to get a Court order which I hope to avoid. Your recent letter regarding settlement negotiations will be considered but the carrier for Dr. Kerr and his entities. The carrier would like you to tender a settlement offer and so would Dr. Kerr.

Very truly yours,

Jeremiah A. Quane

JAQ/cf

ORIGINAL

NO. _____
A.M. _____ FILED P.M. 5

OCT 3 1 2013

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF FILING

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

Please find, attached, Defendants' Exhibit List.

DATED this 31st day of October, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2013, I served a true and correct copy of the foregoing NOTICE OF FILING by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896

Terrence S. Jones

DEFENDANTS' EXHIBITS

Page 1

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
A	Curriculum vitae of Dr. Kerr			
B	Curriculum vitae of Dr. Laurence			
C	Curriculum vitae of Dr. Garrison			
D	Curriculum vitae of Dr. Coffman			
E	Curriculum vitae of Dr. Frankle			
F	Curriculum vitae of Dr. Lundeby			
G	Curriculum vitae of Dr. Stiller			
H	Medical records of Dr. Kerr and Silk Touch Laser			
I	Records of Elmore Medical Center for treatment of Krystal Ballard			
J	Records of Elmore Ambulance Service for care and treatment of Krystal Ballard			
K	Records of Life Flight for care and treatment of Krystal Ballard			
L	Records of St. Alphonsus Regional Medical Center for treatment of Krystal Ballard			
M	Records of Ada County Coroner			
N	Autopsy Report for Krystal Ballard			
O	21 photographs of Krystal Ballard taken by Dr. Kerr for his operative procedure			
P	43 photographs of Krystal Ballard taken at autopsy			
Q	6 photographs of Susan Kerr that depict the positions of Krystal Ballard for the operative procedure of Dr. Kerr			

DEFENDANTS' EXHIBITS

Page 2

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
R	Photographs of brain and kidney tissue from the autopsy of Krystal Ballard prepared by Dr. Garrison that show the presence of fat emboli			
S	Autopsy tissue slides			
T	4 photographs of Krystal Ballard that depict the entry sites by markings for liposuction and fat transfer			
U	Report of Dr. Morgan			
V	CT study of Krystal Ballard of July 25, 2010			
W	Report of Dr. Stemmler for chest x-ray of Krystal Ballard of July 25, 2010			
X	Report of Dr. Schaff for chest x-ray of Krystal Ballard of July 25, 2010			
Y	Visible glass container that shows the quantity of fluid measured in milliliters or the equivalent in cubic centimeters			
Z	Medical devices, equipment, supplies, packaged material, autoclave and instruments used by Dr. Kerr for his procedures with photographs of the same			
AA	Compilation of data and database for operative procedures of Dr. Kerr by date, procedure and patient's first name from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 and the number of liposuction procedures, consisting of a total of 338 procedures.			

DEFENDANTS' EXHIBITS

Page 3

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
BB	Documents, records, material, data and calendars produced with Defendants response to Plaintiff's First Requests for Production of Documents dated June 29, 2012			
CC	For illustrative purposes, the following medical artist illustrations: 18 depicting liposuction of anatomy with and without the cannula			
DD	For illustrative purposes, the following medical artist illustrations: 1 depicting anatomy for fat transfer in the bilateral buttocks			
DD.1	For illustrative purposes, the following medical artist illustrations: 1 depicting various tissue layers			
DD.2	For illustrative purposes, the following medical artist illustrations: 1 depicting the content of the abdomen			
EE	For illustrative purposes, the following medical artist illustrations: 1 depicting the urinary system			
FF	For illustrative purposes, the following medical artist illustrations: 1 depicting gram negative and gram positive bacteria or rods			

Bail
Tara
11-1-13
DS

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Scott McKay (ISB #4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S EXHIBIT LIST

ORIGINAL

Plaintiff, Charles Ballard, through his attorneys, hereby submits his exhibit list for trial in accordance with the Court's Amended Notice of Trial Setting and Order Governing Further Proceedings, dated September 9, 2013. A more formal exhibit list with corresponding exhibit numbers will be submitted to the Court at trial.

1. Curriculum Vitae of Dean E. Sorensen, M.D.
2. Curriculum Vitae of George R. Nichols, II, M.D.
3. Curriculum Vitae of Keith Barclay Armitage, M.D.
4. Curriculum Vitae of Cornelius A. Hofman
5. Complete medical record and chart for Silk Touch and Dr. Kerr including
    i. Contemporaneous photos of Krystal Ballard
6. Complete medical record and chart for Elmore Ambulance
7. Complete medical record and chart for Elmore Medical Center
8. Complete medical record and chart for Saint Alphonsus Regional Medical Center
9. Complete Medical Record and Chart for Ada County Coroner and Dr. Groben including
    i. Autopsy Report, Photos, and
    ii. Tissue Slides
10. Funeral Placard for Krystal Ballard (red background)
11. Funeral Placard for Krystal Ballard (cream background)
12. Photos of Charles & Krystal Ballard (close-up)
13. Photos of Charles & Krystal Ballard (on couch)
14. Photos of Charles & Krystal Ballard (framed photographs)
15. Photo of Krystal Ballard (Tubing)
16. Marriage License for Charles and Krystal Ballard

17. Death Certificate for Krystal Ballard

18. CT Scans of Krystal Ballard

19. Cell Phone Records of Dr. Brian Kerr

20. Cell Phone Records of Susan Kerr

21. Photos of tissue slides from autopsy

22. Tillman Funeral Home Invoice

23. Artistic Flowers Invoice

24. Memorial Program for Krystal Ballard Memorial

25. Bill from St. Alphonsus Regional Medical Center

26. Bill from Elmore Medical Center

27. Bill from Rost Funeral Home

28. Bill from Lifeflight

29. USAF Records Certification for Krystal Ballard - USAF

30. Memorandum - Extension of Enlistment for PCS for Krystal Ballard (Elmendorf AFB)

31. Line of Duty Determination for Krystal Ballard - USAF

32. Awards & Decorations Info for Krystal Ballard - USAF

33. Air Force Achievement Medal for Krystal Ballard - USAF

34. Air Force Commendation Medal for Krystal Ballard - USAF

35. DJMS LES for Krystal Ballard - USAF

36. DJMS LES for Charles Ballard – USAF

37. Letter from Major Thomas Brown to SSgt Charles Ballard from 2010 following death of Krystal Ballard

38. Statement of Service

39. Enlisted Performance Review 2010 for Krystal Ballard - USAF

40. Enlisted Performance Review 2009 for Krystal Ballard - USAF

41. Enlisted Performance Review 2008 for Krystal Ballard - USAF

42. Enlisted Performance Review 2007 for Krystal Ballard - USAF

43. Reenlistment Eligibility Annex for Krystal Ballard - USAF

44. Air University CCAF Transcript for Krystal Ballard - USAF

45. BSU Transcript for Krystal Ballard - USAF

46. Embry-Riddle Transcript for Krystal Ballard - USAF

47. University of Maryland Transcript for Krystal Ballard – USAF

48. Sound Surgical Technologies The VASER System VentX Suction Handpiece User's Guide

49. Bottle of Hibiclens

50. Cannulae

Plaintiff intends to employ charts and tables, which were generated and/or employed by Plaintiff's economic expert, Cornelius Hofman of the GEC Group (*see Assessment of Economic Loss Krystal Melissa Ballard* dated May 8, 2013). Some of the following tables and charts may be offered including for demonstrative or illustrative purposes.

51A. Table 1 PV of Pecuniary Loss Associated with Death of Krystal Ballard (2 Scenarios)

51B. Table 2 Money Earnings Base for Lost Financial Support - Scenario 1

51C. Table 3 Money Earnings Base for Lost Financial Support - Scenario 2

51D. Table 4 Money Earnings Base for Lost Financial Support (Post Military Career) Scenario 1 and 2

51E. Table 5 Life Cycle Index for Lost Financial Support (Post Military Career) Scenario 1 and 2

51F.	Table 6	US Economic Growth and the Growth in Wages of US Workers
51G.	Table 7	Expected Risk Premiums of Corporate Pension Plans (Period 36 years)
51H.	Table 8A	Present Value of Earnings per $10,000 of Initial Earnings (Period 36 years)
	Table 8B	Future Value of Earnings per $10,000 of Initial Earnings (Period 36 years)
51I	Table 9	Mrs. Ballard's Past Money Earnings from Lost Employment - Scenario 1 and 2 (normal worklife) (July 26, 2010 to May 8, 2013)
51J	Table 10	Mrs. Ballard's Past Money Earnings from Lost Employment - Scenario 1 and 2 (full worklife to age 67) (July 26, 2010 to May 8, 2013)
51K	Table 11	Mrs. Ballard's Future Money Earnings from Lost Employment - Scenario 1 (normal worklife) (From May 8, 2013 through normal retirement)
51L	Table 12	Mrs. Ballard's Future Money Earnings from Lost Employment - Scenario 1 (full worklife to age 67) (From May 8, 2013 through age 67)
51M	Table 13	Mrs. Ballard's Future Money Earnings from Lost Employment - Scenario 2 (normal worklife) (From May 8, 2013 through normal retirement)
51N	Table 14	Mrs. Ballard's Future Money Earnings from Lost Employment - Scenario 2 (full worklife to age 67) (From May 8, 2013 through age 67)
51O	Table 15	PV of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 1 (normal worklife)
51P	Table 16	PV of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 1 (full worklife to age 67)
51Q	Table 17	PV of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 2 (normal worklife)
51R	Table 18	PV of Ms. Ballard's Lost Military Retirement Income (through Mr. Ballard's life expectancy) - Scenario 2 (full worklife to age 67)

52A	Chart 1	Worklife Expectancy vis a vis Retirement
52B	Chart 2	Future Values of a $10,000 Salary over 36 years
52C	Chart 3	Future Values of a $10,000 Salary Increased 5 Percent Each Year Over 36 years
52D	Chart 4	A Demonstration of Present Value Increased for Wage Growth a 5% and Decreased for Interest at 6%
52E	Chart 5	Present Value Using the Net Discount Rate Method Decreased for Net Interest at 1%
52F	Chart 6	The Net Discount Rate Determines Present Value
52G	Chart 7	Assuming a Net Discount Rate of 0%, How Much Money Does it Take Today If you Need $10,000 in 10 years?
52H	Chart 8	Expected Risk Premium of Corporate Pension Plans.

Plaintiff reserves the right to use at trial any of the exhibits identified by defendants as defendants' exhibits, other presently unanticipated exhibits including specifically documents exchanged by the parties during discovery and exhibits for impeachment purposes.

Dated this 31st day of October, 2013.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By_____

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2013, I served a true and correct copy of the foregoing **Plaintiff's Exhibit List** by delivering the same to the following via facsimile:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
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Scott McKay

ORIGINAL

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Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE

I. The Court Should Deny Plaintiffs' Efforts to Improperly Impeach the Defense Experts

Plaintiff claims he should be able to impeach the defense experts at trial,

who do not include Dr. Kelly O'Neil, with questions and/or documents involving disciplinary action against Dr. O'Neil given his capacity as a familiarizing physician in this case. In support of their position, Plaintiff has produced a number of documents from the state of California purporting to be evidence of disciplinary action taken against Dr. O'Neil dating back to 1998. Setting aside the obvious hearsay implications associated with these documents which the defense maintains renders the documents themselves wholly inadmissible, the defense further maintains that any questions to the defense experts regarding Dr. O'Neil's prior disciplinary status is irrelevant and should be precluded at the trial.

We start by evaluating the various documents submitted by Plaintiff in opposition to the defense motion. Ex. D is a document entitled "Decision" dated August 14, 1998 by the Medical Board of California which has attached to it a stipulated settlement. The stipulation refers to an Accusation and First Supplemental Accusation, but those documents are not provided. The document also refers to a patient "J.G." but no information about that patient or the care at issue is provided. The document states that Dr. O'Neil's license is revoked, but refers him to complete a class and be placed on five years of probation along with other conditions. There is nothing in Ex. D which gives any indication as to what medical issue was involved regarding the one patient or if it even was a medical issue.

Ex. E is a document entitled "Order for Reciprocal Discipline" dated November 2, 1998 by the Idaho State Board of Medicine which states that it is ordering reciprocal discipline in the state of Idaho for Dr. O'Neil. Again, this document does not identify what the medical care at issue involved.

Ex. F contains multiple documents which are incapable of being reconciled individually or collectively. The first document is entitled "Decision" in case 1993-26899 and is dated August 11, 2004. In this document, the Division of Medical Quality of the Medical Board of California states that based on its review of the prior case from 1998, Dr. O'Neil's license to practice medicine was revoked, but stayed provided Dr. O'Neil complete a training course. It further states that if the board were able to prove the accusations contained in the attached First Amended Accusation that they would constitute grounds for discipline. For settlement purposes, the parties agreed that Dr. O'Neil's license would be revoked, but again stayed so he could complete a training course. The settlement document does not state what the basis is for disciplining Dr. O'Neil other than referring to the complaint document.

The second document in Ex. F consists of a First Amended Accusation, i.e. a complaint by the state against Dr. O'Neil dated October 16, 2002. In the complaint, it refers to allegations involving two patients whose care at issue dates back to 2000, some ten years prior to the care at issue in this case. Furthermore, the medical care at issue has nothing to do with the medical issues in this case.

The first case involves a 70 year old female patient who underwent a chemical peel in July 2000 and had complications associated with the administration of intravenous lidocaine. The board claimed that Dr. O'Neil inappropriately discharged the patient and failed to recognize her cardiac instability. The second case involved a 72 year old female who also had a chemical peel and a thigh liposuction in July 2000. The patient had complications associated with failure to maintain deep vein thrombosis precautions which led to a pulmonary embolism. The board claimed that Dr. O'Neil

should not have performed liposuction and the chemical peel at the same time due to the preoperative work-up showing the patient suffered from lower extremity venous insufficiency. The other issues in the case relate to the propriety and accuracy of Dr. O'Neil's advertising and whether he was improperly using an Embassy Suites hotel for his post-operative patients to stay.

The third document in Ex. F is entitled "Decision After Nonadoption" and also relates to case 1993-26899. This 43 page decision goes through the evidence submitted apparently at a hearing or trial of some nature by both the state and Dr. O'Neil, including the opinions of the experts for both sides. The decision finds some of the allegations supported by adequate evidence and others were not. The decision concludes that Dr. O'Neil should be suspended from the practice of medicine for six months and be on probation or seven years. This decision is dated August 28, 2003, before the decision identified as the first document in Ex. F stating that Dr. O'Neil's license is not suspended.

The fourth document in Ex. F is entitled "Notice of Non-Adoption of Proposed Decision" and simply states that the decision of the administrative law judge, which is the fifth document of Ex. F is not adopted by the Board. This decision, which is dated March 15, 2003 summarizes the same evidence referred to in the third document in Ex. F but finds no evidence of any violations by Dr. O'Neil and dismisses both the Accusation and First Amended Accusation.

Ex. G is a June 15, 2005 document entitled "Public Reprimand" addressed to Dr. O'Neil from the Medical Board of California. It identifies two female patients who underwent an unknown "cosmetic surgery" who had postoperative complications. There

is no mention of what types of procedures the patients had or what types of post-operative complications they had. It is unclear whether the two patients referred to are the same or different patients than those identified in Ex. F.

Also involving Dr. O'Neil, the first document in Ex. H refers to a March 14, 2007 decision of the California Medical Board in matter 2003-147439 and is entitled "Stipulated Settlement and Disciplinary Order." It states under paragraph 3 that Respondent, Dr. O'Neil is in possession of a certificate to practice medicine from the state of California that was "in full force and effect at all times relevant. . ." The document goes on to state under paragraph 8 that Respondent neither admits nor denies he violated Business and Professional Code section 2234 in his care and treatment of the patient in question referred to in Accusation No. 2003-147439. Under discipline, the order states that Dr. O'Neil's certificate is revoked, but stayed and that he is placed on probation for 35 months and sets forth various training requirements. The stipulation states further under paragraph 14 that upon completion of the probation that Dr. O'Neil's "certificate shall be fully restored."

The second document in Ex. H which consists of an Accusation, i.e. a complaint by the state against Dr. O'Neil dated June 9, 2006 – presumably this is what the first document in Ex. H is based upon. In this complaint, it refers to allegations involving two patients. The first is a 71 year old female who underwent a chemical peel procedure in February 2003, over seven years prior to the care at issue in this case. The allegations related to patient selection for use of phenol as an anesthetic in a patient with pre-existing heart disease and patient follow up post procedure. The second patient's age is not listed, but she also underwent a chemical peel dated July 2002. The allegations

involve failure to maintain accurate and adequate medical records due in part to illegible handwritten records or having used some preprinted records which lacked individual patient content.

Ex. I is a document entitled stipulation and order from the Idaho Board of Medicine dated April 28, 2008. This document states that Dr. O'Neil applied for an Idaho license to practice medicine in December 2007. Under paragraph II, it states that Dr. O'Neil had malpractice cases and a disciplinary order in California and states that Dr. O'Neil "incorrectly answered various questions on the application." The document goes on to state in paragraph 6(d) that he shall only perform chemical peels and liposuction. Contrary to Plaintiff's contention, nowhere does the document state that Dr. O'Neil lied or falsified any information in his application for a license in Idaho.

Ex. J is a document entitled decision of the Medical Board of California dated May 5, 2009 with the adopted proposed decision dated March 30, 2009 attached thereto. This document summarizes the prior discipline against Dr. O'Neil and explains the circumstances of his incorrect answers on his Idaho and other state licensing applications due to an error by a Utah company hired to complete and submit documentation. After investigating the matter, the administrative law judge stated in his legal conclusions that there was no cause to conclude that Dr. O'Neil had committed an act of dishonesty, but that he would be subject to further discipline by way of extended probation for the action taken in Idaho in response to his improperly completed Idaho application for a medical license.

Although it is not specifically stated in his opposition, Plaintiff's counsel appears to argue that he should be allowed to not only question defense witnesses, but to

also utilize the above documents at trial for impeachment purposes. The defense objects and contends that none of these documents are admissible nor may they be used for purposes of impeachment in any fashion at trial. Plaintiff states that such impeachment should be fair game because the defense witnesses elected to utilize Dr. O'Neil as a familiarizing expert in order to confirm the local standard of practice applicable to Dr. Kerr. Plaintiff's memorandum summarily concludes that the above evidence regarding Dr. O'Neil's past is relevant and therefore admissible under IRE 402. The defense disagrees.

Plaintiff fails to explain how administrative discipline involving Dr. O'Neil, a witness who is not going to be testifying at trial, involving unrelated medical care, unrelated medical issues, involving cases remote in time, in some cases involving stipulated settlements and involving different medical standards for discipline in another jurisdiction would in any way be relevant evidence in the case involving Krystal Ballard. The issue in the case is whether Dr. Kerr and Silk Touch Medical Spa violated the standard of practice in Boise in 2010 applicable to a cosmetic surgeon and a cosmetic surgery facility. None of the medical issues in this case involve chemical peels, nor do they involve the adequacy of the medical records since it has nothing to do with the standard of practice allegations advanced by Plaintiff's expert disclosures made to date in this case. Plaintiff cites no case authorities from any jurisdiction wherein the testimony of an expert was allowed to be impeached involving the discussion had with a familiarizing physician like Dr. O'Neil.

Not only are all of these events too remote in time to be of any probative value for impeachment purposes, but they focus on chemical peel procedures, not

liposuctions, post-operative infections or fat transfer procedures which are the medical issues in this case. Furthermore, the interactions between the defense experts and Dr. O'Neil were limited to confirming they had knowledge of the local standard of practice and to confirm that the way Dr. Kerr provided care and treatment and operated his surgical facility was consistent with the way things were typically done in Boise. Plaintiff suggests that Dr. O'Neil is the basis for all of the defense opinions which is patently false. The defense experts will testify at trial that their conversations with Dr. O'Neil were intended to confirm knowledge of the Boise standard of practice in 2010 and whether there were any deviations in that standard as compared to the way they practiced cosmetic medicine in their own communities. For example, the laws in Tennessee are different on the types of persons and places where anesthesia can be utilized as compared to Idaho and this difference was partially discussed in Dr. Laurence's deposition.

Moreover, the California Medical Board documents use different standards which will only serve to confuse the jury and force the defense to present a trial within a trial about these irrelevant issues. For example, the legal conclusions set forth in the above administrative documents identify an entirely different format, standard of proof and list of definitions for purposes of imposing discipline which are completely different from whether or not there has been a violation of the standard of practice under Idaho law. The California decisions speak in terms of simple versus extreme negligence versus incompetence versus repeat acts of negligence. No such comparisons can be made to the application of Idaho Code §6-1012 nor the grounds for medical discipline under Idaho law per Idaho Code 54-1814.

The licensing background of Dr. O'Neil or any other expert has nothing to do

with the issues in the case and will result in a trial within a trial about the underlying circumstances of each and every case or claim against each physician. Virtually every physician on both sides of this case has been involved in and/or listed as a defendant in one or more malpractice actions over the course of their careers. This does not make it admissible for purposes of impeachment. The fact that someone has been sued for malpractice or had a patient complaint to a state medical board does not render them incapable of confirming what the local standard of practice was at the time in question. None of the cases cited by Plaintiff stand for the proposition that it is proper impeachment to attack the credibility of the familiarizing local physician.

Under the facts of this case, the Plaintiff had every opportunity to take Dr. O'Neil's deposition if he wanted to challenge his credibility and/or basis of knowledge of the 2010 Boise standard of practice for cosmetic surgeons, but he elected not to do so. To get around this problem, it appears Plaintiff's plan for trial is to question each and every defense expert about whether they were aware that Dr. O'Neil had a prior malpractice lawsuit or that he had one or more prior licensing issue dating back years in an attempt to throw mud at the foundation of the defense expert's opinions. The only way for the defense to respond to such testimony would be to call Dr. O'Neil to the trial and have an extended discussion with him on the stand about the facts and circumstances of each and every issue which led to either a lawsuit and/or inquiry by a state licensing entity. Such a process could last days.

Plaintiff next contends that Dr. O'Neil was not truthful in completing his board of medicine license in Idaho. This is a totally false statement as evidenced by both the Idaho and California documents attached to Plaintiff's counsel's Affidavit which reflect

that he proved he had properly disclosed the requested information to the Utah Company who made the omission which Dr. O'Neil did not discover. ***See*** Plaintiff's Ex. J at pages 4 and 5 of the Proposed Decision attached to the Affidavit of counsel in support of Plaintiff's Responses to Defendant's Motions in Limine. Unfortunately, since Plaintiff is not making accurate representations to this Court regarding the contents of these documents it makes this issue all the more concerning as to how Plaintiff would seek to use them at trial if allowed to do so.

Plaintiff's various references to several Idaho case authorities regarding the use of a local consultant to familiarize and out of area expert have no bearing on this issue whatsoever. None of the medical malpractice cases cited stand for the proposition that a party can cross examine an expert regarding unrelated licensing matters involving someone else. The only answer the defense experts can say to such questions is whether they knew or did not know about the events or circumstances of the investigations and decisions outlined above. None of these witnesses were present, none of them were involved with the care at issue, none of them reviewed any of the medical records of these administrative actions and the only basis for the questions is to try and unfairly cast dispersions against Dr. O'Neil who will not even be present to defend himself.

The defense does not dispute that questions about what an out of area expert did to become familiar with the local standard of practice is fair game at a trial, but that is not what Plaintiff's counsel is proposing to do. Instead, he wants to say in front of the jury to each of the defense experts "so did you know that the guy that Dr. Kerr's attorneys wanted you to talk to about the local standard has had his license in California

sanctioned multiple times?" Such questions have nothing to do with what the expert did or how the expert became familiar with the local standard of practice as set forth in ***Dulaney v. St. Alphonsus Regional Medical Center***, 137 Idaho 160 (2002) and its progeny. This Court should not allow Plaintiff to try and bootstrap improper impeachment under the phony guise that it would somehow qualify as valid questioning about how the expert became familiar with the applicable standard of practice.

Plaintiff further contends that Rule 705 supports the admissibility of the above matters involving Dr. O'Neil. This rule states:

> Idaho Rules of Evidence Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.
>
> The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, provided that the court may require otherwise, and provided further that, if requested pursuant to the rules of discovery the underlying facts or data were disclosed. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The defense contends there is nothing in Rule 705 which entitles the Plaintiff to cross examine the defense experts about what they did or did not know about Dr. O'Neil's prior malpractice actions or administrative matters involving chemical peel procedures. None of these issues were discussed by the defense experts with Dr. O'Neil and therefore none of these issues can be said to have helped form the underlying facts and data of the individual expert's opinion. These matters are entirely collateral issues disconnected from the matters before the court which are unfairly prejudicial and therefore not fair game for cross examination. The competence and credibility of Dr. O'Neil to provide background and familiarizing information to the defense experts about

cleaning reusable medical equipment, what type of physician performs liposuction and was the way Dr. Kerr performed surgery in this case consistent with what they understand to be within the local standard of practice has nothing to do with the documents and administrative matters involving Dr. O'Neil.

None of the out of state cases cited by the Plaintiff involve the circumstances presented here and are therefore entirely distinguishable. Plaintiff cites to a number of cases from other jurisdictions where a court exercised discretion in allowing an expert on the stand to be questioned about his or her own prior lawsuits or administrative licensing disputes. Not one of the cases cited by the Plaintiff involves a situation where Plaintiff seeks to impeach an expert regarding the prior lawsuits or administrative licensing disputes of a third party he talked to about entirely unrelated issues.

As this court is well aware having reviewed Plaintiff's own Motions in Limine and the deposition excerpts submitted therewith, Plaintiff's counsel went to great lengths in deposition to question the defense experts, Drs. Stiller, Lundeby and Laurence about the content of their discussions with Dr. O'Neil. At no point, however, in any of his discussions did Plaintiff's counsel ever even mention or bring up any licensing issues or prior malpractice actions involving Dr. O'Neil. It is therefore clear, particularly considering the volume of materials they have now submitted in opposition to the defense motion, that Plaintiff's counsel intended all along to try and ambush and unfairly sandbag the defense experts with this issue at trial.

Based on the foregoing, the defense requests the court grant his first and second Motions in Limine and preclude the Plaintiff from bringing any of these issues up

at trial in any fashion.

II. Rule 608(b) does not provide a basis for Plaintiff to try and impeach Dr. Laurence with evidence of criminal charges for which he has not been convicted of and which may be totally dismissed.

Plaintiff argues that he should be allowed to use as impeachment at trial the fact that Dr. Laurence has been indicted by a grand jury in the state of Colorado. The indictment involves allegations relating to tax evasion in response to poor advice Dr. Laurence and others received from the main targets of the case who were financial advisors to a large number of U.S. citizens. Plaintiff contends that these allegations against Dr. Laurence relate to his character for truthfulness, his fitness to practice medicine and his qualifications as a medical expert, such that the indictment should be fair game for impeachment at trial. Again, it is not clear from Plaintiff's briefing whether he seeks to merely question the witness or also try and utilize extrinsic evidence relating to the indictment. The defense disagrees that a mere criminal indictment may serve as a basis for either form of impeachment.[1]

Plaintiff points out that the Court has broad discretion in terms of the admissibility of evidence and the latitude associated with the scope of expert impeachment. In support, Plaintiff contends that the defense too narrowly reads IRE 608(b). The defense agrees that whether to admit evidence under Rule 608 is a matter of discretion for the trial court. ***State v. Araiza***, 124 Idaho 82, 90, 856 P.2d 872, 880 (1993).

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1 Plaintiff further attempts to buttress his flawed argument by claiming that the charges against Dr. Laurence "arise out of his medical practice" when in fact they arise out of his earned income period, regardless of whether he was a ditch digger, taxi cab driver or brain surgeon. Plaintiff takes quite the literary license in describing what he believes to be the charges and nature of alleged crimes committed by Dr. Laurence, however, his description, based solely on his reading of the criminal indictment, is nothing more than salacious fiction and unsupported allegations at this juncture.

However, this rule does not allow the nature of impeachment being proposed by Plaintiff regarding Dr. Laurence. IRE Rule 608 provides:

> Idaho Rules of Evidence Rule 608. Evidence of Character and Conduct of Witness.
>
> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning (1) the character of the witness for truthfulness or untruthfulness, or (2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Plaintiff contends that evidence of a criminal indictment for tax evasion for which there has been no plea agreement, no conviction and no trial setting is somehow proper grounds for impeachment to try and establish the character of Dr. Laurence for untruthfulness. The defense contends that a criminal indictment for which there has been no conviction and for which the underlying defendant contests cannot, as a matter of law, qualify as a specific instance of conduct under IRE 608(b). The defense is aware of no case law in Idaho which so states.

Nevertheless, in support of his position, Plaintiff cites the recent Idaho Court of Appeals case of ***State v. Bergerud***, __ Idaho __, __ P.3d __ (Ct. App. October 22, 2013). ***Bergerud*** involved Daniel and Kathleen Bergerud (the Bergeruds) who appealed their judgments of conviction entered following a jury verdict finding both guilty of several drug offenses. The issue on appeal involved the Bergeruds challenge of the district court's ruling prohibiting them from asking the State's rebuttal witness Jones if he had ever made a false statement to police. At trial, the defense position was that the State had not proved that it was the Bergeruds, rather than their occasional guest/renter, Jones, who engaged in the manufacturing of methamphetamine.

In an unrelated past case, Jones had pled guilty to a misdemeanor charge of providing false information to a police officer. At trial, the Bergeruds sought to cross-examine Jones by asking whether he had ever lied to police, and if he denied having done so, the Bergeruds sought permission to impeach Jones **with evidence of the conviction**. The State objected that such cross-examination was prohibited by Idaho Rules of Evidence 608 and 609. The district court sustained the State's objection, precluding questioning of Jones about lying to police or about the conviction. The court held that Idaho Rule of Evidence 609 barred the admission of the conviction because the crime was not a felony and also held that an episode of lying to police was not relevant for impeachment because it was not probative of Jones's credibility.

In analyzing the issue, the ***Bergerud*** court stated:

> As the Bergeruds point out, although Rule 608(b) prohibits extrinsic evidence of a witness's past conduct to attack credibility, it expressly allows cross-examination of the witness concerning instances of the witness's conduct if it is probative of the witness's truthfulness. They contend that

> the district court did not recognize that the rule permitted this type of cross-examination and therefore abused its discretion in precluding cross-examination of Jones about having lied to police. We agree. Because Rule 608 expressly allows cross-examination of a witness concerning specific instances of conduct that are probative of truthfulness or untruthfulness, the Bergeruds' requested inquiry about the incident was not barred by this rule.
>
> . . . . . .
>
> We therefore hold that under Rule 608(b), the district court possessed discretion to permit cross-examination of Jones about his episode of lying to police and that the district court erred in failing to recognize this discretion.

Bergerud, at p. 8-9 (citations omitted).

The above discussion and excerpts from ***Bergerud*** demonstrate that the issue there involved whether a witness could be impeached with questions on cross examination under 608(b) of a prior misdemeanor conviction. No such conviction exists in this case therefore ***Bergerud*** does not support the proposition advanced that Plaintiff should be allowed to utilize 608(b) to try and impeach Dr. Laurence with cross examination questions relating to the fact a criminal indictment exists or any questions relating to it in any way. The defense contends that per Rule 403, any probative value for impeachment purposes of the indictment is massively outweighed by the realistic danger of unfair prejudice the defense and to misleading the jury with questions suggesting that Dr. Laurence committed some crime when no conviction or plea that he has ever done so exists.

Plaintiff further attempts to inflame the court by asserting that Dr. Laurence has failed to properly disclose the indictment to the Idaho Board of Medicine. In support, Plaintiff cites Idaho Code §54-1814(1) and (21), neither of which have any application to

this case. By the very language of these statutes, they relate to the conviction or commission of any felony. Plaintiff ignores the obvious fact that an indictment is neither of these scenarios and therefore no reporting is necessary.

Plaintiff further argues that IRE 404(b) allows him to use the criminal indictment against Dr. Laurence to show financial bias on his part. Such a claim makes no sense. In response to questions by Plaintiff's counsel at deposition, Dr. Laurence testified that in his entire medical career he has only been involved in two other malpractice cases as an expert witness and only one of those resulted in his deposition being taken.[2] This hardly suggests he has a motive to "express a favorable opinion that will result in additional, lucrative expert witness work." Plaintiff's memo at p. 17. Plaintiff offers no case authority to support his claim that by reviewing two prior cases as an expert in his entire medical career that this somehow suggests Dr. Laurence is financially biased and that as a result Plaintiff's counsel should now be allowed to use his prior criminal indictment for impeachment purposes.

Based on the above authorities, there is no valid basis upon which the Plaintiff should be allowed to cross examine or impeach Dr. Laurence by extrinsic evidence relating to the criminal charges for tax evasion. On this basis the court should grant the defense Motion in Limine on this issue.

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2 Q. Doctor, in terms of your involvement in this case, have you been involved in other medical malpractice cases before this one?
A. I have.
Q. Okay. I think I saw an e-mail, and it may be in the disclosure, that there were two other instances that you've reviewed records in a medical malpractice case?
A. That's correct.

See Depo. of Dr. Laurence at p. 8, ll 15 to 23.

III. Conclusion

The defense stands by its prior arguments relating to the balance of its Motions in Limine. For the reasons stated herein and in the Defendants' opening Memorandum, the Defendants respectfully request the court grant their Motions in Limine.

DATED this 1st day of November, 2013.

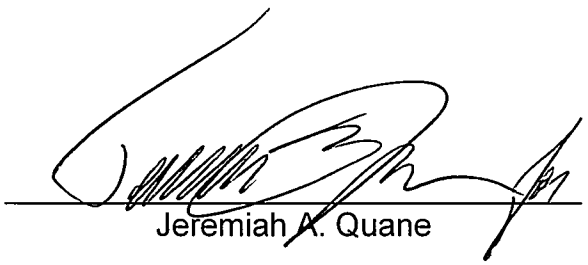
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 2013, I served a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

Time	Speaker	Note
09:36:22 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 1
09:36:25 AM	Judge	Calls case
09:36:26 AM	Scott McKay/ Greg Haddad	on behalf of the Plaintiff
09:36:27 AM	Jeremiah Quane/ Terry Jones	on behalf of the Defendant
09:36:29 AM	Judge	will take up motions in limine
09:42:11 AM	G. Haddad	Argues Motions in Limine
09:51:43 AM	Judge	instructs counsel
09:53:13 AM		Court recesses
09:53:17 AM		Court resumes
10:09:41 AM		the jury panel is present
10:09:49 AM	Clerk	Calls roll
10:13:42 AM	Clerk	Swears in the prospective jury panel
10:14:29 AM	Judge	Voir dires the prospective jury panel
10:32:21 AM	Clerk	Draws twenty-three names
10:44:40 AM	S. McKay	Voir dires the prospective jury panel
11:28:54 AM	S. McKay	passes the panel with cause
11:29:15 AM	Judge	admonishes the prospective jury panel
11:29:39 AM		Court recesses
11:48:26 AM		Court resumes
11:48:31 AM		the prospective jury panel is present
11:48:37 AM	J. Quane	Voir dires the prospective jury panel
12:31:48 PM	J. Quane	passes the panel with cause
12:31:55 PM	Judge	Thanks and excuses the remaining prospective jury panel
12:32:37 PM		counsel exercise their peremptory challenges
12:34:11 PM		side-bar
12:54:02 PM	Judge	Seats the trial jury
12:56:42 PM	Judge	Thanks and excuses the remaining prospective jury panel
12:56:50 PM	Judge	admonishes the jury
12:59:37 PM		Court recesses
02:31:38 PM		Court resumes
02:31:41 PM		the jury is not present
02:31:50 PM	G. Haddad	Argues Motions in Limine
02:39:26 PM	T. Jones	Responds
02:49:47 PM	Judge	Grants Defendant's Motion in Limine # 1, 2, 3, 4, 5 & 6
02:52:54 PM	S. McKay	Responds regarding Defendant's Motions in Limine
02:58:34 PM		the jury is present
02:59:05 PM	Judge	Reads preliminary jury instructions
03:05:21 PM	Clerk	Swears in the trial jury
03:11:37 PM	G. Haddad	Opening statement
03:35:05 PM	J. Quane	Opening statement
03:52:42 PM	G. Haddad	Objection - hearsay
03:52:52 PM	Judge	Objection is sustained - re-phrase remarks
04:12:11 PM	G. Haddad	Objection - per Motion in Limine
04:12:33 PM	Judge	Objection is overruled

04:43:18 PM	Judge	admonishes the jury and excuses them for the day
04:44:37 PM	J. Quane	Requests witnesses be disclosed at the end of the day for the following day
04:45:22 PM	G. Haddad	no objection
04:45:28 PM	Judge	Grants Request
04:45:32 PM	S. McKay	moves to have witnesses excluded except for experts
04:45:57 PM	Judge	Grants the request to exclude lay witnesses
04:46:14 PM		Court recesses

Time	Speaker	Note
08:49:22 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 2
08:49:52 AM	Scott McKay/ Greg Haddad	on behalf of the Plaintiff
08:49:56 AM	Jeremiah Quane/ Terry Jones	on behalf of the Defendant
09:35:54 AM	Judge	Calls case - the jury is not present
09:36:00 AM	S. McKay	Counsel have stipulated to the admission of certain exhibits. Plaintiff - Exhibits 1 -4, 5-21. Has concerns with exhibit 5. Exhibits 22-28 have not been stipulated. Exhibits 29-43 have not been stipulated. Defendant-Exhibits A-G, I-P. S has not been stipulated. U, V, W and X are duplicated exhibits
09:38:28 AM	Judge	Exhibits 1-21 and A-G and I-P are admitted
09:43:16 AM	G. Haddad	Argues admission of Exhibit H
09:46:16 AM	Judge	Exhibit H will have to be redacted
09:56:23 AM		Court recesses
09:56:26 AM		Court resumes
10:09:30 AM		the jury is present
10:10:39 AM	G. Haddad	Calls Brian Kerr, sworn, direct examination
10:15:14 AM	J. Quane	Objection
10:15:17 AM	Judge	Objection is overruled
10:16:29 AM	J. Quane	Objection - asked and answered
10:16:38 AM	Judge	re-phrase question
10:18:09 AM	J. Quane	Objection - hearsay
10:18:21 AM	Judge	Objection is sustained
10:22:01 AM	J. Quane	Objection
10:22:11 AM	Judge	Objection will have to be addressed at the time of the question
10:22:36 AM	J. Quane	Objection - relevance
10:22:46 AM	Judge	Objection is overruled
10:23:39 AM	J. Quane	Objection - argumentative
10:23:42 AM	Judge	Objection is overruled
10:23:53 AM	J. Quane	Objection
10:23:56 AM	Judge	Objection is overruled
10:24:40 AM		Jury is excused
10:25:27 AM	G. Haddad	Argues regarding excerpts of deposition of an expert Dr. Coffman
10:26:53 AM	J. Quane	Objection - hearsay
10:34:21 AM	Judge	would like an offer of proof
10:34:52 AM	J. Quane	Responds
10:35:07 AM	G. Haddad	Offer of proof
10:38:34 AM	Judge	will allow the 3 questions to be asked but not by video
10:40:26 AM		Court recesses
10:51:21 AM		Court resumes - the jury is present
10:51:31 AM	G. Haddad	continues direct examination of the witness - Brian Kerr
10:52:10 AM	J. Quane	Objection
10:52:14 AM	Judge	Objection is overruled
10:53:55 AM	J. Quane	Objection - to form
10:53:56 AM	Judge	Objection is overruled
10:56:14 AM	J. Quane	Objection - asked and answered in deposition
10:56:17 AM	Judge	Objection is overruled

10:57:57 AM	J. Quane	Objection
10:57:59 AM	Judge	Objection is overruled
10:58:28 AM	J. Quane	Objection
10:58:29 AM	Judge	Objection is overruled
10:58:48 AM	J. Quane	Objection
10:58:55 AM	Judge	Objection is overruled
11:00:02 AM	J. Quane	Objection -
11:00:03 AM	Judge	Objection is overruled
11:28:54 AM	G. Haddad	Exhibit # 48 previously marked is identified
11:29:00 AM	G. Haddad	Moves to admit Exhibit # 48
11:29:23 AM	J. Quane	Objection
11:30:23 AM	G. Haddad	lays foundation
11:30:45 AM	G. Haddad	Moves to admit Exhibit # 48
11:30:53 AM	J. Quane	Objection -
11:30:58 AM	Judge	Exhibit # 48 is admitted
11:38:19 AM	G. Haddad	Objection - hearsay
11:38:28 AM	Judge	Objection is overruled
11:42:20 AM	J. Quane	Objection - repetitious
11:42:21 AM	Judge	Objection is overruled
11:47:40 AM	J. Quane	Objection - authoritativeness
11:49:07 AM	Judge	re-phrase question
11:52:30 AM	J. Quane	Objection - foundation
11:52:32 AM	Judge	Objection is overruled
11:53:01 AM	J. Quane	Objection - foundation
11:53:03 AM	Judge	Objection is overruled
11:53:48 AM	Judge	admonishes the jury
11:53:51 AM		Court recesses
01:37:13 PM		Court resumes
01:37:13 PM		the jury is not present
01:37:20 PM	Judge	Exhibit 5 may be redacted per the Plaintiff's request
01:40:20 PM	T. Jones	Responds
01:40:24 PM	G. Haddad	Clarifies redactions
01:42:48 PM		the jury is present
01:44:17 PM	G. Haddad	continues direct examination of the witness - Brian Kerr
02:00:27 PM	G. Haddad	Exhibit # 53 is marked and identified
02:00:48 PM	J. Quane	Objection - relevance
02:00:51 PM	Judge	The answer may stand
02:01:26 PM	G. Haddad	Moves to admit Exhibit # 53
02:02:11 PM	J. Quane	Objection - relevance
02:02:40 PM	J. Quane	Objection - relevance
02:40:06 PM	J. Quane	Objection - asked and answered
02:40:08 PM	Judge	Objection is sustained
02:41:11 PM	J. Quane	Cross-examination of the witness - Brian Kerr
02:45:00 PM	G. Haddad	Objection - leading
02:45:02 PM	Judge	Objection is overruled
02:45:40 PM	G. Haddad	Objection - leading
02:46:21 PM	Judge	Objection is overruled
02:46:40 PM	G. Haddad	Objection - leading
02:46:43 PM	Judge	Objection is sustained
02:52:35 PM	G. Haddad	Objection - relevance

02:53:27 PM		admonishes the jury
02:53:32 PM		Jury is excused
02:53:39 PM		Court recesses
03:33:21 PM		Court resumes - the jury is present
03:33:38 PM	J. Quane	continues cross-examinaiton of the witness - Brian Kerr
03:34:43 PM	G. Haddad	Re-direct examination of the witness - Brian Kerr
03:35:48 PM	J. Quane	Re-cross examination of the witness - Brian Kerr
03:36:36 PM	G. Haddad	Calls Dean Sorensen, sworn, direct examination
03:40:25 PM	J. Quane	Objection - leading
03:40:29 PM	Judge	Objection is overruled
03:40:52 PM	J. Quane	Objection
03:41:01 PM	Judge	Objection is overruled
03:51:01 PM	J. Quane	Objection - foundation
03:51:03 PM	Judge	Objection is overruled
03:51:22 PM	J. Quane	Objection - moves to strike
03:51:30 PM	Judge	Objection is sustained.
03:51:49 PM	J. Quane	Objection - foundation
03:51:52 PM	Judge	Objection is overruled
03:52:14 PM	J. Quane	Objection - foundation
03:52:23 PM	Judge	Objection is overruled
03:53:40 PM	J. Quane	Objection - relevance
03:53:41 PM	Judge	Objection is overruled
04:01:20 PM	J. Quane	Objection
04:01:22 PM	Judge	Objection is overruled
04:03:06 PM	J. Quane	Objection - foundation
04:03:08 PM	Judge	Objection is overruled
04:11:47 PM	Judge	admonishes the jury
04:11:51 PM		Court recesses
04:11:55 PM		Court resumes
04:54:25 PM		the jury is present
04:55:25 PM	G. Haddad	continues direct examination of the witness - Dean Sorensen
05:10:08 PM	Judge	admonishes the jury
05:10:12 PM		Court recesses

Time	Speaker	Note
08:40:23 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 3
08:40:37 AM	Scott McKay/ Greg Haddad	on behalf of the Plaintiff
08:40:41 AM	Jeremiah Quane/ Terry Jones	on behalf of the Defendant
09:38:42 AM	J. Quane	Cross-examination of the witness - Dean Sorensen
09:49:51 AM	G. Haddad	Objection - speculation
09:49:55 AM	Judge	Objection is overruled
10:06:08 AM	G. Haddad	Objection
10:06:11 AM	Judge	Objection is overruled
10:19:57 AM	G. Haddad	Objection - relevance
10:19:59 AM	Judge	Objection is overruled
10:36:26 AM	Judge	admonishes the jury
10:36:34 AM		Court recesses
10:36:49 AM		Court resumes
11:01:14 AM		the jury is present
11:01:45 AM	J. Quane	continues cross-examination of the witness - Dean Sorensen
11:09:35 AM	J. Quane	Publishes Deposition of Dean Sorensen
11:11:47 AM	G. Haddad	Objection
11:11:51 AM	Judge	Objection is overruled
11:21:24 AM	G. Haddad	Objection - argumentative
11:21:26 AM	Judge	Objection is sustained
11:26:18 AM	G. Haddad	Objection - moves to strike question and answer
11:26:20 AM	Judge	Objection is sustained
11:33:39 AM	Judge	admonishes the jury
11:33:46 AM		Court recesses
01:24:39 PM		Court resumes
01:24:42 PM		the jury is not present
01:24:45 PM	Judge	adresses counsel regarding witnesses being taken out of order
01:25:22 PM	T. Jones	Responds regarding witness
01:25:24 PM	J. Quane	Responds regarding witness
01:26:41 PM	Judge	will advise jury of schedule
01:27:23 PM		the jury is present
01:27:48 PM	Judge	advises the jury of schedule
01:28:03 PM	G. Haddad	Calls George Nichols, sworn, direct examination
01:52:35 PM	J. Quane	Objection
01:52:37 PM	Judge	Objection is overruled
01:53:35 PM	J. Quane	Objection
01:53:37 PM	Judge	Objection is overruled
01:57:43 PM	J. Quane	Objection
01:57:50 PM	Judge	Objection is overruled
02:28:24 PM	Judge	admonishes the jury
02:28:25 PM		Court recesses
02:48:50 PM		Court resumes
02:48:53 PM		the jury is present
02:49:04 PM	J. Quane	Cross-examination of the witness - George Nichols

03:26:32 PM	G. Haddad	Re-direct examination of the witness - George Nichols
03:27:45 PM	J. Quane	Objection - leading
03:27:46 PM	Judge	Objection is overruled
03:29:59 PM	J. Quane	Re-cross examination of the witness - George Nichols
03:33:34 PM	G. Haddad	Objection - beyond the scope
03:33:47 PM	Judge	Objection is sustained
03:34:14 PM	Judge	excuses the witness - George Nichols
03:34:52 PM	S. McKay	Video Deposition of Jonelle Buchanan
04:08:55 PM	J. Quane	Objection -
04:09:17 PM		side bar
04:10:17 PM	Judge	Objection is overruled
04:40:48 PM	Judge	admonishes the jury
04:40:53 PM		Court recesses
04:49:08 PM		Court resumes
04:49:10 PM		the jury is not present
04:49:10 PM	S. McKay	Objects to reading of certian questions of deposition - hearsay
04:49:10 PM	Judge	Objections are overruled
04:52:40 PM	S. McKay	Objection - question regarding infection
04:52:59 PM	Judge	Objection is sustained
04:56:38 PM		the jury is present
04:56:45 PM	J. Quane	Reads 2 questions and answers from Deposition of Jonelle Buchanan
05:06:14 PM	Judge	admonishes the jury
05:06:27 PM		Court recesses

Time	Speaker	Note
09:10:38 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 4
09:13:18 AM	Scott McKay/ Greg Haddad	on behalf of the Plaintiff
09:13:21 AM	Jeremiah Quane/ Terry Jones	on behalf of the Defendant
09:33:12 AM	Judge	Calls case
09:33:13 AM		the jury is not present
09:33:20 AM	S. McKay	Offers and moves to admit Exhibit # 29, 31-35 & 37-43
09:35:09 AM	T. Jones	Objection - to exhibit 37
09:35:25 AM	Judge	Exhibits # 29, 31-35 & 37-43 are admitted
09:36:39 AM	S. McKay	Argues Motion in Limine re: re-marriage
09:36:58 AM	Judge	Grants the Motion in Limine
09:58:03 AM		Court recesses
10:48:26 AM		Court resumes
10:48:30 AM		the jury is not present
10:48:33 AM	Judge	Juror # 265 has failed to appear
10:50:03 AM	Judge	Releases Juror # 265 from this trial
10:52:09 AM		the jury is present
10:53:25 AM	S. McKay	Calls Cornelius Hofman, sworn, direct examination
11:09:29 AM	J. Quane	Objection - relevance
11:09:33 AM	Judge	Objection is overruled
11:10:45 AM	S. McKay	Exhibit # 51b previously marked is identified
11:11:44 AM	S. McKay	Moves to admit Exhibit # 51b
11:11:49 AM	J. Quane	Objection - relevance
11:11:57 AM	Judge	Objection is overruled
11:12:00 AM	Judge	Exhibit # 51b is admitted
11:14:34 AM	S. McKay	Exhibit # 51c previously marked is identified
11:16:08 AM	S. McKay	Moves to admit Exhibit # 51c
11:16:11 AM	J. Quane	Objection - relevance
11:16:14 AM	Judge	Objection is overruled
11:16:17 AM	Judge	Exhibit # 51c is admitted
11:18:53 AM	S. McKay	Exhibit # 51d previously marked is identified
11:18:53 AM	S. McKay	Moves to admit Exhibit # 51d
11:18:55 AM	J. Quane	Objection - relevance
11:18:56 AM	Judge	Objection is overruled
11:18:56 AM	Judge	Exhibit # 51d is admitted
11:21:33 AM	J. Quane	Objection
11:21:36 AM	Judge	Objection is sustained - re-phrase question
11:25:12 AM	S. Mckay	Exhibit # 51k previously marked is identified
11:25:47 AM	S. Mckay	Moves to admit Exhibit # 51k
11:25:52 AM	J. Quane	Objection - relevance
11:25:53 AM	Judge	Objection is overruled
11:25:56 AM	Judge	Exhibit # 51k is admitted
11:28:04 AM	S. Mckay	Exhibit # 51m previously marked is identified
11:28:10 AM	S. Mckay	Moves to admit Exhibit # 51m
11:28:11 AM	J. Quane	Objection - relevance
11:28:12 AM	Judge	Objection is overruled

11:28:12 AM	Judge	Exhibit # 51m is admitted
11:35:42 AM	S. McKay	Exhibit # 51a previously marked is identified
11:35:54 AM	S. McKay	Moves to admit Exhibit # 51a
11:36:15 AM	J. Quane	Objection - relevance
11:36:30 AM	Judge	Objection is overruled
11:36:31 AM	Judge	Exhibit # 51a is admitted
11:42:11 AM	J. Quane	Objection - relevance
11:42:15 AM	Judge	Objection is overruled
11:45:28 AM	J. Quane	Objection - relevance
11:45:38 AM	Judge	Objection is overruled
11:50:28 AM	J. Quane	Cross-examination of the witness - Cornelius Hofman
11:53:13 AM	S. McKay	Objection - argumentative
11:53:15 AM	Judge	Objection is sustained
11:53:32 AM	S. McKay	Objection - relevance
11:53:34 AM	Judge	Objection is sustained
11:54:17 AM	S. McKay	Objection - relevance
11:54:20 AM	Judge	Objection is sustained
11:56:07 AM	S. McKay	Objection - relevance
11:57:05 AM	S. McKay	Objection - argumentative
11:57:09 AM	Judge	Objection is sustained
12:01:49 PM	S. McKay	Objection - asked & answered
12:01:51 PM	Judge	Objection is sustained
12:02:43 PM	S. McKay	Objection - asked & answered
12:02:45 PM	Judge	Objection is sustained
12:03:13 PM	Judge	admonishes the jury
12:03:16 PM		Court recesses
01:18:38 PM		Court resumes
01:18:39 PM		the jury is present
01:18:41 PM	J. Quane	continues cross-examination of the witness - Cornelius Hofman
01:20:41 PM	S. McKay	Objection - argumentative
01:20:44 PM	Judge	Objection is overruled
01:23:42 PM	S. McKay	Objection - argumentative
01:23:45 PM	Judge	Objection is overruled
01:29:02 PM	S. McKay	Objection - asked & answered
01:29:05 PM	Judge	Objection is sustained
01:33:24 PM	J. Quane	Objection - argumentative
01:33:29 PM	Judge	Objection is sustained
01:41:31 PM	S. McKay	Objection - asked & answered
01:41:33 PM	Judge	Objection is sustained
01:47:15 PM	S. McKay	Objection - asked & answered
01:47:19 PM	Judge	Objection is overruled
01:50:28 PM	S. McKay	Objection - compound
01:50:31 PM	Judge	Objection is overruled
01:52:15 PM	S. McKay	Objection - relevance
01:52:21 PM	Judge	Objection is sustained
01:53:38 PM	S. McKay	Objection - relevance
01:53:46 PM	Judge	Objection is sustained
02:00:43 PM	S. McKay	Objection - asked & answered

02:00:46 PM	Judge	Objection is overruled
02:04:35 PM	S. McKay	Objection - relevance
02:04:41 PM	Judge	Objection is sustained
02:09:18 PM	S. McKay	Objection - asked & answered
02:09:20 PM	Judge	Objection is overruled
02:18:37 PM	S. McKay	Objection - relevance
02:18:40 PM	Judge	Objection is overruled
02:27:06 PM	S. McKay	Objection - asked & answered
02:27:19 PM	Judge	Objection is sustained
02:28:57 PM	S. McKay	Objection - asked & answered
02:28:59 PM	Judge	Objection is overruled
02:29:29 PM	S. McKay	Objection - argumentative
02:29:31 PM	Judge	Objection is sustained
02:33:18 PM	S. McKay	Objection - asked & answered
02:33:20 PM	Judge	Objection is sustained
02:41:25 PM	S. McKay	Re-direct examination of the witness - Cornellus Hofman
02:42:39 PM	J. Quane	Objection - asked & answered
02:42:42 PM	Judge	Objection is overruled
02:42:44 PM	Judge	admonishes the jury
02:42:47 PM		Court recesses
03:05:42 PM		Court resumes
03:05:50 PM		the jury is present
03:06:10 PM	J. Quane	continues cross-examination of the witness - Dean Sorensen
03:12:36 PM	G. Haddad	Objection - speculation
03:12:38 PM	Judge	Objection is overruled
03:18:28 PM	S. McKay	Objection - asked & answered
03:18:31 PM	Judge	Objection is sustained
03:31:02 PM	G. Haddad	Objection - mischaracterization
03:31:14 PM	Judge	Objection is sustained
03:34:58 PM	G. Haddad	Objection
03:37:40 PM	Judge	Objection is overruled
03:43:10 PM	G. Haddad	Objection
03:43:14 PM	Judge	Objection is sustained
03:57:11 PM	G. Haddad	Objection
03:57:13 PM	Judge	Objection is sustained
04:00:49 PM	G. Haddad	Objection - relevance
04:00:57 PM	Judge	Objection is sustained
04:08:47 PM	G. Haddad	Objection - relevance
04:08:48 PM	Judge	Objection is overruled
04:15:15 PM	G. Haddad	Objection - asked & answered
04:15:26 PM	Judge	Objection is sustained
04:18:05 PM	G. Haddad	Objection - relevance
04:18:08 PM	Judge	Objection is sustained
04:18:11 PM	G. Haddad	Objection - relevance
04:18:14 PM	Judge	Objection is sustained
04:19:21 PM	Judge	admonishes the jury
04:19:30 PM		Court recesses

04:29:57 PM		Court resumes
04:30:03 PM		the jury is present
04:30:06 PM	J. Quane	continues cross-examination of the witness - Dean Sorensen
04:40:13 PM	G. Haddad	Objection - asked & answered
04:40:16 PM	Judge	Objection is sustained
04:42:05 PM	G. Haddad	Objection - asked & answered
04:42:10 PM	Judge	Objection is sustained
04:42:58 PM	G. Haddad	Objection - asked & answered
04:43:04 PM	Judge	Objection is overruled
04:44:35 PM	G. Haddad	Objection - asked & answered
04:44:37 PM	Judge	Objection is sustained
04:45:59 PM	G. Haddad	Objection
04:46:02 PM	Judge	Objection is overruled
04:59:17 PM	G. Haddad	Re-direct examination of the witness - Dean Sorensen
05:00:07 PM	J. Quane	Objection
05:00:09 PM	Judge	Objection is overruled
05:00:45 PM	J. Quane	Objection - asked & answered
05:00:47 PM	Judge	Objection is overruled
05:01:33 PM	J. Quane	Objection - asked & answered
05:01:35 PM	Judge	Objection is overruled
05:01:54 PM	J. Quane	Objection - leading
05:01:56 PM	Judge	Objection is overruled
05:02:13 PM	Judge	admonishes the jury
05:02:20 PM		Court recesses for the day

Time	Speaker	Note
08:37:37 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 5
09:36:25 AM	Judge	Calls case - the jury is not present
09:36:29 AM	S. McKay	comments re: medical bills
09:43:51 AM	J. Quane	Responds
09:47:04 AM	J. Quane	Offer of Proof - regarding who paid the medical bills
09:47:57 AM	T. Jones	comments re: witnesses
09:56:29 AM		the jury is present
09:56:53 AM	S. McKay	Calls Charles Ballard, sworn, direct examination
10:26:53 AM	S. McKay	Exhibit # 36 previously marked is identified
10:27:02 AM	S. McKay	Moves to admit Exhibit # 36
10:27:40 AM	J. Quane	Objection - relevance
10:27:50 AM	S. McKay	Responds
10:28:23 AM	Judge	Objection is overruled
10:28:32 AM	Judge	Exhibit # 36 is admitted
10:44:41 AM	J. Quane	Objection
10:44:53 AM	Judge	re-phrase question
10:45:20 AM	J. Quane	Objection - leading
10:45:25 AM	Judge	Objection is sustained
10:46:26 AM	J. Quane	Objection - asked & answered
10:46:28 AM	Judge	Objection is overruled
11:12:07 AM	Judge	admonishes the jury
11:12:15 AM		Court recesses
11:27:47 AM		Court resumes
11:27:52 AM		the jury is present
11:27:57 AM	S. McKay	continues direct examination of the witness - Charles Ballard
11:31:21 AM	S. McKay	Exhibit # 24 previously marked is identified
11:31:45 AM	S. McKay	Moves to admit Exhibit # 24
11:31:54 AM	J. Quane	No objection
11:32:26 AM	Judge	Exhibit # 24 is admitted
11:34:21 AM	S. McKay	Exhibits # 22, 23, 25, 26, 27 & 28 previously marked is identified
11:34:26 AM	S. McKay	Moves to admit Exhibit # 26
11:34:30 AM	J. Quane	Objection - to all exhibits previously stated
11:34:41 AM	Judge	Exhibit # 26 is admitted
11:34:50 AM	S. McKay	Moves to admit Exhibit # 28
11:34:58 AM	Judge	Exhibit # 28 is admitted
11:35:06 AM	S. McKay	Moves to admit Exhibit # 25
11:35:11 AM	Judge	Exhibit # 25 is admitted
11:35:19 AM	S. McKay	Moves to admit Exhibit # 27
11:35:26 AM	Judge	Exhibit # 27 is admitted
11:35:33 AM	S. McKay	Moves to admit Exhibit # 22
11:35:37 AM	Judge	Exhibit # 22 is admitted
11:35:44 AM	S. McKay	Moves to admit Exhibit # 23
11:35:50 AM	Judge	Exhibit # 23 is admitted
11:36:27 AM	Judge	Objection is noted and not waived
11:39:00 AM	J. Quane	Cross-examination of the witness - Charles Ballard
12:01:43 PM	S. McKay	Objection - vague

12:01:55 PM	Judge	admonishes the jury
12:02:04 PM		Court recesses
01:59:18 PM		Court resumes
01:59:23 PM		the jury is present
01:59:45 PM	J. Quane	continues cross-examination of the witness - Charles Ballard
02:05:01 PM	S. McKay	Objection - asked & answered
02:05:03 PM	Judge	Objection is overruled
02:09:17 PM	J. Quane	Publishes the first deposition of Charles Ballard
02:28:09 PM	S. McKay	Objection - hearsay
02:28:14 PM	J. Quane	Responds
02:28:57 PM	Judge	Objection is sustained
02:32:45 PM	Judge	admonishes the jury
02:32:51 PM		Jury is excused
02:33:29 PM	J. Quane	Offer of proof re: testimony
02:35:15 PM	Judge	Inquires of witness
02:35:46 PM	Judge	Objection is sustained
02:38:17 PM		Court recesses
02:45:23 PM		Court resumes
02:45:29 PM		the jury is present
02:47:27 PM	J. Quane	continues cross-examination of the witness - Charles Ballard
02:55:16 PM	J. Quane	Publishes the second deposition of Charles Ballard
02:58:07 PM	S. McKay	Objection
03:02:19 PM	S. McKay	Objection - relevance
03:02:24 PM	J. Quane	Responds
03:02:32 PM	Judge	Objection is sustained
03:06:17 PM	S. McKay	Objection - assumed facts
03:06:19 PM	Judge	Objection is sustained
03:06:43 PM	S. McKay	Objection - asked & answered
03:07:14 PM	S. McKay	Objection - assumed facts
03:07:16 PM	Judge	Objection is overruled
03:11:32 PM	S. McKay	Objection - asked & answered
03:11:41 PM	Judge	Objection is sustained
03:12:00 PM	S. McKay	Objection - asked & answered
03:12:04 PM	Judge	Objection is sustained
03:12:11 PM	S. McKay	Objection - asked & answered
03:12:26 PM	Judge	Objection is overruled
03:13:31 PM	S. McKay	Objection - asked & answered
03:13:34 PM	Judge	Objection is sustained
03:23:07 PM	S. McKay	Objection - asked & answered
03:23:16 PM	Judge	Objection is overruled
03:42:55 PM	J. Quane	Objection - mischaracterized
03:42:58 PM	Judge	re-phrase question
03:43:44 PM	J. Quane	Objection - relevance
03:43:48 PM	Judge	Objection is overruled
03:44:18 PM	J. Quane	Objection - leading
03:44:20 PM	Judge	Objection is sustained
03:45:08 PM	J. Quane	Objection - leading

03:45:13 PM	Judge	Objection is sustained
03:47:44 PM	J. Quane	Objection
03:47:50 PM	Judge	Objection is overruled
03:49:35 PM	J. Quane	Re-cross examination of the witness - Charles Ballard
03:50:43 PM	S. McKay	Re-direct examination of the witness - Charles Ballard
03:53:03 PM	Judge	excuses the witness - Charles Ballard
03:53:19 PM	Judge	admonishes the jury
03:53:27 PM		Jury is excused
03:54:41 PM	J. Quane	comments re: testimony tomorrow
03:55:00 PM	G. Haddad	comments re: motion in limine
03:57:46 PM	J.Quane	Responds
04:00:33 PM	Judge	instructs counsel
04:11:30 PM		the jury is present
04:11:53 PM	S. McKay	The Plaintiff rests
04:12:00 PM	Judge	admonishes the jury
04:12:33 PM		Court recesses

ORIGINAL

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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM OBJECTING TO PLAINTIFF RECOVERING FOR KRYSTAL BALLARD'S MEDICAL COSTS AND BURIAL BENEFITS AND EXPENSES

I.

INTRODUCTION

This matter is solely a wrongful death action brought by Charles Ballard,

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individually, that is based on allegations that Defendant Dr. Kerr breached the standard of health care practice. Plaintiff should not be permitted to recover, as a windfall, expenses that were incurred and paid by Krystal Ballard, or her estate. Mr. Ballard must not be allowed to recover for expenses and obligations which died with his spouse, including medical bills and burial costs/benefits. All of these costs and expenses were paid for by Krystal Ballard's military medical insurance carrier, Tricare. Mr. Ballard did not pay these expenses and is under no obligation to reimburse any party for these expenses.

II.

ANALYSIS

It is well established that at common law, the death of either the victim of the tort or the tortfeasor, extinguished the victim's right of action, and could not be continued by a representative of the estate. ***Vulk v. Haley***, 112 Idaho 855, 857, 736 P.2d 1309, 1311 (1987); ***Evans v. Twin Falls County***, 118 Idaho 210, 215-16, 769 P.2d 87, 92-93 (1990). In addition, at common law where a person's death was caused by the wrongful act of another, the relatives and dependents of the victim had no cause of action on their own. ***Evans***, 118 Idaho at 215.

In 1881, in order to alleviate the harshness of the common law rules regarding survival, Idaho enacted the Wrongful Death Act. The statute "as originally enacted, has remained virtually intact for over one hundred years." ***Westfall v. Caterpillar, Inc.***, 120 Idaho 918, 922, 821 P.2d 973, 977-78 (1991). The statute, Idaho Code § 5-311, "did not create a right for a survival action, but a new cause of action for the benefit of the heirs." ***Vulk***, 112 Idaho at 858.

According to well established Idaho law, "[a] survival action is for the

damages the deceased suffered and could have sued for had he survived, while a wrongful death action involves the damages suffered by the heirs of the decedent because of his death, such as loss of guidance, support, etc." ***Hayward v. Valley Vista Care Corp.***, 136 Idaho 342, 353, 33 P.3d 816, 827 (2001). The Idaho Supreme Court has held that no right of action is given to the estate of the victim of the tort, but is granted only to his or her heirs. ***Moon v. Bullock***, 65 Idaho 594, 605, 151 P.2d 765, 770 (1944), *overruled on other grounds by* ***Doggett v. Boiler Eng'g & Supply Co., Inc.*** 93 Idaho 888, 477 P.2d 511 (1970). "If there are no heirs, no right of action vests in anybody." ***Id.***

According to Idaho's Wrongful Death Act, "[w]hen the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death." I.C. §5-311. This statute "does not allow a decedent's claims to survive, but creates a new cause of action in favor of heirs or personal representatives." ***Craig v. Gellings***, 148 Idaho 192, 194, 24 P.3d 1208, 1210 (Ct. App. 2009). Pursuant to Idaho's Wrongful Death Act, Charles Ballard may only pursue and recover his damages that he alleges were caused by his wife's death. Her medical and final expenses were her expenses and obligations. Her claims do not survive.

III.

CONCLUSION

Based on the foregoing, Plaintiff Charles Ballard should not be permitted to recover expenses which were the sole possession and obligation of Krystal Ballard. To allow this would be a windfall to Charles Ballard as he would have no obligation to repay the expenses.

DATED this 12 day of November, 2013.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of November, 2013, I served a true and correct copy of the foregoing MEMORANDUM OBJECTING TO PLAINTIFF RECOVERING FOR KRYSTAL BALLARD'S MEDICAL COSTS AND BURIAL BENEFITS AND EXPENSES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709

Jeremiah A. Quane

Time	Speaker	Note
09:07:04 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 6
09:36:38 AM	Judge	Calls case
09:37:35 AM	J. Quane	Calls Brian Kerr, sworn, direct examination
10:00:54 AM	S. McKay	Objection - relevance
10:01:00 AM	J. Quane	Responds
10:01:17 AM	Judge	Objection is overruled
10:45:43 AM	G. Haddad	Objection
10:45:53 AM	Judge	Objection is sustained
10:45:58 AM	Judge	admonishes the jury
10:46:04 AM		Court recesses
11:08:46 AM		Court resumes
11:08:50 AM		the jury is present
11:09:26 AM	J. Quane	continues direct examination of the witness - Brian Kerr
11:12:01 AM	J. Quane	Exhibit # Z1 previously marked is identified
11:15:02 AM	J. Quane	Moves to admit Exhibit # Z1 - for demonstrative purposes
11:15:11 AM	Judge	Exhibit # Z1 is admitted - for demonstrative purposes
11:23:05 AM	J. Quane	Exhibit # H previously marked is identified
11:48:58 AM	G. Haddad	Objection - leading
11:48:59 AM	Judge	Objection is sustained - re-phrase question
11:49:01 AM	G. Haddad	Objection - foundation
11:49:22 AM	Judge	Objection is overruled
11:53:02 AM	G. Haddad	Objection - relevance
11:53:06 AM	Judge	Objection is sustained
11:53:45 AM	Judge	admonishes the jury
11:53:52 AM		Jury is excused
11:54:37 AM	J. Quane	Offer of proof re: line of questioning
11:59:11 AM	Judge	Objection is sustained
11:59:30 AM		Court recesses
01:39:03 PM		Court resumes
01:39:03 PM		the jury is not present
01:39:04 PM	G. Haddad	Argues in opposition to exhibit, it was not disclosed
01:40:22 PM	J. Quane	Responds
01:49:40 PM	J. Quane	Offer of proof re: exhibit
01:50:30 PM	J. Quane	Exhibits # II and JJ are marked and identified
01:52:52 PM	J. Quane	Moves to admit Exhibit # II & JJ - for offer of proof
01:53:16 PM	Judge	Exhibits # II & JJ will not be admitted
01:55:08 PM		the jury is present
01:55:11 PM	J. Quane	continues direct examination of the witness - Brian Kerr
01:57:55 PM	S. McKay	Objection - foundation
01:57:59 PM	Judge	Objection is sustained
01:59:05 PM	S. McKay	Objection
01:59:13 PM	Judge	Objection is overruled
02:04:45 PM	J. Quane	Exhibits # O1 - O21 previously marked is identified
02:06:24 PM		Moves to admit Exhibit # O1 - O21
02:06:27 PM		No objection

02:06:30 PM		Exhibits # O1 - O21
02:07:49 PM	Judge	admonishes the jury
02:08:00 PM		Court recesses
02:23:27 PM		Court resumes
02:23:33 PM		the jury is present
02:24:24 PM	J. Quane	continues direct examination of the witness - Brian Kerr
02:43:26 PM	J. Quane	Exhibit # Q previously marked is identified
02:44:47 PM	J. Quane	Moves to admit Exhibit # Q - illustrative purposes
02:45:10 PM	G.	No objection
02:45:16 PM	Judge	Exhibit # Q is admitted - illustrative purposes
02:49:24 PM	J. Quane	Exhibit # T previously marked is identified
02:50:30 PM		Moves to admit Exhibit # T
02:50:38 PM	G. Haddad	Objection
02:52:36 PM	Clerk	The exhibits are marked T1, T2, T3 and T4
02:53:11 PM	G. Haddad	Objection to T3 - foundation
02:53:20 PM	Judge	Exhibits # T1, T2 and T4 are admitted
02:56:27 PM	J. Quane	Moves to admit Exhibit # T3
02:56:38 PM	G. Haddad	Objection - inquires to aid the objection
02:59:44 PM	G. Haddad	Withdraws the objection
02:59:45 PM	Judge	Exhibit # T3 is admitted
03:14:01 PM	Judge	admonishes the jury
03:14:15 PM		Court recesses
03:46:50 PM		Court resumes
03:46:55 PM		the jury is present
03:47:06 PM	J. Quane	continues direct examination of the witness - Brian Kerr
04:08:17 PM	G. Haddad	Objection - asked & answered
04:08:20 PM	Judge	Objection is sustained
04:11:26 PM	G. Haddad	Objection - speculation
04:11:41 PM	Judge	re-phrase question
04:13:27 PM	G. Haddad	Objection - argumentative
04:13:32 PM	Judge	re-phrase question
04:31:23 PM	G. Haddad	Objection - leading
04:32:02 PM	Judge	re-phrase question
04:33:20 PM	G. Haddad	Objection - relevance
04:33:54 PM	Judge	Inquires of witness
04:37:13 PM	G. Haddad	Objection - relevance
04:37:15 PM	Judge	Objection is overruled
04:49:34 PM	Judge	admonishes the jury
04:49:42 PM		Court recesses

Time	Speaker	Note
09:08:39 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 7
09:35:18 AM	Judge	Calls case
09:35:19 AM		the jury is not present
09:35:21 AM	T. Jones	Comments re: calling witness out of order
09:35:53 AM	S. McKay	Responds
09:38:46 AM	G. Haddad	comments re: Objection to the admission of Exhibit V
09:39:46 AM	T. Jones	Responds
09:40:17 AM	Judge	Objection is sustained
09:42:40 AM		the jury is present
09:45:31 AM	T. Jones	Calls Geoffrey Stiller, sworn, direct examination
10:06:55 AM	G. Haddad	Objection - relevance
10:06:58 AM	Judge	Objection is sustained
10:07:19 AM	G. Haddad	Objection - relevance
10:07:22 AM	Judge	Objection is sustained
10:08:58 AM	G. Haddad	Objection - broad
10:09:02 AM	Judge	Objection is overruled
10:09:45 AM	G. Haddad	Objection - relevance
10:09:48 AM	Judge	Objection is sustained
10:12:27 AM		admonishes the jury
10:12:31 AM		Jury is excused
10:13:07 AM	G. Haddad	comments re: new evidence by witness
10:13:38 AM	T. Jones	Responds
10:20:57 AM	Judge	comments
11:05:54 AM		Court Recesses
11:06:01 AM		Court resumes
11:06:13 AM		the jury is present
11:06:16 AM	T. Jones	continues direct examination of the witness - Geoffrey Stiller
11:11:06 AM	G. Haddad	Objection - foundation
11:11:08 AM	Judge	Objection is overruled
11:11:33 AM	G. Haddad	Objection - relevance
11:11:37 AM	Judge	Objection is sustained
11:12:01 AM	G. Haddad	Objection - foundation
11:12:03 AM	Judge	Objection is overruled
11:32:48 AM	G. Haddad	Objection - relevance
11:33:03 AM	Judge	Objection is overruled
11:46:38 AM	G. Haddad	Objection
11:46:59 AM	Judge	Objection is overruled
11:55:08 AM	G. Haddad	Objection
11:55:10 AM	Judge	Objection is sustained
11:55:19 AM	Judge	admonishes the jury
11:55:25 AM		Jury is excused
11:56:06 AM	G. Haddad	Moves for a mis-trial
11:57:00 AM	T. Jones	Responds
11:57:57 AM	Judge	Grants a mis-trial
11:58:13 AM		Court recesses
01:33:07 PM		Court resumes
01:33:11 PM		the jury is not present

01:33:15 PM	Judge	addresses counsel re: Motion in Limine as to other infections
01:35:56 PM	Judge	Declares a mis-trial
01:35:58 PM	Judge	awards expert witnesses costs to be paid to Plaintiff to be paid prior to the next trial. Reserves the issue on attorney fees.
01:37:35 PM	S. McKay	comments re: mis-trial
01:43:22 PM		the jury is present
01:43:27 PM	Judge	Thanks and excuses the jury
01:46:31 PM		Court recesses - all exhibits were returned to counsel

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MOTION FOR SANCTIONS, FOR FULL ENFORCEMENT OF SANCTIONS PREVIOUSLY IMPOSED, AND FOR ENFORCEMENT OF EXISTING DISCOVERY AND DISCLOSURE DEADLINES

ORIGINAL

Plaintiff Charles Ballard, through his attorneys, respectfully moves this Court pursuant to Rule 37(e) of the Idaho Rules of Civil Procedure for an order imposing sanctions upon Defendants and Defense counsel as a result of the mistrial declared by the Court on November 14, 2013. The declaration of a mistrial followed repeated warnings by the Court that it would declare a mistrial and impose sanctions in the form of payment to the non-offending party of all attorney fees associated with the trial, expert trial costs, and other costs of trial if the Court's orders *in limine* were violated. Following the declaration of this mistrial, the Court further indicated it would consider all other appropriate relief requested. Accordingly, Plaintiff now seeks through this motion an Order as follows:

- Imposing sanctions in the form of reimbursement of attorney fees associated with reasonable trial preparation and the handling of the trial by Plaintiff's counsel;
- Imposing sanctions in the form of reimbursement of the costs associated with Plaintiff's experts' travel, lodging, and testimony at the trial of this matter;
- Imposing sanctions in the form of reimbursement of reasonable trial costs incurred by Plaintiff and Plaintiff's counsel to include travel, lodging, and meals for SSgt Charles Ballard, attorney Greg Haddad, paralegal Farrah Caruthers, costs associated with Plaintiff's courtroom technician to run Trial Director, costs for service of trial subpoenas, costs of trial witness fees, and other reasonable costs to be submitted to the Court upon entry of an Order imposing sanctions;
- Imposing sanctions in the form of striking Defendants' liability defenses;
- Imposing sanctions in the form of the remaining attorney fees requested by Plaintiff following the Court's earlier imposition of sanctions against Defense counsel for improperly refusing to answer Plaintiff's discovery (*See* Court's

Order, filed October 11, 2012, imposing sanctions against Defendants' counsel in the amount of $1,500.00 and permitting Plaintiff to later seek reimbursement for full fees incurred in bringing motion to compel);

- Enforcing existing discovery and disclosure deadlines;
- Disqualifying Jeremiah Quane, Terrence Jones, and the law firm of Quane, Jones and McColl from handling the retrial of this matter; and
- Other sanctions deemed appropriate by the Court, including reimbursement to Ada County of the jury costs associated with the trial.

Good cause exists for this motion given Defendants' and defense counsel's conduct in ignoring the admonitions of the Court concerning conduct at trial, including specifically the need to strictly adhere to the Court's *limine* orders and pretrial rulings, as well defense counsel's repeated and persistent efforts to undermine the fairness of these proceedings, all of which ultimately caused a mistrial at great cost and prejudice to Plaintiff. Accordingly, Plaintiff seeks an Order consistent with the foregoing, after which Plaintiff will submit an itemized statement of costs and attorney fees for consideration by the Court.

A memorandum of law and declaration of counsel are submitted contemporaneously herewith. Plaintiff requests a hearing on this motion.

Dated this 6th day of December 2013.

Respectfully Submitted,

BAILEY & GLASSER LLP

By _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2013, I served a true and correct copy of the foregoing by delivering the same to the following via U.S. Mail, postage prepaid:

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DECLARATION OF P. GREGORY HADDAD IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS, FOR FULL ENFORCEMENT OF SANCTIONS PREVIOUSLY IMPOSED, AND FOR ENFORCEMENT OF EXISTING DISCOVERY AND DISCLOSURE DEADLINES

ORIGINAL

DECLARATION OF P. GREGORY HADDAD

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, TO WIT:

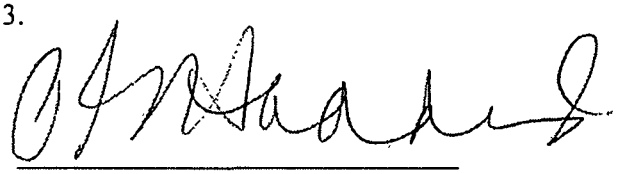
1. I am an attorney, duly licensed to practice law in the State of West Virginia, and a partner with the law firm of Bailey & Glasser LLP in Morgantown, West Virginia. I am admitted *pro hac vice* in this case, and I am lead counsel for Plaintiff, Charles Ballard. Together with the law firm of Nevin, Benjamin, McKay & Bartlett LLP, I have prosecuted this case, and I was present throughout the trial of this matter, which began on November 5, 2013, and ended upon the declaration of a mistrial on November 14, 2013. I make the statements contained in this Declaration based upon my personal observations and in support of a contemporaneously filed motion for sanctions.

2. To my knowledge, a complete transcript of the above referenced trial in this matter has not been prepared. Nevertheless, I have reviewed the factual assertions stated in the contemporaneously filed motion and memorandum of law, and I believe the descriptions of such factual matters to be true, accurate and consistent with my memory of such matters during trial.

This ends my declaration.

I declare under penalty of perjury, pursuant to the law of the State of Idaho, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated this 6th day of December, 2013.



P. Gregory Haddad

STATE OF West Virginia;
COUNTY OF Monongalia, to-wit:

Taken, subscribed and sworn to before me this 6th day of December, 2013.

My Commission expires: December 16, 2021.

OFFICIAL SEAL
DOROTHY A. SOMMERS
NOTARY PUBLIC
STATE OF WEST VIRGINIA
525 Tyrone Road
Morgantown, WV 26508
My Commission Expires Dec 16, 2021

Dorothy A. Sommers
Notary

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2013, I served a true and correct copy of the foregoing by delivering the same to the following via U.S. Mail, postage prepaid:

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS, FOR FULL ENFORCEMENT OF SANCTIONS PREVIOUSLY IMPOSED, AND FOR ENFORCEMENT OF EXISTING DISCOVERY AND DISCLOSURE DEADLINES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

COMES NOW Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Rule 37(e) of the Idaho Rules of Civil Procedure, and moves for an order imposing sanctions upon Defendants and defense counsel following the declaration of a mistrial by the Court in this matter.

On November 14, 2013, this Court declared a mistrial as a result of the Defendants' violation of a pretrial *limine* order of the Court in the presence of the jury. The mistrial declaration occurred on the eighth day of trial, and it followed repeated warnings by the Court that if orders *in limine* were violated, the Court would declare a mistrial and impose sanctions in the form of payment to the non-offending party of all trial related attorney fees, expert trial costs, and other trial related costs. Following the mistrial declaration, the Court further indicated it would consider all other appropriate relief requested.

Plaintiff now seeks an Order not only consistent with the above admonitions, but also commensurate with defense counsel's repeated disregard for this Court's pretrial rulings and persistent efforts to undermine the fairness of these proceedings, all of which ultimately caused a mistrial at great cost and prejudice to Plaintiff. The sanctions requested through this motion and set forth below are wholly within the Court's discretion. Moreover, the requested sanctions are required to bring some semblance of fairness to these proceedings in light of Defendants' persistent disregard for the rules, the blatant indifference defense counsel exhibited toward this Court's authority to govern the parties' conduct at trial, as well as the inexcusable prejudice defense counsel inflicted upon Plaintiff Charles Ballard.

No better example highlights the disrespect Defendants exhibited not only toward Charles Ballard, but also toward the Court, than Defendants' conduct when the Court recessed to

consider, and ultimately grant, Plaintiff's motion for mistrial. After committing the fatal violation of this Court's *in limine* Order, and after the Court indicated that it would declare a mistrial prior to the noon break, Defendants and their counsel could be seen smiling, apparently pleased about the prospect of a mistrial, rather than demonstrating any measure of contrition. After the noon break, while the Court issued its mistrial ruling and explained the necessity of same as a direct result of Defendants' misconduct, Defendants' lead counsel, Jeremiah Quane, had the audacity to rotate his chair and turn his back to the Court.

In commencing its analysis under these circumstances, the Court need ask one fundamental question: which party should bear the costs and expenses incurred in preparing and attending trial -- including those of readily calculable monetary value (trial related attorney fees and costs), as well as those less readily quantifiable (the jurors' time wasted, the Court's time wasted, Charles Ballard's time wasted away from active duty in the United States Air Force, and the emotional toll Charles Ballard suffered while recounting his wife's death on the witness stand) -- when the conduct of the Defendants, defense counsel, and defense witnesses demonstrated such profound and flagrant disregard for the Court's authority and disrespect for Staff Sergeant Charles Ballard that a mistrial was required? Of course, the answer is as simple as the question: it must be the Defendants. Otherwise, any party would, in effect, be granted license to disrupt the orderly and efficient administration of justice at trial with only limited repercussions. Surely, the sanctions being requested here are moderate in comparison to those the Plaintiff must face in terms of a retrial.

The Court itself, in ruling on the mistrial, astutely observed that the mistrial was not caused by an isolated incident of misconduct, but rather a demonstrated "pattern and practice" of misconduct. Noteworthy is the fact that defense counsel's misconduct at trial is consistent with,

and comprises, a pattern of misconduct taking place over the course of months. This same pattern and practice, while pervasive throughout the litigation, became so prejudicial as to destroy the fundamental fairness that every litigant should rightfully expect at trial.

In addition to costs, expenses, and attorney fees, Plaintiff moves for enforcement of existing discovery and disclosure deadlines, which have long passed. Neither defense counsel, nor Defendants should realize any benefit by a new trial necessitated by their misconduct, and specifically, by the admission of evidence not previously produced, or by the elicitation of opinions not previously disclosed. Defendants should be strictly confined to the record evidence exchanged in this case before defense counsel sabotaged the fairness of trial; otherwise, Defendants, no matter the sanctions ultimately imposed, will reap significant benefits for their counsel's blatant unwillingness to follow the rules and this Court's repeated mandates, and Plaintiff will suffer even greater prejudice in the form of trial by ambush.

Additionally, Charles Ballard seeks imposition of the following sanctions: full imposition of sanctions previously imposed, but held in abeyance, as a result of Defendants' refusal to abide by the rules of discovery; the striking of Defendants' liability defenses; the disqualification of Defendants' present counsel from handling the retrial of this matter; and such other relief and sanctions this Court deems appropriate, including, but not limited to, reimbursement of the jury costs associated with this trial to Ada County.

II. ARGUMENT

a. Defense Counsel's Conduct at Trial is Part of a Larger Pattern of Obstructive and Noncompliant Conduct.

Defense counsel's behavior, which the Court correctly noted had become a pattern during trial, actually extends back to the very first hearing in this case. As the Court will likely recall, on September 12, 2012, Plaintiff was forced to bring a motion to compel discovery after Defendants refused to answer any of Plaintiff's initial interrogatories. Defendants claimed that those interrogatories exceeded the number permitted by rule, thus purportedly excusing Defendants from answering *any* of those interrogatories. The Court, of course, deemed Defendants' position baseless, ordered Defendants to answer all of Plaintiff's interrogatories, and assessed sanctions against defense counsel in the amount of $1,500.00. (*See* Order, Oct. 11, 2012.) The Court also ruled, however, that "[t]his order does not preclude plaintiff from requesting full fees at a later date." (*Id.*)

Defense counsel's pattern of obstructive and noncompliant behavior continued to develop when, shortly prior to trial, defense counsel attempted to mislead this Court regarding Plaintiff's willingness to engage in mediation. In reference to the parties' pretrial exchange of information conference, defense counsel made the following representation to this Court:

> *For the first time in the history of the case, counsel for Plaintiff said that his client would agree to mediation, even though the trial is scheduled to start November 5, 2013.* Defense counsel had to decline the untimely suggestion of mediation due to the date the trial was to start, the impossibility of arranging mediation on such short notice and the fact that the bulk of the trial preparations had been completed and that defense counsel would be completely occupied with continued trial preparations.

(Certification of Defense Counsel 2, Oct. 29, 2013.) In so doing, defense counsel audaciously assigned blame for the undersigned's "untimely" willingness to participate in mediation, all the while making a demonstrably false representation as evidenced by correspondence exchanged

six months earlier, which Plaintiff was compelled to produce to the Court in an effort to confront defense counsel's astounding betrayal of reality. (*See* Pl.'s Resp. to Defense Counsel's Misrepresentation Re: Mediation, Oct. 30, 2013.) Defense counsel became remarkably quiet when it came time to acknowledge, or offer any explanation for, their misrepresentation; in fact, they filed nothing in reply to Plaintiff's correction.

Furthermore, in response to Plaintiff's Motions *in Limine* to Preclude Speaking Objections, Unsworn Testimony of Counsel, and References to the Parties' Motion Practice While in the Jury's Presence, Defendants offered the following, self-righteousness statement: "Defense counsel have tried cases before this court in the past and were quite capable of staying within the rules of this court." (Defs.' Mem. in Opp. to Pl.'s Mots. in Limine 40, Oct. 29, 2013.) In the wake of a mistrial caused by Defendants, their counsel, and their witnesses, one would quite naturally wonder, then, whether Defendants lacked the capacity, or perhaps only the willingness, to act accordingly in this instance. Defendants' response continued, "Defense counsel is comfortable that this Court is fully capable of determining whether any lines are about to be crossed during the trial before it occurs." (*Id.* at 41.) As defense counsel proved at trial, they are also quite comfortable disregarding any such determinations.

Throughout the trial, when objections were sustained by the Court, defense counsel, within the hearing of the jury, stated the testimony he wished to elicit, though the Court had previously ruled the testimony improper. Undeterred, not only did defense counsel state the substance of the precluded testimony, but he also declared the inference to be drawn from the inadmissible testimony. Defense counsel's conduct sunk to such a level that Plaintiff counsel asked the Court to admonish defense counsel. And though the Court did admonish defense counsel, the admonishment had little, if any, deterrent effect on defense counsel.

In granting Plaintiff's motion *in limine* on the topic, the Court explicitly ruled that evidence of Krystal Ballard's purported "noncompliance" would be precluded because it lacked any causal connection to the alleged injuries. The Court reasoned that evidence and argument pertaining to Krystal Ballard's reluctance to use narcotic pain medication, her failure to inform her husband of the liposuction procedure, and her failure to inform the Air Force about the liposuction procedure had nothing whatsoever to do with Krystal Ballard's death from an infection. And prior to commencement of trial, the Court warned both sides that if pretrial rulings on any matter needed to be revisited, those issues would be addressed outside the presence of the jury.

Despite the Court's admonition, and in direct contravention of the Court's pretrial rulings, defense counsel attempted to introduce evidence of Krystal Ballard's "noncompliance." Defense counsel elicited testimony from his own client of Krystal Ballard's "noncompliance" without seeking reconsideration of the Court's pretrial ruling. Additionally, even after an objection, defense counsel, again, in the jury's presence, blurted out that "this goes to the issue of noncompliance".

Plaintiff's counsel responded by moving for a mistrial based on a clear violation of the Court's pretrial rulings. Although the Court acknowledged that the Defendant and his counsel had violated the Court's order, it did not feel that the prejudice inflicted by the violation rose to a level justifying a mistrial. However, the Court advised the parties, yet again, that if a mistrial was occasioned by a violation of its pretrial rulings, the Court would award sanctions in the form of costs, expenses, and fees. It goes without comment that the Defendants, their counsel, and their witnesses ignored this admonition as well.

The fatal violation necessitating a mistrial occurred during Defendants' presentation of

their expert, Dr. Stiller. Defense counsel asked Dr. Stiller directly why he believed Defendants had not violated the standard of practice, to which Dr. Stiller responded that there had not been any other infections at Defendants' facility. This testimony was offered despite the fact that the Court had previously deemed this information inadmissible. At no time did defense counsel even feign an attempt to stop Dr. Stiller as he rambled on for several sentences in this prohibited area. And though defense counsel characterized Dr. Stiller's prohibited testimony as inadvertent, other areas of Dr. Stiller's testimony reveal the speciousness of defense counsel's explanation.

First, despite only speaking with Dr. O'Neil on one occasion prior to trial in order to avail himself of knowledge pertaining to the applicable standard of care, Dr. Stiller admitted that he conferred with Dr. O'Neil the night before taking the witness stand at trial, after he recognized in reviewing his deposition transcript that he had insufficient information about the local standard of practice. This conversation, clearly intended to remedy the paucity of information derived from Dr. Stiller's previous conversation with Dr. O'Neil, was never disclosed to Plaintiff's counsel. It is apparent, then, that Defendants attempted to sandbag Plaintiff, who had no ability to discover the substance of the conversation, and therefore, had no meaningful capacity to cross-examine Dr. Stiller on that topic.

Second, Dr. Stiller had *not* been provided information about the absence of other infections at Silk Touch prior his deposition. The compilation of information purportedly revealing a lack of other infections had been, according to defense counsel, "prepared shortly before August 20," well after Dr. Stiller's deposition of July 19. (Letter from J. Quane to P. Gregory Haddad 1, September 26, 2013; *see also* Pl.'s Consol. Mots. *in Limine* 12-18, Oct. 22, 2013 (providing chronology and analysis related to "absence of infection" information.).) Defendants never provided an opportunity to engage in discovery on the data underlying this

compilation. Thus, Stiller had only recently been provided the information, which again demonstrates a pattern of sandbagging in violation of discovery rules, as it does the propriety of, and necessity for, Plaintiff's motions *in limine*.

Lastly, defense counsel asked Dr. Stiller, who previously served in the military, about Air Force protocol, which violated the Court's prohibition of evidence and argument pertaining to Krystal Ballard's failure to inform the Air Force of her liposuction. In fact, defense counsel didn't simply ask Dr. Stiller once, but even after an objection was sustained, defense counsel attempted to ask the same question immediately *after* the Court sustained the objection.

To suggest mere inadvertence in eliciting testimony from Stiller on the issue of an alleged lack of infections requires an untenable suspension of disbelief in light of the numerous instances of Defendants' misconduct, which are almost too numerous to recount. Each such instances of misconduct placed Plaintiff's counsel in the impossible position of having to choose whether to object in the jury's presence, and thus call attention to the issue, or to silently allow the questioning notwithstanding the prejudicial effect. For example, Plaintiff's counsel chose not to object during the cross-examination of SSgt Ballard when defense counsel immediately published to the jury a pay stub of Plaintiff's wife and asked Plaintiff to identify deductions from Mrs. Ballard's earnings, which were made for life insurance and federal taxes. The Court had previously and clearly prohibited inquiry into these areas in its *limine* rulings. Nevertheless, defense counsel immediately forged ahead into these areas upon the opportunity to examine SSgt Ballard.

Defendants' claim of inadvertence rings hollow in light of the pervasive pattern of conduct in this case, including violations of discovery rules, rules of evidence, Court rulings, sustained objections, and fundamental notions of fairness and professional conduct. However,

even if one were to believe that Dr. Stiller's improper testimony was the product of inadvertence, the prejudice and damage caused by that inadvertence is obvious, and it is the responsibility of the party sponsoring a witness to ensure that the witness does not offer precluded testimony. Neither Charles Ballard, nor his witnesses, nor his attorneys should be the ones to bear the resultant costs, expenses, and fees.

On at least three occasions prior to the Court's declaration of mistrial, the parties were warned that a violation of its rulings would result in an assessment of expert costs, trial costs, and attorney fees against the party responsible for a mistrial. Notwithstanding these repeated warnings, Defendants acted unprofessionally and violated clear and unequivocal Court mandates. In so doing, defense counsel exhibited disrespect toward the Court, as well as toward the jurors, all of whom set aside two weeks of their lives to perform an honorable civic duty. What renders defense counsel's conduct particularly inexcusable, however, is the disrespect shown for Staff Sergeant Charles Ballard, who seeks and deserves nothing more, and certainly nothing less, than the fair administration of justice in relation to the death of his wife. Charles Ballard is the most severely impacted by defense counsel's apparent disdain for fair and orderly trial proceedings.

Charles Ballard, who is on active duty in the United States Air Force, and who is currently stationed in Florida when not deployed overseas, is now, due to defense counsel's conduct, forced to seek two to three weeks of additional leave in order to participate in a second trial. And he will be forced to once again endure agonizing memories associated with the loss of his wife, the effects of which this Court observed when Charles Ballard described his loss from the witness stand.

b. This Court is Afforded Considerable Discretion to Impose Significant Sanctions Upon Defense Counsel for Their Disdainful, Noncompliant, and Highly Prejudicial Conduct.

By his motion to compel discovery, as well as his memorandum of law in support thereof, both filed on August 24, 2012, Plaintiff provided full legal support in requesting sanctions for Defendants' refusal to answer Plaintiff's interrogatories. This Court granted Plaintiff's motion by Order dated October 11, 2012, awarding $1,500.00 in fees and costs. Pursuant to that Order, Plaintiff now seeks full reimbursement of fees and costs incurred in pursuing Defendants' compliance with their discovery obligations.

Whereas Rule 37(a)(4) justified sanctions under those circumstances, Rule 37(e) authorizes sanctions for defense counsel's misconduct at trial:

> **General Sanctions--Failure to Comply With Any Order.** In addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, or assess attorney's fees, costs or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules.

Moreover, under the instant circumstances, dismissal of Defendants' liability defenses is a permissible and justified sanction. Due to the severity of this sanction, there is no doubt that this Court must consider the ineffectiveness of lesser sanctions. However, "explicit warnings are among the lesser sanctions that are appropriate before imposition of the drastic sanction of dismissal." *Adams v. Reed*, 138 Idaho 36, 39, 57 P.3d 505, 508 (Ct. App. 2002) (citing *Ashby v. W. Council, Lumber Prod. & Indus. Workers,* 117 Idaho 684, 687, 791 P.2d 434, 437 (1990)).

Additionally, "the Idaho Supreme Court enumerate[s] factors that must be expressly considered by the trial court in deciding whether dismissal with prejudice is warranted:

> The two primary factors are a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one "aggravating" factor, including: 1) delay resulting from intentional conduct, 2) delay caused by the plaintiff personally, or 3) delay causing prejudice to the defendant. The

> consideration of these factors must appear in the record in order to facilitate appellate review.

Adams, 138 Idaho at 39, 57 P.3d at 508 (*quoting Ashby*, 117 Idaho at 686–87, 791 P.2d at 436–37).

"As to the ineffectiveness of lesser sanctions, the district court found that during . . . hearings of October 30, 2000 and March 19, 2001, the Adamses were specifically warned that failure to comply with discovery could result in dismissal, and they were admonished to immediately respond to outstanding discovery requests." *Adams*, 138 Idaho at 39, 57 P.3d at 508. Moreover, "[t]he district court's finding of a clear record of delay [was] amply supported by the record . . . which demonstrates that the Adamses were routinely late in responding to discovery, were repeatedly noncompliant with deadlines set out in pretrial orders, and on one occasion failed to engage in court-ordered mediation." *Adams*, 138 Idaho at 39, 57 P.3d at 508. For these reasons, the Court of Appeals affirmed the trial court's imposition of dismissal as a sanction for repeated misconduct.

1. Plaintiff seeks full reimbursement of fees and costs for pursuing his successful motion to compel Defendant's discovery responses.

In accordance with this Court's Order of October 11, 2012, Plaintiff requests that defense counsel be ordered to pay $5,651.36, which represents the difference between the sanctions imposed by the Court in October 2012, and the total fees and expenses associated with Plaintiff's pursuit of an order compelling Defendants to comply with well-established discovery obligations. (*See* Aff. of Counsel, Sept. 14, 2012 (setting forth $7,151.36 in reasonable fees and expenses).)

2. The reprehensible conduct of Defendants and defense counsel, which necessitates a new trial, warrants full reimbursement of Plaintiff's reasonable trial related fees, costs and expenses, all of which will be replicated for retrial.

In addition to full reimbursement of attorney fees incurred as a result of Defendants' failure to comply with discovery rules, Plaintiff also moves for an order compelling Defendants to reimburse the following, reasonable trial related fees, all of which will be itemized and submitted for the Court's consideration upon the granting of this motion:

- attorney fees incurred in trial preparation, including preparation of Plaintiff's expert witnesses to the extent the time associated with such fees will be replicated in preparation for retrial;
- attorney fees incurred for lead plaintiff counsel and his trial paralegal to travel to and from Boise, Idaho, for trial;
- attorney fees incurred from November 4, 2013, through November 14, 2013 (the first day of trial through the date the Court declared a mistrial); and
- attorney fees incurred in drafting and presenting this motion.

Sanctions should also include reimbursement of Plaintiff's reasonable, trial related costs and expenses, all of which will be itemized and submitted for the Court's consideration upon the granting of this motion:

- costs incurred for Plaintiff, Charles Ballard's travel from Florida to Boise, Idaho, and costs incurred for his return;
- costs incurred for Plaintiff, Charles Ballard's lodging and meals while in Boise, Idaho;
- travel costs incurred for lead plaintiff counsel and his trial paralegal to and from Boise, Idaho;

- costs incurred for Plaintiff's lead counsel and his trial paralegal's lodging and meals while in Boise, Idaho;
- costs and expenses incurred by Plaintiff's counsel for trial technology support;
- costs incurred for Dr. Dean E. Sorensen's trial preparation and expert witness appearance at trial;
- costs incurred for Dr. George R. Nichols's trial preparation and expert witness appearance at trial;
- costs incurred for Cornelius Hofman's trial preparation and expert witness appearance at trial; and
- costs for service of trial subpoenas, costs of trial witness fees, and other reasonable costs to be submitted.

Because Plaintiff will incur these fees and expenses upon retrial, defense counsel should be ordered to pay all of those fees and costs. The Plaintiff should not bear the cost, fees, and expenses, which must now be duplicated secondary to the Defendants' misconduct. To rule otherwise would send the message that mistrial bears no consequences and encourage parties to create a second opportunity in cases where a trial is not proceeding favorably.

3. Defendants' liability defenses should be dismissed because Defendants repeatedly disregarded Court rulings and warnings, because previous sanctions had no deterrent effect on Defendants' adherence to Court orders, and because extraordinary delay and prejudice befell Plaintiff upon the Court's declaration of mistrial.

Defendants were sanctioned by this Court in 2012 for failing to comply with discovery rules. Defense counsel made patently false representations regarding Plaintiff's willingness to engage in mediation. Defense counsel, despite multiple warnings from the Court, repeatedly violated explicit pretrial rulings, which eventually resulted in a mistrial.

Plaintiff not only incurred significant fees and costs in presenting this case to a jury, but he took leave from active duty to participate in seeking justice at trial for the death of his wife. Additionally, Plaintiff incurred the emotional cost of reliving his wife's death on the witness stand. Plaintiff will incur all of these costs when the case is retried.

Pursuant to the analysis set forth in *Adams v. Reed*, dismissal of Defendants' liability defenses is wholly appropriate. And though, in *Adams*, the plaintiffs were the offending party, it is only appropriate that all parties be subject to sanctions for conduct satisfying the criteria set forth in that case. Lesser sanctions, including the sanctions imposed by the Court's Order of October 11, 2012, as well as the explicit warnings issued to defense counsel during trial, were previously imposed, yet Defendants continued to defy Court orders and disregard Court warnings. In doing so, Defendants compromised the fairness of the trial proceedings to such a degree that the Court had little choice but to declare a mistrial.

Obviously, Defendants' misconduct will delay the administration of justice in this case, likely for months. While Plaintiff's counsel is currently attempting to identify a time for retrial that works for Plaintiff, Plaintiff's counsel and Plaintiff's witnesses, it is difficult to imagine that Plaintiff's counsel would be available to retry this case until February 2014, at the earliest. Because there can be little question by the repeated and overtly defiant instances of misconduct that defense counsel's conduct was intentional, and because there can be no question that Plaintiff suffered, and continues to suffer, extraordinary prejudice as a result of defense counsel's misconduct, dismissal of Defendants' liability defenses is entirely justified because all criteria under *Adams* is not only satisfied, but exceeded.

4. Defense counsel should be disqualified from this case.

Rule 37(e) authorizes this Court to impose sanctions or conditions for failure to obey an

order in addition to those sanctions delineated by the rule. Additionally, the Court is afforded discretion to grant a motion to disqualify counsel. *Crown v. Hawkins Co., Ltd.*, 128 Idaho 114, 122, 910 P.2d 786, 794 (Ct. App. 1996); *Weaver v. Millard*, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991). This discretion derives from the Court's inherent authority to supervise the professional conduct of attorneys appearing before it. *United v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980); *see also Pichon v. Benjamin*, 108 Idaho 852, 854, 702 P.2d 890, 892 (Ct. App. 1985) (regulation of the practice of law is an inherent power of the judiciary).

The party seeking disqualification has the burden of establishing the grounds, and the goal of the Court is to shape a remedy that will assure fairness to the parties and the integrity of the judicial process. *Crown*, 128 Idaho at 122-23, 910 P.2d at 794-95; *Weaver*, 120 Idaho at 696, 819 P.2d at 114. In extreme circumstances, a party to a lawsuit is permitted to interfere with the attorney-client relationship of his opponent. *Alexander v. Superior Court In and For Maricopa County*, 685 P.2d 1309, 1313 (Ariz. 1984). A motion to disqualify opposing counsel should be filed with promptness and reasonable diligence once the facts upon which the motion is based have become known. *Crown*, 128 Idaho at 122-23, 910 P.2d at 794-95; *Weaver*, 120 Idaho at 696, 819 P.2d at 114.

In engaging in a pervasive "pattern and practice" of refusing to obey Court orders and other conduct, as described above, defense counsel violated their duty under Idaho Rule of Professional Conduct 3.2, which requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client." This rule reflects "that dilatory practices bring the administration of justice into disrepute." Cmnt 3.2. The rules of professional conduct also prohibit counsel from knowingly disobeying an obligation under the rules of a tribunal. I.R.P.C. 3.4(c).

Given defense counsels' ongoing practice of disobeying court orders notwithstanding admonitions and sanctions, the Court can expect such willful violations to continue to cause undue delay. In the event the Court determines that striking Defendants' defenses is too drastic a remedy, removing defense counsel from representation and requiring the appearance of counsel who will not disregard court orders is the only way to prevent further prejudice to Plaintiff.

c. Existing Discovery and Disclosure Deadlines Must Be Enforced to Ensure that Defendants Enjoy No Benefit Stemming from Their Misconduct.

As this Court knows, Defendants disclosed untimely and unsupported "demonstrative" evidence purportedly indicative of a lack of other infections at Defendants' practice. Defendants' expert, Dr. Garrison, revealed a previously disclosed opinion pertaining to fat embolism well after the expert disclosure deadline had passed. At trial, defense counsel attempted to elicit testimony from their expert witness, Dr. Stiller, pertaining to a conversation Plaintiff had no opportunity to discover because the conversation between Dr. Stiller and a local physician occurred *the night prior to trial.*

The mistrial caused by defense counsel should not benefit Defendants in any way. Specifically, Defendants should not be allowed, upon retrial, to depart from the record evidence exchanged during discovery in this matter, and, in essence, advance a trial by ambush strategy, which defense counsel so clearly espouses. Accordingly, Plaintiff seeks strict enforcement of the discovery and disclosure deadlines set forth by the Court's Amended Notice of Trial Setting and Order Governing Further Proceedings, which the Court entered on September 9, 2013, as well as the pretrial rulings made by the Court prior to the start of trial.

III. CONCLUSION

For the foregoing reasons, this Court should grant the instant motion and enter an Order (1) imposing sanctions in the form of reimbursement of attorney fees associated with reasonable trial preparation and the handling of the trial by Plaintiff's counsel; (2) imposing sanctions in the

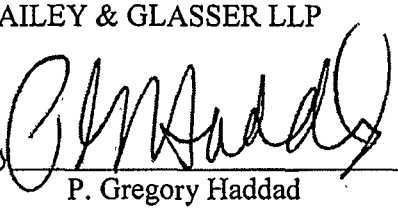
form of reimbursement of costs associated with Plaintiff's expert's travel, lodging, and testimony at the trial of this matter; (3) imposing sanctions in the form of reimbursement of reasonable trial costs incurred by Plaintiff and Plaintiff's counsel to include travel, lodging, and meals for SSgt Charles Ballard, attorney Greg Haddad, paralegal Farrah Caruthers, costs incurred for Plaintiff's courtroom technician to run evidence and exhibit presentation software at trial, costs for service of trial subpoenas, costs of trial witness fees, and other reasonable costs to be submitted to the Court upon entry of an Order imposing sanctions; (4) imposing sanctions in the form of striking Defendants' liability defenses; (5) imposing sanctions in the form of the remaining attorney fees requested by Plaintiff following the Court's earlier imposition of sanctions against Defense counsel for improperly refusing to answer discovery; (6) enforcing the discovery and disclosure deadlines previously imposed by the Court; (7) disqualifying Jeremiah Quane, Terrence Jones, and the law firm of Quane, Jones and McColl from handling the retrial of this matter; and (8) other sanctions deemed appropriate by the Court, including reimbursement to Ada County of the jury costs associated with the trial.

Upon entry of an Order consistent with the foregoing, Plaintiff will submit an itemized statement of costs including expert costs and attorney fees for consideration by the Court.

Dated this 6th day of December 2013.

Respectfully Submitted,

BAILEY & GLASSER LLP

By 

P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2013, I served a true and correct copy of the foregoing by delivering the same to the following via U.S. Mail, postage prepaid:

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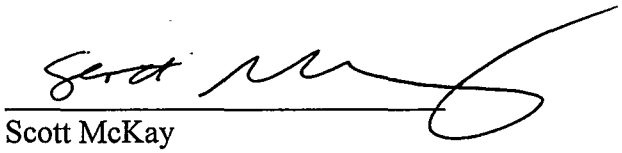

Scott McKay

Bail
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DJ

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CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

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Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 OBJECTION TO PLAINTIFF'S MOTION FOR SANCTIONS, FOR FULL ENFORCEMENT OF SANCTIONS PREVIOUSLY IMPOSED, AND FOR ENFORCEMENT OF EXISTING DISCOVERY AND DISCLOSURE DEADLINES

COMES NOW, Defendants, by and through their counsel of record, and hereby submit their objection to Plaintiff's Motion for Sanctions. To the extent this Motion

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is viewed as a substitute for a memorandum of costs under Rule 54(d), Defendant hereby objects and gives notice that it intends to oppose the Motion and will submit the appropriate opposition including copies of relevant transcripts and affidavits once Plaintiff provides timely notice of hearing for his Motion.

DATED this 23rd day of December, 2013.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2013December, 2013, I served a true and correct copy of the foregoing OBJECTION TO PLAINTIFF'S MOTION FOR SANCTIONS, FOR FULL ENFORCEMENT OF SANCTIONS PREVIOUSLY IMPOSED, AND FOR ENFORCEMENT OF EXISTING DISCOVERY AND DISCLOSURE DEADLINES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
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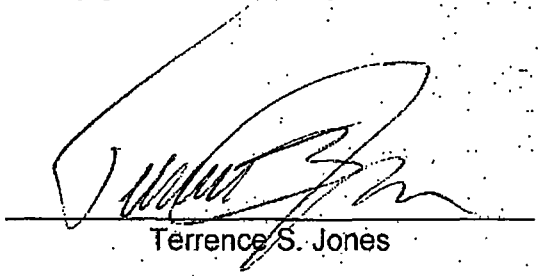
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE OF HEARING**

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Plaintiff Charles Ballard, through his attorneys, gives notice that his Motion For Sanctions, For Full Enforcement Of Sanctions Previously Imposed, And For Enforcement Of Existing Discovery And Disclosure Deadlines will be heard at 2:00 p.m. on Wednesday, February 12, 2014. Plaintiff further gives notice that he will request that the Court address setting a new trial date at this hearing.

Dated this 24th day of December, 2013.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2013, I served a true and correct copy of the foregoing by mailing the same to the following:

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Scott McKay

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' MOTION FOR LEAVE TO FILE OVER LENGTH BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS

Defendants, by and through their counsel of record, Quane Jones McColl, PLLC, pursuant to Idaho Rule of Civil Procedure 7(b)(1) and Fourth Judicial District Local Rule 8.1, hereby move this Court for an Order granting leave to file an over length brief in Memorandum in Opposition to Plaintiff's Motion for Sanctions, in excess of the 25-page

limitation set forth in Local Rule 8.1. Defendants' Memorandum in Opposition to Plaintiff's Motion for Sanctions is 37 pages in length inclusive of the caption page and Certificate of Service.

This Motion is brought in good faith and on the grounds that the 25-page limitation set forth in the local rule is insufficient to allow Defendants to respond to the numerous issues raised and/or omitted from Plaintiff's moving papers which seek substantial sanctions which, if granted, would severely prejudice the defense. References to deposition testimony and discovery documents are being provided within the body of the brief for the convenience of the Court and counsel, in addition to the actual excerpts which are being attached to the Affidavit of Counsel filed concurrently in opposition to Plaintiff's Motion for Sanctions.

For these reasons, Defendants respectfully requests that the Court grant this Motion and permit it to file an over length brief as requested herein.

Defendants do not request oral argument on this Motion, and leaves the determination as to the necessity of oral argument on this Motion to the sound discretion of the Court.

A proposed Order granting this Motion for Leave to File Over length Brief is attached hereto.

DATED this 5th day of February, 2014.

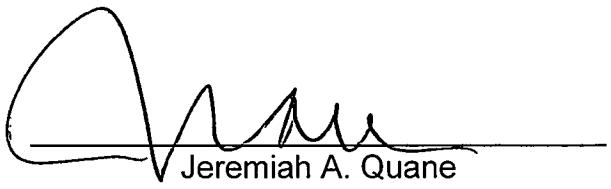
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2014, I served a true and correct copy of the foregoing DEFENDANTS' MOTION FOR LEAVE TO FILE OVERLENGTH BRIEF IN RESPONSE TO DEFENDANT APV'S MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709 [X] Email
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896 [X] Email



Jeremiah A. Quane

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 AFFIDAVIT OF COUNSEL IN SUPPORT OF MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

STATE OF IDAHO)
: ss.
County of Ada)

Jeremiah A. Quane, having been first duly sworn upon oath, deposes and says:

1). I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2). Attached hereto as **Exhibit A** are true and correct copy of portions of the transcript of the Court's hearing of November 14, 2013.

3). Attached hereto as **Exhibit B** is a true and correct copy of the Court's Amended Scheduling Order.

4). Attached hereto as **Exhibit C** is a true and correct copy of the November 14, 2013 transcript of the testimony of Dr. Stiller.

5). Attached hereto as **Exhibit D** are true and correct copies of portions of the November 5, 2013 hearing transcript.

6). Attached hereto as **Exhibit E** are true and correct copies of portions of the November 8, 2013 hearing transcript.

7). Attached hereto as **Exhibit F** is the email of Terrence Jones to Mr. Haddad dated October 1, 2013.

8). Attached hereto as **Exhibit G** is Certification of Defense counsel.

9). Attached hereto as **Exhibit H** is Defendants' exhibit list.

10). Attached hereto is Defendants Exhibit AA.

11). Attached hereto is Defendants Exhibits U, W and X.

12). Attached hereto as **Exhibit I** is a true and correct copy of portions of the deposition of Dean E. Sorensen, M.D. dated August 21, 2013.

FURTHER your Affiant saith not.

Jeremiah A. Quane

SUBSCRIBED AND SWORN to before me this 5th day of February, 2014.

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709 [X] Email
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896 [X] Email

Jeremiah A. Quane

EXHIBIT A

District Court of the Fourth Judicial District

in and for the County of Ada

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Held on November 14, 2013, before

Deborah A. Bail, District Court Judge,

sitting with a jury.

Reported by
Roxanne K. Patchell, RPR, CSR
Idaho CSR No. 733
California CSR No. 12057

Q. Did the standard of practice require Dr. Kerr to have any of his employees certified in any fashion in order for them to be able to clean, sterilize, and disinfect his reusable medical equipment?

A. I don't believe there is any certification for that.

Q. Now, you likened cleaning, disinfecting, and sterilization to the use of the dishwasher at home. When you were in the military in the Air Force, did you have to perform sterilization in a field setting?

A. When I was at Mountain Home, I was on the -- I was deployable, which means -- and it was right after 9/11, so obviously, they geared us all up to ship. And Mountain Home, at that point in time, was a base where the whole base could up and move and you would have a whole fighting team because we had the bombers and everything. So as the surgeon, yeah. They sent me to all kinds of training to do that.

I had to do something called C4, which is combat, casualty, and something training. And during that we had to set up a tent and we had to set up an autoclave as well. Did I run the

autoclave myself? Did I do the cleaning? No. Again, I had scrub techs there, but I was in the process of -- I was with the process of setting up the operating room and having that all available for us while we were there. It was actually the same equipment we would deploy with.

Q. And this was out in a field setting, not inside a building somewhere?

A. It was in a tent.

Q. And you were able to reach sterility?

A. As best as we can in a tent, yes.

Q. During Dr. Kerr's examination by the plaintiff, he was asked about a manual that exists for the Vaser machine?

A. Okay.

Q. A sound surgical technology manual. Have you had an opportunity to see that manual?

A. I have.

MR. HADDAD: Your Honor, this was not provided to him prior to his deposition. We've had no supplementation on any opinions regarding the significance or lack of significance of the Vaser manual. It was produced in discovery by the defendants long ago. It was available. They didn't provide it to him.

MR. JONES: Your Honor, this is consistent with his disclosure, which predated --

THE COURT: Which I've read.

MR. JONES: -- a deposition.

THE COURT: All right. Well, I'm going to allow him to respond to the question. The objection is overruled.

BY MR. JONES:

Q. I'd asked you if you had occasion to see that document.

A. I have.

MR. JONES: All right. And I don't remember which exhibit that was of yours, counsel.

Could I have the overhead? If the witness could be handed Exhibit 48.

BY MR. JONES:

Q. Now, there were two sections that were discussed with Dr. Kerr. One had to do with the fragmentation hand piece and the other had to do with the Vaser System Ventex Control Users guide.

And for ease of use so you don't have to dig through there and find it, I'm going to put them up on the overhead. One is page 8 of 14. And if I remember the instructions the judge gave me, if I zoom in, it will get better. And it

does.

The other page that talks about cleaning and sterilization, you've seen both pages; haven't you not?

A. I have.

Q. All right. Now, the representation was made in questioning of Dr. Kerr that this manual in that second, I guess, it would be the third paragraph in the first sentence as well up at the top where it says, "This section described cleaning procedures and sterilization procedures and must be used to ensure clean systems." Do you see that?

A. I do.

Q. And then you go down to the fourth paragraph where it says, "Follow the cleaning procedures and guidelines recommended by your institution. The following are guidelines that may be used in conjunction with your institution's procedures and guidelines." Did I read that correctly?

A. I believe so.

Q. All right. Now, my question to you regarding these two documents, which are identical, is simply this: Based on your

understanding of the standard of healthcare practice applicable to Dr. Kerr in Boise in 2010, was he required to clean, disinfect, and sterilize his reusable surgical equipment as is discussed on this overhead document?

A. Well, he did on the second portion, not the first portion. And that being said, we've already discussed there is no magical wash, so he did follow within the standard of care.

Q. Okay.

A. Or standard of practice, excuse me.

Q. Thank you. That's all I have for that document.

Now, during the surgery -- get us back to our timeline here on July 21, 2010. I want you to assume that Dr. Kerr utilized reusable medical equipment during the liposuction and fat transfer which had been cleaned, disinfected, and sterilized as he described in his deposition as we've discussed here today. All right?

A. Okay.

Q. All right. Now, with that assumption, you are aware of the autopsy findings in this case that observe the presence of gram negative bacteria; are you not?

A. I am.

Q. All right. And the jury already has some idea of gram negative bacteria, but just so they know you know, can you just, in a nutshell, tell us what gram negative bacteria are.

A. So again we talk about two different types of staining for bacteria, negative and positive. Gram negative bacteria are a class of organisms that can be both aerobic and anaerobic. Anaerobic means can't use -- it will die in the presence of oxygen. Aerobic means it has to have oxygen.

So when you talk about a gram negative rod, it could be E coli or bacteroides or it could be pseudomonas so that is basically what you talk about with gram negatives.

Q. So there are different types?

A. There are.

Q. All right. Is there a more common type of gram negative bacteria that you are aware of?

A. The most common types, at least on humans, in humans would be E coli's and bacteroides.

Q. And the jury has heard that they live in the intestinal track.

A. Correct.

Q. All right. Are bacteria capable, in your opinion, Doctor, from being killed or eliminated from reusable surgical equipment?

A. That's the whole point of sterilization, yes.

Q. Is that the whole point of the autoclave?

A. That is the whole point of the autoclave.

Q. All right. And I have this question for you, Doctor: Is the presence of gram negative bacteria being found at the autopsy of Krystal Ballard at her buttock, is that proof to you that Dr. Kerr did anything wrong?

A. No.

Q. Explain your answer, please.

A. Gram negative rods or gram negative bacteria can come at any point in time. It's in your stool. If she wiped herself in the wrong way and put her hand on her buttock, it can go into the wound. So it isn't directly applicable to the surgical therapy.

Q. Now, Dr. Sorensen has rendered the opinion that he believes the patient became

infected with gram negative bacteria as a result of contaminated reusable surgical instruments from Dr. Kerr's office being used on Krystal Ballard. You are aware of that?

A. I am.

Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?

A. I do have an opinion.

Q. What is your opinion?

A. That that is incorrect.

Q. What is your opinion based on?

A. In order -- well, there's multiple different ways of looking at it.

As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned as long as the machine basically said that it was adequate time. All the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay.

Spore counts don't matter. It's a gram negative; okay. When you look at the process of liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria (phonetic) or from one of his

equipment, I don't see how it can happen.

Let alone the fact of -- that no pertinent or persistent infections in the office. There is no history of the fact that --

MR. HADDAD: Your Honor.

THE COURT: Sustained, and we'll address it.

MR. HADDAD: Thank you.

THE COURT: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.

(Jury Leaves.)

THE COURT: Is there some reason why you did not tell your witness about the order in limine?

THE WITNESS: He did; I apologize.

THE COURT: Well, that may not be sufficient.

MR. HADDAD: Well, Your Honor, at this time we are obligated, based upon the discussion with the Court earlier and the clear mandate by this Court on this very issue, not on other issues, this very issue, that if the issue of persistent history of infections or lack of infections came into this trial, that the Court would grant a mistrial and award attorneys' fees, costs, and expenses to the party that violated that order.

This is a clear violation of that order.

Based upon the activities in this trial, I am suspect as to the serendipity of that statement being made in the presence of this jury by this witness, but we move for a mistrial at this point in time, Your Honor, and ask you to enforce your admonition to these parties as you made earlier and on numerous occasions.

MR. JONES: Your Honor, first of all, I did make that discussion on more than one occasion with this particular witness. So to the extent it came out, I'll take responsibility for it; he's my witness. But the discussion was had and was had more than once.

I would like to see exactly what the witness said so I can better comment on it to the judge on the issue of grounds for a mistrial. I do know that when this judge -- when Your Honor talked about this initially, the issue of costs and attorney fees and granting a mistrial was in response to bringing up the issue of whether the patient was going to remarry.

Now, I know there was subsequent discussions about the issue of other infections, and I don't believe what this witness just

testified to and what he said --

THE COURT: I said there was not to be any reference to any other infections.

I don't see I have any choice but to grant a mistrial. And I will address the costs and attorney fees later, but it seems to me that this was something I addressed specifically. I said, "take it up outside the presence of the jury."

This is a serious violation of the Court's prior order, and I don't see the Court has any choice but to grant counsel's request for a mistrial.

MR. KERR: Your Honor, can I --

MR. JONES: No. No.

THE COURT: We'll recess. I'll see you all at 1:30.

(Court in recess.)

THE COURT: I have reviewed extensively all of the orders and arguments in limine that we had the first day of the trial. And I specifically reviewed the testimony relating to the absence of other infections.

I discussed in general terms the general rule that the absence of other accidents

is not generally admissible to prove the absence of negligence in a particular case. There are exceptions, and those exceptions require a foundation of a significant nature to establish why the evidence would be relevant and admissible in a particular case.

As our discussion on that issue continued, I was advised by plaintiff's counsel that they had not been provided the underlying data that went into the summary that there had, in fact, been no other infections. The failure to provide the data, which would support the conclusion, then played directly into my decision to grant the order in limine with respect to the absence of other infections as being not permissible and to direct counsel not to address that unless we had a discussion outside the presence of the jury and a foundation was laid.

But it was particularly of concern to me that the underlying records had not been provided to the plaintiffs so that the plaintiffs could independently verify whether that was a conclusion which could be drawn from the records. So there were a number of -- there were a number of problems that were flagged that were discussed

by counsel on the first day of trial.

And at approximately 2:40 in the afternoon on the first day of trial, I said I'm granting an order in limine and I will not allow evidence of absence of other infections. And I expressly outlined the normal procedure to follow when counsel wants that revisited, which is draw my attention outside the presence of the jury and we would discuss it. But it was particularly critical because of the failure to disclose the underlying data.

I am therefore declaring a mistrial in this case, and I will award expert witness's cost to be paid to the plaintiff prior to the retrial.

And I will ask counsel that you take a look at your calendars and see when you would next be available. I know you will have to meet with various witnesses and consult with them so we can have -- so that we can proceed.

MR. HADDAD: Your Honor, are you only awarding expert witness costs?

THE COURT: I'm awarding expert witness fees. I'm reserving the issue on attorney fees. I'm not denying it. I said that it was something that I would consider if my orders in limine were

District Court of the Fourth Judicial District

in and for the County of Ada

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Held on November 14, 2013, before

Deborah A. Bail, District Court Judge,

sitting with a jury.

Reported by
Roxanne K. Patchell, RPR, CSR
Idaho CSR No. 733
California CSR No. 12057

Page 21

A. Correct.
Q. All right. Are bacteria capable, in your opinion, Doctor, from being killed or eliminated from reusable surgical equipment?
A. That's the whole point of sterilization, yes.
Q. Is that the whole point of the autoclave?
A. That is the whole point of the autoclave.
Q. All right. And I have this question for you, Doctor: Is the presence of gram negative bacteria being found at the autopsy of Krystal Ballard at her buttock, is that proof to you that Dr. Kerr did anything wrong?
A. No.
Q. Explain your answer, please.
A. Gram negative rods or gram negative bacteria can come at any point in time. It's in your stool. If she wiped herself in the wrong way and put her hand on her buttock, it can go into the wound. So it isn't directly applicable to the surgical therapy.
Q. Now, Dr. Sorensen has rendered the opinion that he believes the patient became

Page 22

infected with gram negative bacteria as a result of contaminated reusable surgical instruments from Dr. Kerr's office being used on Krystal Ballard. You are aware of that?
A. I am.

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Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?
A. I do have an opinion.
Q. What is your opinion?
A. That that is incorrect.
Q. What is your opinion based on?
A. In order -- well, there's multiple different ways of looking at it.
As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned as long as the machine basically said that it was adequate time. All the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay.
Spore counts don't matter. It's a gram negative; okay. When you look at the process of liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria (phonetic) or from one of his

Page 24

equipment, I don't see how it can happen.
Let alone the fact of -- that no pertinent or persistent infections in the office. There is no history of the fact that --
MR. HADDAD: Your Honor.
THE COURT: Sustained, and we'll address it.
MR. HADDAD: Thank you.
THE COURT: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.
(Jury Leaves.)
THE COURT: Is there some reason why you did not tell your witness about the order in limine?
THE WITNESS: He did; I apologize.
THE COURT: Well, that may not be sufficient.
MR. HADDAD: Well, Your Honor, at this time we are obligated, based upon the discussion with the Court earlier and the clear mandate by this Court on this very issue, not on other issues, this very issue, that if the issue of persistent history of infections or lack of infections came into this trial, that the Court would grant a mistrial and award attorneys' fees, costs, and expenses to the party that violated that order.

EXHIBIT B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV-OC-2012-04792

AMENDED
NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS

This case is set for Jury Trial to commence on the **Tuesday, November 5, 2013 at 09:30 AM** and continue for ten (10) days. *No trial proceedings will be held on Mondays, because it is the Court's criminal calendar day.*

IT IS HEREBY FURTHER ORDERED:

1. All pretrial motions, with the exception of Motions in Limine, shall be heard and completed at least twenty-eight (28) days before the trial date. *A Judge's copy of all motions and memoranda in support thereof should be filed directly with chambers. *Motions in Limine must be filed not later than two (2) weeks prior to trial. No Motions filed after that time will be considered. Motions in Limine shall be heard on the morning of trial, unless otherwise scheduled by the Court.*

a. The last day to file written discovery. (Interrogatories and request for production of documents) shall be no later than ninety (90) days prior to trial.

b. The plaintiff shall disclose all expert witnesses to be used at trial by no later than one hundred eighty (180) days prior to trial.

c. The defendants shall disclose all expert witnesses to be used at trial by no later than one hundred twenty (120) days prior to trial.

d. The last day for the taking of any discovery depositions shall be no later than sixty (60) days prior to trial.

e. The last day to file amendments to join any additional parties shall be no later than one hundred eighty (180) days prior to trial.

f. **MOTIONS FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINETY (90) DAYS PRIOR TO TRIAL.

**NO HEARING ON ANY SUMMARY JUDGMENT WILL BE PERMITTED IN THE SEVENTY-FIVE (75) DAY PERIOD PRIOR TO TRIAL, REGARDLESS OF WHEN THE MOTION IS FILED.

**IT IS ADVISABLE TO SCHEDULE YOUR MOTION FOR HEARING AS SOON AS FEASIBLE.

**ALL WITNESSES ARE TO BE IDENTIFIED BY NAME AND ADDRESS.

2. Not later than fourteen (14) days before the trial date, counsel for all parties to the action shall hold a conference for exchange of information and discussion of matters specified by I.R.C.P. 16(a) and 16(b).

3. Not later than seven (7) days before trial: (a) each attorney shall certify to the Court in writing that such Exchange of Information Conference has taken place and furnish with such certification a list of the names of persons disclosed as possible witnesses pursuant to Rule 16(a)(4), and a descriptive list of all exhibits proposed to be offered in evidence, reciting which exhibits counsel have agreed may be received in evidence without objection and those to which no objection will be made on grounds other than irrelevancy or immateriality; or (b) in lieu thereof, all counsel may join in submitting a written stipulation in conformance with Rule 16(b).

4. Any objection to the date of this trial must be made by any party within fifteen (15) days from the date of this notice.

5. All exhibit lists must be submitted to the Court five (5) days prior to trial.

6. All requested jury instructions must be submitted to the Court, *both hard copy and e-mailed to* lsimsdouglas@adawcb.net fourteen (14) days prior to trial.

7. This Order shall control the subsequent course of the action unless modified for good cause shown to prevent manifest injustice.

8. The Court may impose appropriate sanctions for violation of this order, which may include assignment of the trial date to another case.

9. Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case if the assigned judge is unavailable. The following is a list of potential alternate judges:

Hon. G. D. Carey	Hon. James C. Morfitt
Hon. Gregory M. Culet	Justice Gerald Schroeder
Hon. Dennis Goff	Hon. Kathryn A. Sticklen
Hon. Renae Hoff	Justice Linda Copple Trout
Hon. Daniel C. Hurlbutt, Jr.	Hon. Darla Williamson
Hon. James Judd	Hon. W. H. Woodland
Hon. Duff McKee	**All Sitting Fourth District Judges**

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this notice.

DATED Monday, September 9, 2013.

DEBORAH A. BAIL

DEBORAH A. BAIL
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 10th day of September, 2013, I mailed (served) a true and correct copy of the within instrument to:

DAVID Z. NEVIN
SCOTT S. MCKAY
ATTORNEYS AT LAW
POST OFFICE BOX 2772
BOISE ID 83701-2772

JEREMIAH A. QUANE
ATTORNEY AT LAW
POST OFFICE BOX 519
BOISE ID 83701-0519

CHRISTOPHER D. RICH
Clerk of the District Court

SEAL

LINDA SIMS-DOUGLAS

By: _____
Deputy Court Clerk

EXHIBIT C

District Court of the Fourth Judicial District

in and for the County of Ada

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Held on November 14, 2013, before

Deborah A. Bail, District Court Judge,

sitting with a jury.

Reported by
Roxanne K. Patchell, RPR, CSR
Idaho CSR No. 733
California CSR No. 12057

Boise, Idaho

November 14, 2013

I think that -- frankly, I'm perturbed by the pattern in this case of pulling out exhibits and items that haven't previously been disclosed and then try to end run around the fact that when a person at a deposition is asked what's

their opinion, what's it based on, and they respond in a certain way, then I see no reason to allow information to slip in later that they did not rely on when they formed their opinion and related their opinion a very brief time ago.

I don't think that is fair or reasonable. And I'm not going to permit it.

MR. JONES: So I'm clear, Your Honor. He is certainly capable, then, of talking about the reports which he reviewed and replied upon.

THE COURT: He can talk about everything he reviewed and testified about in his deposition, and I hope he will and I hope the jury find it informative.

MR. JONES: Thank you, Your Honor.

And also, with respect to the two in limine issues, there will be an offer of proof in about the middle of this witness that will need to be made. Perhaps, we can take it up during a break.

THE COURT: That's a very good idea.

MR. JONES: I'm just letting the Court know.

THE COURT: All right. I'm very concerned that we are not using our jury time well.

MR. JONES: I'll try to move quickly this

bacteria being found at the autopsy of Krystal Ballard at her buttock, is that proof to you that Dr. Kerr did anything wrong?

A. No.

Q. Explain your answer, please.

A. Gram negative rods or gram negative bacteria can come at any point in time. It's in your stool. If she wiped herself in the wrong way and put her hand on her buttock, it can go into the wound. So it isn't directly applicable to the surgical therapy.

Q. Now, Dr. Sorensen has rendered the opinion that he believes the patient became infected with gram negative bacteria as a result

of contaminated reusable surgical instruments from Dr. Kerr's office being used on Krystal Ballard. You are aware of that?

A. I am.

Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?

A. I do have an opinion.

Q. What is your opinion?

A. That that is incorrect.

Q. What is your opinion based on?

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As far as the process of sterilization,

we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned. As long as the machine basically said that it was adequate time, all the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay.

Spore counts don't matter. It's a gram negative; okay. When you look at the process of

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liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria or from one of his equipment, I don't see how it can happen.

Let alone the fact of that no pertinent or persistent infections in the office. There is no history of the fact that --

MR. HADDAD: Your Honor.

THE COURT: Sustained, and we'll address it.

MR. HADDAD: Thank you.

THE COURT: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.

(Jury Leaves.)

THE COURT: Is there some reason why you did not tell your witness about the order in limine?

THE WITNESS: He did; I apologize.

THE COURT: Well, that may not be sufficient.

patient was going to remarry.

Now, I know there was subsequent discussions about the issue of other infections, and I don't believe what this witness just testified to and what he said --

THE COURT: I said there was not to be any reference to any other infections.

I don't see I have any choice but to grant a mistrial. And I will address the costs and attorney fees later, but it seems to me that this was something I addressed specifically. I said take it up outside the presence of the jury.

This is a serious violation of the Court's prior order, and I don't see the Court has any choice but to grant counsel's request for a mistrial.

MR. KERR: Your Honor, can I --

MR. JONES: No. No.

THE COURT: We'll recess. I'll see you all at 1:30.

(Court recessed.)

EXHIBIT D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR and SILK TOUCH LASER, LLP,

Defendants.

Case No. CV-OC-2012-4792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MOTIONS IN LIMINE

Held on November 5, 2013, before

Honorable Deborah A. Bail, District Court Judge.

Reported by
Tiffany Fisher, RPR
CSR No. 979

ORIGINAL

1

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR and SILK TOUCH LASER, LLP,

Defendants.

Case No. CV-OC-2012-4792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MOTIONS IN LIMINE

Held on November 5, 2013, before

Honorable Deborah A. Bail, District Court Judge.

Reported by
Tiffany Fisher, RPR
CSR No. 979

2

APPEARANCES

FOR THE PLAINTIFF

Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT
303 West Bannock Street
Boise, Idaho 83702

P. Gregory Haddad
BAILEY & GLASSER
209 Capitol Street
Charleston, West Virginia 25301

FOR THE DEFENSE

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, MCCOLL, PLLC
101 South Capitol Boulevard, Suite 1601
Boise, Idaho 83702

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November 5, 2013

BOISE, IDAHO

THE COURT: All right. I will take up Ballard vs. Kerr, No. 2012-4792.

Is the plaintiff ready to proceed?

MR. MCKAY: We are, Your Honor.

THE COURT: Is the defense ready to proceed?

MR. QUANE: We are, Your Honor.

THE COURT: All right. Well, I'll take up a few preliminary matters first, and then I'll explain the jury selection process. The first thing we'll take up are motions in limine filed by both plaintiff and defense.

The purpose of a motion in limine under the rules is to address some item of anticipated evidence that is so problematic that it should be addressed at the start of the trial. However, a motion in limine is actually supposed to be a somewhat rare motion, because a judge, when considering it, lacks the context of the testimony.

And, therefore, a motion in limine should only be used to address unusual matters that present issues of such an extreme nature that

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mere reference of those issues could present a problem for maintaining the same jury. For that reason, it is not appropriate to deal with -- a motion in limine is not a proper mechanism to deal with things that should be addressed by way of a regular objection or things which should have been addressed by pretrial motions of a different nature.

Reviewing your motions in limine, there are certain things that are obviously proper in the motions that have been filed before the Court.

The Court will bar all reference and grant a motion in limine with respect to references to insurance of any kind.

The Court will grant the motion in limine with respect to any collateral source information. Since that's now presented to the jury, that's presented for the Court post-verdict, and the Court makes any appropriate adjustments.

The Court will grant the motion in limine with respect to all settlement negotiations and settlement offers, since that is always improper testimony.

Those are the motions in limine that appear to me to be, on their face, clearly proper

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issues to address in limine.
I will now take up the rest of your motions. But I would like you to prioritize, at this point, and address only those items that you think are going to come up during jury selection. We'll have a longer discussion after we select the jury, but before opening statements.
Question, Counsel?
MR. QUANE: Your Honor, I didn't hear exactly about the matter of insurance you mentioned.
THE COURT: I have granted the motion in limine barring any reference to insurance, by any party, covering anything, since that is a traditionally appropriate motion.
Now, that means that I left out some that you may feel warrant immediate attention. And so I'd like to address those now, before we begin with jury selection.
Now, of course, during jury selection, I would not anticipate that there would be anything other than very cursory reference to the facts of this particular case. And I would anticipate that we would be exploring those general issues that might make a person not an

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acceptable juror.
We will have too many jurors today because there is a defect -- was a defect in the computer system. Now, I think we've asked for them to check and see how many no-shows we have. But what happened was there was a problem in the automatic draw system that meant the notices went out a bit later than they should have.
And, for that reason, the jury commissioner anticipated that there might be more than average no-shows, because there's not as much notice as we usually give. And so the jury commissioner has given us an overlarge panel. Hopefully, it won't be that overlarge. And I have said, if we get everybody, which is not too likely -- if you get everybody, I only asked for 45. I think 45 is adequate.
And so we'll probably stop at the No. 45 on your list. And that would be the number on this column.
Now, let's talk about, first from the plaintiff, those issues that you feel are so critical that you would like to address them now before we get to the jury selection. As I said, we'll take a break before you begin your openings

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so we can resolve any remaining questions.
Counsel for the plaintiff?
MR. HADDAD: Thank you, Your Honor.
Your Honor, in taking the guidance from the Court as far as its preference, you know, to the extent that there's not a lot of issues, factual issues that are addressed with the jury in the voir dire, just based on my very cursory review of our motions, it appears there wouldn't be anything necessarily substantive that the Court needs to address at this point in time, until we impanel the jury and then decide how we want to deal with those evidentiary issues.
THE COURT: All right. How about with the defense, are there issues you would like to have addressed before we begin jury selection?
MR. JONES: Thank you, Your Honor.
There are so many that are intermingled, if the plaintiffs are willing to defer, we will do the same.
THE COURT: Okay. And I will say, it is not my practice to address speaking objections. I don't think it's necessarily appropriate for motions in limine.
But when an objection is made, I do

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follow the traditional and less exciting approach that a party should simply state the objection, the grounds for objection, and then weigh it, because most of the time it's not necessary to go further than that. But if we do have to have a more likely discussion, I'll excuse the jury.
So I do not welcome very significantly speaking objections. So just state the basis, "Objection, relevance"; "objection, hearsay." And if I need more discussion, I'll ask you for it. Because I think that's always the cleanest way to go.
(Voir dire of prospective jury panel. A jury of 13 is impaneled.)
(Recess.)
THE COURT: Let's proceed.
MR. HADDAD: To lay the chronology down, Your Honor, on August 20, 2013, we took the deposition of Dr. Thomas Kaufman, the plaintiff's infectious disease expert. At that point in time -- or the defendant's infectious disease expert. I'm sorry. And I might slip every once in a while, because I do a lot of defense work.
But during the time that they brought Dr. Kaufman's litigation file, Mr. Quane had

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produced to me at that time what appeared to be simply a chart with patient names, dates of procedure, and types of procedure.

THE COURT: Right. And, generally, that's not relevant.

So what is it you're specifically concerned about?

MR. HADDAD: Well, I'm concerned because we learned, after Dr. Kaufman's deposition when I asked, "Have you seen any charts that go along with this," "no," later the plaintiffs in September, after the discovery deadline, supplemented an interrogatory where they identified that Susie Kerr will testify that she and other staff went through all of the patient charts at Silk Touch and determined that there were no other infections.

THE COURT: Well, I'm certainly not going to permit that. So let's move on to the next topic. That is obviously a proper subject in limine, and your motion is granted with respect to that. And if counsel wanted me to revisit that, they would have to bring it up outside the presence of the jury.

Because clearly the absence of other

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car accidents is not relevant. The review of other charts with -- if it were to become relevant, counsel would have to draw my attention to it outside the presence of the jury. And then we would discuss it in full. Of course, that's not generally admissible.

MR. HADDAD: The other issue that we wanted to raise, Your Honor, was a theme that has been throughout this case on the defense side, which is the alleged noncompliance of Krystal Ballard.

THE COURT: Yes. And I read your brief on that subject. And it appeared -- first, it appears to me that there would have to be specific evidence of something she was noncompliant about.

Now, it is, of course, admissible if she were noncompliant. But -- and it would be a subject of cross-examination. But to simply speculate that she might have been noncompliant raises questions in my mind.

MR. HADDAD: I appreciate that, Your Honor. But there's actually a second step in that process, which means: If she was noncompliant, was there any causation that attaches to that noncompliance?

And, I think, certainly we don't feel

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that her actions were noncompliant. But, more importantly and I think undisputedly, nobody has testified to anything in terms of deciding not to take narcotic medications, not having somebody drive her home after the procedure, not telling Charles she had a procedure or telling the Air Force, no expert, nor has Dr. Kerr, connected that with any causative effect.

THE COURT: Okay. Let's focus a bit more narrowly. Not telling her husband or the Air Force is irrelevant as to whether there was or was not negligence. So, certainly, I see no relevance in that, and I see no reason to address it, nor do I care what the Air Force procedures were with respect to what people do about seeking all of their medical attention. And I don't see that that's a problem.

But, of course, it's always relevant whether she followed the doctor's instructions about care of the wound or that area. And that's entirely admissible.

MR. HADDAD: Yeah, I would agree with that, Your Honor. But there's no testimony, at least thus far. So maybe that's something that we can address.

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But there has been no testimony. In fact, there has been contrary testimony from Dr. Kerr. And specifically he said, when he examined her in the postoperative period, there was nothing that he saw that led him to believe that she was not appropriately managing herself in terms of bandage changes and the like. It was completely absent from his testimony and absent from any other expert's testimony that has offered any opinions in this case.

So, with that caveat, understanding the Court may need to hear that testimony as it develops, I understand the Court's limitations.

THE COURT: Certainly, her care of the wound and her following of procedures that would minimize the risk of infection are, of course, relevant. But to the extent it has -- it is irrelevant to any issue of cause, I would not permit, I don't see, nor do I see any basis to permit, any evidence about whether or not she told the Air Force or whether or not she told her husband, unless counsel can explain to me why that would be relevant to an infection.

And, as far as the Air Force goes, I'm not even going to revisit that. It's not

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relevant. It's not going to be permitted.
MR. HADDAD: Your Honor, I guess maybe just as an offshoot, we moved in limine about conversations Dr. Kerr had with Krystal's aunt that, quite frankly, raised the issue of that conversation touching upon alleged noncompliance.
THE COURT: That's hearsay. So make your objection when it comes up.
MR. HADDAD: Thank you.
Your Honor, there's some issues with the experts, on the cumulative nature of them. We had raised that before the Court, thought it was premature, but did not think necessarily three experts were, on the face of it at the point in time in time when we were presenting that motion, unduly burdensome.
We had deposed all three of those experts, none of which practiced in Boise in 2010, all three of which relied upon a conversation they had with a Dr. Kelly O'Neil in order to avail themselves about the knowledge of the standard of care. To have three experts come in and simply parrot their conversations with Dr. O'Neil, we think is cumulative, especially since the individual doctor's backgrounds almost become

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irrelevant. It all focuses on what did Dr. O'Neil tell them and how did that help them understand the standard of care.
And three experts on that and regurgitating the same conversation seems to be cumulative, Your Honor.
THE COURT: All right. Your reply?
MR. JONES: Your Honor, I want to make sure I understand the Court's ruling on the issue of noncompliance.
The Court isn't saying we're not allowed to present evidence of noncompliance as it relates to issues that would have impacted medical care and treatment decisions of the healthcare providers; correct?
THE COURT: I'm saying that if it relates to why there might be an infection, you can talk about it. If it relates to whether or not she told the husband or the Air Force, that's irrelevant. I'm not going to allow you to go into that, so don't go there.
As to -- I think it is a questionable relevance whether she drove herself home from the procedure or not. But perhaps you can fill me in on why that might present a problem.

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MR. JONES: In your statement about whether or not she told her husband, it absolutely has to do with medical care and treatment because the records discuss and the testimony discusses how the patient was instructed to have someone at home to take care of her.
If she didn't even tell her husband -- in fact, the evidence will show --
THE COURT: Well, I'm granting the motion in limine with respect to that. I think I find that rather strange, Counsel, and a very peculiar argument.
MR. JONES: I'm not sure I'm understanding what the Court is saying. Peculiar that she didn't tell her husband?
THE COURT: I find this discussion peculiar.
Before you even get into it, I'm going to grant the motion in limine with respect to that. Before you get into it, if it becomes relevant on particular testimony, we can revisit it outside the presence of the jury --
MR. JONES: Very good, Your Honor.
THE COURT: -- so that I can get the benefit of hearing from the physician why or why not that would be important.

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MR. JONES: Okay. Now, with respect to the issue involving other infections, we provided the Court with information regarding the opinions of the plaintiff's own expert on the importance of other infections and how he testified in his deposition. And it's in our brief that he said that was the very best evidence; the very best evidence of whether or not someone is having problems with their sanitizing, disinfecting, sterilization procedures, is whether or not they are having issues with other infections.
And so, I guess, for the benefit of making sure --
THE COURT: But you didn't have that -- you had that work done by personnel working for the defendant, just pulling files and looking to see if they had any notations about infection.
You either limit it on time. I mean, we're talking about a risk of extremely collateral information. So refine it, and tell me what you're talking about.
Are we talking about that day?
MR. JONES: We can talk about that day. We can talk about the week before, the week after. We can talk about -- and we have data --

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THE COURT: The week after is irrelevant, so don't bother with the week after.

MR. JONES: Actually, Your Honor, the infectious disease guy will talk about how --

THE COURT: Well, he will not.

MR. JONES: Well, the week after, if you would allow him to, he would talk about how you want to look at the time period. Do you have --

THE COURT: No, you're not allowed to -- you may not go into the week after the accident.

Fill me in on the day of, the week before. Fill me in on your theory on that.

MR. JONES: Your Honor, there's two parts to it. The first is what the plaintiff's own expert said, where he said that was the best evidence to consider the infection issues.

THE COURT: Okay.

MR. JONES: And so, whether or not we would offer testimony, we should be able to at least address, through the plaintiff's own expert, issues associated with his opinion. His opinion being that the best evidence in the case is to whether or not Dr. Kerr and his clinic are doing what they're supposed to do, is to look at either the presence of or absence of infections in other

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cases. So there's that aspect of it.

THE COURT: Um-hmm.

MR. JONES: Secondly, you have, from an infectious disease standpoint, what they look at and consider for purposes of evaluating whether or not a facility has problems with their infection control. They look at infection rates and look at that data.

As far as who gathered the information, Dr. Kerr has testified in his deposition regarding his knowledge, personally, of his own infection rates. And he should be able to testify regarding his knowledge, as opposed to concerns about, for example, a non-physician looking at the charts, which I understand is one of the concerns. So there's another avenue, I guess, in terms of utilizing Dr. Kerr's testimony on that basis.

But we take the position that because of the plaintiff's own expert testimony on that issue, at the very least Dr. Kerr's knowledge of his own infection rates, that that data ought to be something that should be considered by the jury when they're being asked in this case to evaluate the sterilization procedures, cleaning procedures, things of that nature.

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THE COURT: Um-hmm. Well, I can see how if the plaintiff's expert were to testify in that fashion, then there could be some relevance to problems that day or problems in the immediate time period proceeding. But, as a general rule, one doesn't get into the absence of other accidents in establishing whether there was or was not negligence on a particular occasion.

And so it sounds to me like that, again, is probably one that we should revisit once we have an opportunity to hear the testimony. And it sounds to me that would be reasonable to revisit again.

Just draw my attention to it prior to bringing out the evidence. We'll exclude the jury, because it sounds to me that could have some relevance. In particular, that's what an expert in the field would rely on, then I think that it could be an appropriate area, provided it's limited to day of and time period immediately proceeding.

It could be relevant without leading us into too many collateral matters. But I think it would be prudent to have that discussion outside the presence of the jury, since the absence of

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other injuries, as a rule, is not viewed as relevant.

So I'll revisit that one, if you'll -- when you get ready to -- when you feel it has reached the point where it may be relevant for some purpose, just draw my attention to it. We'll excuse the jury, and we'll discuss it.

MR. JONES: So, for the purposes of opening statements, we should avoid that topic?

THE COURT: For opening statements, I would avoid it, because I think it's fair to say they followed proper practice. They did what was reasonable and required. And that's not, in their view, why anything occurred. And I think that's fair.

But to get more -- the risk of collateral evidence becomes rather high. And the fact that generally absence of other accidents is not admissible is also playing a role in my feeling that the preferred practice would be to just draw my attention to it, we'll have an extensive discussion outside the presence of the jury, and I'll revisit it. Because then I'll have the benefit of hearing the testimony that may have made it both relevant and admissible.

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MR. HADDAD: Your Honor, I understand your directive. I just want to make sure that the Court understands that part of the dilemma that even revisiting that has is: We've never been supplied the information upon which, allegedly, there was no other infections, other than anecdotally by the defendants.

THE COURT: You were never given access to all of the other records that show there was no infection?

MR. HADDAD: I'm sorry, Your Honor?

THE COURT: Are you telling me you were never given that --

MR. HADDAD: No. We asked for it. As soon as they supplemented with the interrogatory answer, we asked the defendants, "We need the records that went into the summary so we can analyze that." They did not respond to that.

We then re-noticed Mrs. Kerr, because she was a 30(b)6, and said, "Bring those records with her." They told us we were untimely and refused to produce them.

THE COURT: All right. Well, in that case, I will definitely bar this in limine. And I will not revisit it, until we have a discussion outside

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the presence of the jury. And do not refer to it during opening statements. And we'll revisit it in its entirety, should the necessity arise.

But the lack of disclosure of data underlying the summary presents a separate and considerably more serious problem.

MR. JONES: I'll reserve my response on that issue, because there are more --

THE COURT: Yeah, I'll let you respond more fully on that.

MR. JONES: Yeah. Moving on, Your Honor, to the defense motions in limine.

THE COURT: Yes, and I think I granted some of those. So let me pull my notes up.

I granted your motion about whether complaints have been filed against any of your treating physicians. Complaints aren't evidence. So in your Motion in Limine No. 1, that's -- your motion is granted.

With respect to Motion in Limine No. 2, your position is correct. Your motion in limine is granted.

Your position with respect to Motion in Limine No. 3 is well taken. Your motion is granted.

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Your position on Motion in Limine No. 4 is correct. Your motion in limine is granted.

Your -- I don't see a motion in limine level of problem with respect to No. 5.

And, in general, with respect to your Motion in Limine No. 6, neither side is usually permitted to argue the societal broad impacts of a particular decision in a particular case, as opposed to focusing on the case itself and the facts of the case.

So I didn't quite -- your No. 5, I suppose that it could be relevant that they had a friendly relationship with counsel, defense counsel. I suppose that would be fair. I have a hunch they have an answer for that. I don't think that rises to the level of an in limine concern.

MR. JONES: I understand. Thank you, Your Honor.

THE COURT: Was there anything else on that? I think I pretty much granted your motions.

What else?

MR. JONES: You did, Your Honor. I want to digress only to the motion regarding cumulative nature of the testimony.

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I don't know if I need to respond, given the Court's comments. We did argue this on July 10th. And I believe our testimony -- or the argument that I made at that point would again apply. I think the judge can take this up witness by witness, topic by topic.

THE COURT: I think I will take it up when it arises. I don't think it would be appropriate to allow extensive cumulative testimony. And it taxes a jury a great deal. And when they tend to resent that, it doesn't benefit either party.

But I think it's something that should be addressed with an objection made and after we've gotten into the testimony. And I don't think I can rule on it in any sensible fashion by way of an in limine motion.

I am not troubled by the fact that maybe more than one physician would have to talk to the same person to identify what the local standard of care is. And I don't think, in and of itself, that makes the testimony improperly cumulative.

So I'm deferring any ruling on cumulative testimony, until it appears to me that there is cumulative testimony. And then I will

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welcome an objection by either side, if the testimony has become unduly cumulative.

MR. JONES: Thank you, Your Honor.

THE COURT: Okay. Now, what exhibits? You have stipulated to some?

MR. MCKAY: We have. Before we get into that, Your Honor, would it be possible to raise one issue with respect to the defense motions in limine? And that is --

THE COURT: Yes, one issue is fine.

MR. MCKAY: Okay. And that's the second part of their motion dealing with instances where defense experts have previously been sued.

And this is an issue that we just recently discovered. And it concerns one of their standard of care experts, Dr. Lawrence, the fellow who was also criminally indicted.

Dr. Lawrence testified at his deposition, he was asked how many times has he been named as a defendant. And testifies to two instances where he had been named, one where he was named among a bunch of other physicians where he was acting as the --

THE COURT: Who asked the question, you did?

MR. MCKAY: It was Mr. Haddad.

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THE COURT: Okay.

MR. MCKAY: And the second case was part of his obstetrical practice. And it was some time ago. And he indicated the hospital was sued, the hospital settled, and then he was dismissed out of it.

What he didn't mention was that there was a current suit where he is named.

THE COURT: And what would be the relevance of this, Counsel?

MR. MCKAY: That he testified at his deposition that he had only been sued twice, when, in fact, he has an ongoing lawsuit where he has just recently given a deposition. It's not some matter that he --

THE COURT: Well, the question, "Have you ever been sued," to me, is not a proper question, anyway. Because when you're talking about somebody suing someone, you're saying their opinion is that somebody else did something that's negligent. That's hearsay. You're not going to bring in this out-of-court declarant to say, "This is my basis." Plus, it gets you into collateral trial, and it's not a permissible question.

Now, it's an acceptable deposition

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question. And so I think that would certainly be in the range of things that a person might normally inquire in a deposition. But it's not a relevant trial question.

MR. MCKAY: We would not ask the question. We would not revisit the issue with him to suggest that because he had been sued this third time, that it somehow suggests that he's not qualified to render an opinion on the standard of care.

The issue is more that he didn't tell the truth at the deposition when he was asked about it, and asked very, very clearly about it.

THE COURT: Well, I'm not going to permit it. I don't think it's permissible. It's somebody else's opinion about whether he did or did not do something that was negligent. It involves collateral matters. And it's not admissible impeachment.

MR. MCKAY: Okay. All right. And you have ruled also that the information that we have about Dr. O'Neil's various disciplinary matters in this state and in California --

THE COURT: That's correct.

MR. MCKAY: -- is not admissible?

THE COURT: That's correct.

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MR. MCKAY: All right. Thank you.

(Opening arguments of counsel.)

(The proceedings adjourned.)

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EXHIBIT E

District Court of the Fourth Judicial District

in and for the County of Ada

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Held on November 8, 2013, before

Deborah A. Bail, District Court Judge,

sitting with a jury.

Reported by
Roxanne K. Patchell, RPR, CSR
Idaho CSR No. 733
California CSR No. 12057

MR. McKAY: I haven't moved the admission of 38.

MR. QUANE: Oh.

THE COURT: Actually, you did. You did move 38.

MR. McKAY: I'm sorry. I did and I intended to move it. I'm sorry. I misspoke.

THE COURT: All right. Now, you had other issues to bring up.

MR. McKAY: Right. Our first witness this morning is an economist. We have moved in limine to forbid opposing counsel from inquiring, speculating about the possibility that Mr. Ballard might someday remarry.

THE COURT: Yes.

MR. McKAY: And we don't think that is an appropriate subject of examination, and we wanted to cover that with the Court to the extent defense counsel is intending to do that. And I'll present further argument on that.

THE COURT: Well, it's not necessary to present further argument on it. Both sides very thoroughly briefed the issue. And rather than relying on a 1982 Michigan case, I'm going to rely on the 1991 Idaho case, Westfall versus

Caterpillar, Incorporated. 120 Idaho 918, 821 P2d 973(1991). The case that sets forth the law in Idaho.

I informally polled my colleagues to see if anybody had been tempted to stray by existing Idaho law. And it was advised that none had been tempted nor had done so. So I am going to hold to existing Idaho precedent Westfall versus Caterpillar, Incorporated.

I will grant the motion in limine and under no circumstances whatsoever can a party refer to any possibility of remarriage nor to anything of that sort. There will be no evidence allowed of any potential remarriage by Mr. Ballard, period.

MR. JONES: Your Honor, may I make a point on the record for that?

THE COURT: Well, you already did in your motion. You did a very thorough job in your briefing. So you are preserved in terms of your objection.

MR. JONES: Very well, Your Honor, just so the record is clear that we disagree respectfully.

THE COURT: And I think it's quite clear and I thought it was a very thorough job, but I am

sticking with Idaho precedent. It's clear. It's established. And it has some solid reasoning that still appears to be good solid reasoning, but whether it was solid reasoning or not, which it happens to be in this case, I would still be bound to follow it because it is existing Idaho law. I'm the trial judge. That's my obligation.

MR. QUANE: Could I have one point of clarification, Your Honor?

THE COURT: Yes.

MR. QUANE: Does it -- does the prohibition apply only to remarriage or divorce? What -- I need to know exactly what the prohibition relates to and I don't understand that yet.

MR. McKAY: Is counsel suggesting that he would argue or question the economist about this couple getting a divorce?

THE COURT: Well, it's not -- I'm barring that. There will be no evidence. There will be no question. There will be no discussion of that. And if I have to grant a mistrial, I'm granting all witness costs and all attorney fees costs against anybody who causes it.

MR. QUANE: Well, all I need to know, judge, is what does the prohibition apply specifically

to. That's all I'm asking. Remarriage?

THE COURT: And any -- it covers remarriage, and it covers all the speculation about all of the change, any change as a result of the death. Because the reasoning behind Idaho law is what the plaintiffs had a right to expect to receive from the party during their life and that is a loss for which they are to be compensated. What they get after the death of a person who has been taken, does not enter into the case.

So the law spoke of the taking away of that which they would have received had the person lived, the destruction of their expectations in that regard. And that is what the law bars that -- appears that Idaho also follows a majority rule with respect to this.

MR. QUANE: Now, I'm just trying to understand what the prohibition is so I don't invade it. I have to know what it is. Would it prohibit, for instance, the loss of his position in the Air Force as a possibility that would affect the economic analysis?

First, what if the Air Force downsized?

THE COURT: All right. That is undue speculation. I won't permit it. I think that

unduly speculative. You largely look at the circumstances and expectations as of the date of death. And all the -- and I don't think there's any purpose in asking the jury to speculate about all the things that are simply possible for anybody to know about. There is always an element of uncertainty in certain kinds of damages for wrong death, but it is the loss of the companionship and support that they are talking about.

So, I don't think that speculating about Mr. Ballard might find his position downsized is relevant. I don't think that would be an appropriate area of inquiry.

MR. QUANE: What about -- what about -- the economist will say, according to him, Mr. Ballard had a life expectancy of so many years.

THE COURT: Right.

MR. QUANE: Well, does that take into account, for instance, if he dies within 20 years, as an element that would be contrary to the assumption he would live 20 more years? The questions like that on cross-examination?

THE COURT: Just a moment.

MR. McKAY: Your Honor, if I may respond?

THE COURT: I don't need you to respond. I don't see speculating what a third party might do like whether the Air Force will or will not downsize is worth consuming jury time because I think that is undue speculation.

And there will not be anyone on the planet who could truthfully answer the question about whether the Air Force will or will not downsize. But it is proper -- it is proper for you to discuss his occupation, health habits, and other activities. And so it is proper to discuss things like -- it would be proper to discuss those things that relate to his health habits and other activities which would mean that the standard mortality table would have to be adjusted in his particular case. That is a fair area of inquiry.

Now, as far as speculating about whether the Air Force might downsize, I think that is unduly speculative. On the other hand, there are already existing requirements about standards that people have to meet, what are existing factors that play into whether a person can make their full career in the military.

And to the extent that it relates to what exists now, and affects a person's ability to

stay in their full career, then occupation, health habits, and other activities are permissible areas to inquire into.

MR. QUANE: Just for clarification, I anticipate, having been through this many times, that the economic expert will say these are his economic losses based on the assumption he will continue to be in the military service for a designated period of time and he will live that long. He is assuming that for the purpose of his calculations.

What I have done in the past and been permitted to do is say, "Well, you don't take into account the variables that what you are assuming may not come to pass." Because it's his assumption.

THE COURT: All right. It is his assumption. And there are existing variables that play a role into whether a person can make a full career in the military.

Now, I'm not as familiar as -- and I'm generally familiar with the fact that there are existing requirements that play into whether you can keep going on in the military. But I just don't I think to speculate about whether or not

there might be a downsizing in the future, would need to be more finely -- would have to be a more refined condition.

MR. QUANE: Well, I'm not asking him to speculate on that. I'm just saying, "Does your assumption take into account the assumption that he will always be in the military for the length of time you project for your economic losses?"

THE COURT: Right.

MR. QUANE: And he will probably say, "Statistically yes, but not as it pertains to Mr. Ballard."

THE COURT: Right. It's fair to inquire about his occupation, health habits, and other activities that will play a direct role in his life expectancy. That is fair to inquire into. But as to remarriage, you can --

MR. QUANE: I understand the remarriage. There is no doubt about that. That was the motion in limine was remarriage.

THE COURT: Right.

MR. QUANE: I understand that perfectly. I won't mention that ever.

THE COURT: Okay. And I don't think the other area outside that approach is in limine, the

approach is in limine level. So if counsel does have an objection, they need to make the objection.

MR. QUANE: Okay. Fine.

THE COURT: That does -- I am saying I do think that to speculate what a third party would do -- to speculate what congress would do about military funding is such an endless guessing game.

MR. QUANE: I'm not going to ask him to speculate. I'm just going to say, "You assume this --

THE COURT: Right.

MR. QUANE: -- per your calculation. Have you taken account other reasons why your calculation may be erroneous?"

THE COURT: Sure. That is fair.

MR. QUANE: That kind of approach is all I am saying.

THE COURT: That's all right, and council can make an objection if they think it's over -- but I don't think that approaches an in limine level where the remarriage issue is settled in Idaho.

All right. Well, hopefully (name redacted) -- I will tell you that (name redacted)

In The District Court of the Fourth Judicial District

In and for the County of Ada

CHARLES BALLARD,

Plaintiff,

Vs.

BRIAN CALDER KERR, M.D., et al,

Defendant.

Case No. CVOC-12-4792

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

(Testimony of Dr. Dean Sorensen)

Held on November 8, 2013 before Deborah A. Bail, district court judge.

For the Plaintiff: Gregory Haddad
BAILEY & GLASSER
2855 Cranberry Square
Morgantown, WV 26508

Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT
303 W. Bannock
Boise, ID 83702

For the Defendant: Jeremiah Quane
Terrence S. Jones
QUANE JONES MCCOLL
101 South Capitol Boulevard
Boise, Idaho 83701

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MR. QUANE: It isn't malpractice?
THE COURT: He said if everything were perfect.
MR. QUANE: It wouldn't be malpractice?
THE COURT: Yes.
MR. QUANE: Okay. If he said that, that's what I'm asking him.
THE COURT: That's what he said.
MR. QUANE: And that was part of my question.
MR. HADDAD: Objection.
Q. BY MR. QUANE: You agree?
A. Yes.
Q. Does all surgery to some extent or another relate -- result in an inflammatory response? Let me shoot out ophthalmology surgery.
A. I think any time you cut the body, there's an inflammatory response.
Q. Isn't it true that just because there's bacteria present in an area, that doesn't mean the patient is infected?
MR. HADDAD: Objection, asked and answered.
MR. QUANE: I haven't asked that one.
THE COURT: Sustained. You have covered this topic, Counsel.

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MR. QUANE: Pardon?
THE COURT: You have covered this topic.
MR. QUANE: I asked that question?
THE COURT: Yes, you have.
MR. QUANE: Oh, okay. I didn't think I had.
Q. BY MR. QUANE: Is -- let me ask you this: Do you subscribe to the view that under the best of circumstances and the highest degree of quality of care in performing surgery that infections can occur?
MR. HADDAD: Objection, asked and answered.
MR. QUANE: He hasn't answered that -- the way I worded that.
THE WITNESS: Yes.
THE COURT: I'm going to let the answer stand. I do think you covered this multiple times.
MR. QUANE: Well, I talked about equipment before.
THE COURT: All right.
Q. BY MR. QUANE: And when you gave your opinion, Doctor, isn't it true that you were assuming that bacteria did enter her body during Dr. Kerr's proceeding?
A. Yes.

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Q. And you're assuming that, aren't you?
A. Yes.
Q. And it's an assumption on your part?
A. Yes.
Q. In your opinion is an assumption tantamount to conjecture?
A. I have no -- I don't know how to discriminate between those two words.
Q. They mean the same, don't they?
A. I don't know, Counselor.
THE COURT: Counsel, I think that's unduly argumentative. Please ask your next question.
Q. BY MR. QUANE: Isn't it true, Doctor, in your opinion that there's no proof by any means of the fact at the time of the surgery by Kerr that these gram negative bacteria went into her body, is there?
A. No.
Q. Not a dime's worth of proof, is there?
MR. HADDAD: Objection, argumentative, asked and answered.
THE COURT: Sustained.
Q. BY MR. QUANE: But you agree that's your opinion?
MR. QUANE: Objection, asked and answered.

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THE COURT: Sustain the objection. It has been asked and answered.
MR. QUANE: Oh, okay.
Q. BY MR. QUANE: You would agree, would you not, that Dr. Kerr is in a better position than you to know more about Crystal Ballard and what he did than you do?
MR. HADDAD: Objection, goes to the weight, Your Honor.
THE COURT: Overruled.
MR. QUANE: I did not hear the answer because of that. I did not hear it, Judge, because he interrupted.
THE COURT: All right. You can state your answer again.
THE WITNESS: Counselor, he has to know more than I do about his own patient.
Q. BY MR. QUANE: Right. Does the term in medicine prophylaxis have a meaning?
A. Yes.
Q. What does it mean?
A. It means preventative.
Q. Does the term etiology in medicine have a meaning?
A. Yes.

EXHIBIT F

Terry Jones

From: Terry Jones
Sent: Tuesday, October 01, 2013 12:45 PM
To: Philip G. Haddad; 'smckay@nbmlaw.com'
Cc: Corina Ferris
Subject: RE: Ballard v. Kerr

Greg:

I have been out of state on other matters. I see you sent out a notice of depo for Ms. Kerr for tomorrow. In addition to your notice being untimely, please be advised she will not be attending. Neither the witness nor Jerry are available in addition to which this witness has already been deposed and we object to producing her again. I am covering the depo of Dr. Laurence tomorrow while Jerry is out of state on other matters. You will need to take up the issue of obtaining a further depo of Ms. Kerr with the court consistent with Jerry's correspondence to you on this issue. I am working on getting the file for Dr. Laurence emailed to you later today so you will have it in advance of tomorrow. Please note that we also object to the breadth of your depo notice for Dr. Laurence and the limited time we have had to try and respond. We will do our best to have the requested information.

Terry.

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Quane Jones McColl, PLLC
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Boise, Idaho 83701
(208)780-3939 Telephone
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EXHIBIT G

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED SEPTEMBER 9, 2013

Undersigned counsel for the Defendants hereby certifies that the Court ordered exchange of information conference with counsel for the Plaintiff was conducted

October 22, 2013 and that a discussion was held on matters specified by Rules 16(a) and 16(b), I.R.C.P. and the attorneys for the parties engaged in an exchange of information. The subject of settlement or alternate dispute resolution was brought up by Defense counsel and discussed. For the first time in the history of the case, counsel for the Plaintiff said that his client would agree to mediation, even though the trial is scheduled to start November 5, 2013. Defense counsel had to decline the untimely suggestion of mediation due to the date the trial was to start, the impossibility of arranging mediation on such short notice and the fact that the bulk of the trial preparations had been completed and that defense counsel would be completely occupied with continued trial preparations.

Persons disclosed as possible witnesses for the Defendants

Dr. Brian Kerr

Susan Kerr

Briana Dumas

Donna Berg

Dr. Thomas Coffman

Dr. Charles Garrison

Dr. Gregory Laurence

Dr. Alan Frankle

Dr. John Lundeby

Dr. Geoffrey Stiller

Stephanie Miller

Dr. Karl Olson

Dr. Matthew Campbell

Dr. Glen Groben

Dr. Billy Morgan

Dr. Howard Schaff

Dr. Bertram Stemmler

Melissa Fellows

Cody Murphy

Wendy Vanderburgh

Dr. Tisha Fujii

Charles Ballard

Descriptive list of all exhibits proposed to be offered in evidence by the Defendants

1. Curriculum vitae of Dr. Kerr;
2. Curriculum vitae of Dr. Laurence;
3. Curriculum vitae of Dr. Garrison;
4. Curriculum vitae of Dr. Coffman;
5. Curriculum vitae of Dr. Frankle;
6. Curriculum vitae of Dr. Lundeby;
7. Curriculum vitae of Dr. Stiller.
8. Medical records of Dr. Kerr and Silk Touch Laser.
9. Records of Elmore Medical Center for treatment of Krystal Ballard.
10. Records of Elmore Ambulance Service for care and treatment of Krystal Ballard.

11. Records of Life Flight for care and treatment of Krystal Ballard.

12. Records of St. Alphonsus Regional Medical Center for treatment of Krystal Ballard.

13. Records of Ada County Coroner.

14. Autopsy Report for Krystal Ballard.

15. 21 photographs of Krystal Ballard taken by Dr. Kerr for his operative procedure.

16. 43 photographs of Krystal Ballard taken at autopsy.

17. 6 photographs of Susan Kerr that depict the positions of Krystal Ballard for the operative procedure of Dr. Kerr.

18. Photographs of brain and kidney tissue from the autopsy of Krystal Ballard prepared by Dr. Garrison that show the presence of fat emboli.

19. Autopsy tissue slides.

20. 4 photographs of Krystal Ballard that depict the entry sites by markings for liposuction and fat transfer.

21. Report of Dr. Morgan.

22. CT study of Krystal Ballard of July 25, 2010.

23. Report of Dr. Stemmler for chest x-ray of Krystal Ballard of July 25, 2010.

24. Report of Dr. Schaff for chest x-ray of Krystal Ballard of July 25, 2010.

25. Visible glass container that shows the quantity of fluid measured in milliliters or the equivalent in cubic centimeters.

26. Medical devices, equipment, supplies, packaged material, autoclave and instruments used by Dr. Kerr for his procedures with photographs of the same.

27. Compilation of data and database for operative procedures of Dr. Kerr by date, procedure and patient's first name from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 and the number of liposuction procedures, consisting of a total of 338 procedures.

28. Documents, records, material, data and calendars produced with Defendants responses to Plaintiff's First Requests for Production of Documents dated June 29, 2012.

29. For illustrative purposes, the following medical artist illustrations:

a. 18 depicting liposuction of anatomy with and without the cannula.

b. 1 depicting anatomy for fat transfer in the bilateral buttocks.

c. 1 depicting various tissue layers.

d. 1 depicting the content of the abdomen.

e. 1 depicting the urinary system.

f. 1 depicting gram negative and gram positive bacteria or rods.

Exhibits counsel have agreed may be received in evidence without objection:

Defense exhibits to which this section applies are numbers 1 through 16, 19, 21, 22, 23 and 24.

The rest of defense exhibits are objected to by the Plaintiff on all grounds allowed by law.

Plaintiff's exhibits to which this section applies are numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 24 and 25.

The rest of Plaintiff's exhibits are objected to by the defense on all grounds allowed by law except that no objections will be asserted to the following exhibits on the basis of authenticity – numbers 12, 13, 15, 16, 17 and 18.

The Plaintiff disclosed the following exhibits at the exchange of information conference that undersigned counsel has numbered 1 through 37.

1. Medical records – charts for Silk Touch, Elmore Ambulance, Elmore Medical Center, St. Alphonsus Regional Medical Center, Ada County Coroner including Autopsy Report;

2. Cell phone record of Silk Touch;

3. Curriculum Vitaes of Dr. Sorensen, Dr. Nichols, Dr. Armitage and Cornelius Hofman;

4. Funeral placard;

5. Funeral placard;

6. Photo of Charles and Krystal;

7. Photo of Charles and Krystal;

8. Framed photos of Charles and Krystal;

9. Photo of Krystal tubing;

10. Marriage License;

11. Death Certificate;

12. Tillman Funeral Home invoice;

13. Artistic Flowers invoice;

14. Memorial program;

15. Bill from St. Alphonsus;

16. Bill from Elmore Medical Center;

17. Bill from Rost Funeral Home;

18. Bill from Lifeflight;

19. Memorandum – Extension of Enlistment for PCS (Elmendorf);

20. USAF Records Certification;

21. Line of Duty Determination;

22. Awards and Decorations info;

23. Air Force Achievement Medal;

24. Air Force Commendation Medal;

25. DJMS LES – Krystal;

26. DJMS LES – Charles;

27. Letter from Major Thomas Brown to Charles expressing sympathies;

28. Statement of Service;

29. Enlisted Performance Review 2010;

30. EPR 2009;

31. EPR 2008;

32. EPR 2007;

33. Reenlistment Eligibility Annex;

34. Air University CCAF Transcript;

35. BSU Transcript;

36. Embry-Riddle Transcript; and

37. University of Maryland Transcript.

DATED this 29th day of October, 2013.

QUANE JONES McCOLL, PLLC

By /s/
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED SEPTEMBER 9, 2013 - 8

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2013, I served a true and correct copy of the foregoing CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED SEPTEMBER 9, 2013 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

/s/
Jeremiah A. Quane

EXHIBIT H

DEFENDANTS' EXHIBITS

Page 1

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
A	Curriculum vitae of Dr. Kerr		X	
B	Curriculum vitae of Dr. Laurence		X	
C	Curriculum vitae of Dr. Garrison		X	
D	Curriculum vitae of Dr. Coffman		X	
E	Curriculum vitae of Dr. Frankle		X	
F	Curriculum vitae of Dr. Lundeby		X	
G	Curriculum vitae of Dr. Stiller		X	
H	Medical records of Dr. Kerr and Silk Touch Laser			
I	Records of Elmore Medical Center for treatment of Krystal Ballard		X	
J	Records of Elmore Ambulance Service for care and treatment of Krystal Ballard		X	
K	Records of Life Flight for care and treatment of Krystal Ballard		X	
L	Records of St. Alphonsus Regional Medical Center for treatment of Krystal Ballard		X	
M	Records of Ada County Coroner		X	
N	Autopsy Report for Krystal Ballard		X	
O.1 - O.21	21 Photographs of Krystal Ballard taken by Dr. Kerr for his operative procedure		X	

DEFENDANTS' EXHIBITS

Page 2

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
P.1 – P.43	43 Photographs of Krystal Ballard taken at autopsy		X	
Q.1 – Q.6	6 Photographs of Susan Kerr that depict the positions of Krystal Ballard for the operative procedure of Dr. Kerr			
R.1 – R.46	46 Photographs of brain and kidney tissue from the autopsy of Krystal Ballard prepared by Dr. Garrison that show the presence of fat emboli			

DEFENDANTS' EXHIBITS

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
S	Autopsy tissue slides			
T.1 – T.4	4 Photographs of Krystal Ballard that depict the entry sites by markings for liposuction and fat transfer			
U	Report of Dr. Morgan			
V	CT study of Krystal Ballard of July 25, 2010 (44 films)			
W	Report of Dr. Stemmler for chest x-ray of Krystal Ballard of July 25, 2010			
X	Report of Dr. Schaff for chest x-ray of Krystal Ballard of July 25, 2010			
Y	Visible glass container that shows the quantity of fluid measured in milliliters or the equivalent in cubic centimeters			

DEFENDANTS' EXHIBITS

Page 4

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
Z.1 – Z.36	Various medical devices, equipment, supplies, packaged material, autoclave and surgical instruments used by Dr. Kerr for the liposuction and fat transfer procedure with illustrative photographs of the same			
AA	Compilation of operative procedures of Dr. Kerr from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 with the total number of liposuction procedures, consisting of 338.			
BB	Documents, records, material, data and calendars produced with Defendants response to Plaintiff's First Requests for Production of Documents dated June 29, 2012			

DEFENDANTS' EXHIBITS

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
CC.1 – CC.18	Medical illustrations depicting liposuction of anatomy with and without cannula of Krystal Ballard			
DD	Medical illustrations depicting anatomy for fat transfer in the bilateral buttocks of Krystal Ballard			
EE	Medical illustrations depicting various tissue layers			
FF	Medical illustrations depicting the content of the abdomen			
GG	Medical illustrations depicting the urinary system			
HH	Medical illustrations depicting gram negative and gram positive bacteria or rods			

EXHIBIT AA

Last Name	First Name	Date of Tx	procedures
Kerr	Susan Kerr	12.11.2007	abdomen
	Tiffany	12.11.07	upper arms, abdomen
	Erica	12.24.07	abdomen, love handles, flank
	Mike	12.28.07	abdomen, love handles & flank

Last Name	First Name	Date of Tx	procedures.
	Vicki	01.29.08	neck
	Donna	01.31.08	thighs
	Julie	02.01.08	full ab, love handles, bra fat
	ruth	02.02.08	lower ab, under bum, outer hips
	Jane	02.08.08	inner & outer thigh, knees
	Matthew	02.08.08	abdomen, flanks
	Nancy	02.11.08	neck, full abdomen & luvs
	Matthew	02.21.08	abdomen, chest
Kerr	Susan	02.25.08	luv handles, flank
	Ruth	02.25.08	luvs, inner thigh
	Jennifer	02.28.08	banana roll, inner & outer thigh
	Char	02.29.08	abdomen
	Patty	03.03.08	abdomen
	Patty	03.03.08	abdomen
	Cheryl	03.04.08	abdomen, flank & loves
	Timothy	03.11.08	abdomen, flanks
	Joni	03.13.08	abdomen, neck
	Mike	04.01.08	abdomen & flank touch up
	Kristyn	04.03.08	abdomen, flank, inner thigh, tootsie roll, upper arm
	Simone	04.07.08	abdomen & flank
	Dee	04.09.08	abdomen, flanks
	Cindy	04.11.08	abdomen
	Tauni	04.17.08	inner & outer thigh, tootsie roll
	Tonya	04.18.08	abdomen, hips, inner thigh
	Dennis	04.19.08	abdomen, flanks, neck
	Myrna	05.08.08	flanks,abdomen
	Cindy	05.13.08	abdomen
	Molly	05.13.08	abdomen
	Sheila	05.15.08	abdomen, outer leg, flanks, Fat transfer to face
	LeAnn	05.19.08	full ab
	Vicki	05.19.08	flank & bra fat
	Patricia	05.20.08	inner and outer thigh
	Melinda	05.21.08	inner & outer thighs
	Jennifer	05.21.08	inner & outer thighs
	Debbie	05.22.08	abdomen, flank
	JoAnn	05.22.08	abdomen, chin
	Kimber	05.29.09	abdmen & flank
	Kim	06.06.08	abdomen & love handles
	Diane	06.26.08	abdomen
	Teresa	07.03.08	abdomen, flanks
	Teresa	07.03.08	abdomen, flanks
	Randae	07.10.08	abdomen, flank, neck
	Patty	07.11.08	abdomen touch up
	Patty	07.11.08	lower abdomen
	Kathy	07.12.08	upper & lower abdomen
	Lisa	07.16.08	abdomen, flank
	Krissie	07.17.08	abdomen
	Jenny	07.24.08	abdomen, bra & back fat,
	Pam	07.25.08	abdomen, lateral waist
	Steve	07.30.08	abdomen, love handles & chest
	Mary Ann	07.30.08	neck
	Nancy	07.31.08	hips
	Lyubov	08.09.08	abdomen
	Jeanette	08.15.08	abdomen, thorax, waist, lat bra fat area
	Nancy	08.19.08	luv handles
	Kendall	09.03.08	arms
	Denis	09.04.08	Breast
	Beverly	09.05.08	abs & flank
	Debbie	09.08.08	abdomen
	Eleanor	09.16.08	abdomen, lat waist, flank and lateral bra area
	Jennifer	09.16.08	outer & inner thigh, buttocks
	Marion	09.17.08	waist, flank, neck, bra fat

	Jenny	09.19.08	arm, lat waist, flank
	Michelle	09.23.08	abdomen, lateral waist & thigh
	Jennifer	09.25.08	inner/outer thigh, knees
	Ernie	09.26.08	luvs, chest
	Kimber	10.02.08	abdomen, luv handles and flanks
	Lisa	10.07.08	outer & inner thigh, abdomen
	Patty	10.30.08	abdomen, flank, waist and bra area, arms, butt
	Kim	11.04.08	abdomen, waist, fat transfer to face
	Katie	11.12.08	inner & outer thighs
	Becky	11.17.08	arms
	linda	12.08.08	fullt ab, hips, luv, bra fat
	Erica	12.27.08	abdomen, luv handles and flanks
	MANDI	12.28.08	abdomen, chin, inner thighs, arms

Last Name	First Name	Date of Tx	procedures
	Terri	01.07.09	abdomen & neck, fat transfer to face
	Phyllis	01.15.09	abd, luv, bra fat
	Kayce	01.16.09	abdomen, luv handles, flank
	Leah	01.19.09	ankles
	Barbara	01.20.09	ful abd, chest from hip to armpit
	Polly	01.21.09	abd, luvs & flank
	Jennifer	01.22.09	abd
	Cheryl	01.22.09	abd
	Cathi	01.23.09	full ab, luv, bra fat
	Jenny	01.23.09	abdomen, outer thighs
	Barbara	01.26.09	inner & outer thigh,
	Kerry	01.28.09	ankle, thigh, knee
	Ruth	01.30.09	outer thigh
	Carole	02.10.09	ab, luv, flank, bra fat
	Beverly	02.11.09	abdomen, luv handles
	Julie	02.13.09	inner & outer thigh
	Christina	02.16.09	abd, waist, outer thigh
	Linda	02.17.09	upper arm & lower arms, neck
	Helena	02.18.09	abdomen
	Jacque	02.18.09	full abdomen
	Phyllis	02.19.09	outer, inner thigh, knees
	LeAnn	02.20.09	outer & inner thigh, knee
	Liz	02.23.09	abdomen, full waist and flank
	Judie	02.26.09	full abdomen
	Bonnie	03.04.09	abdomen, lat waist & flank, & bra fat
	Vicki	03.05.09	neck & lower jowels
	Jennifer	03.06.09	lat thigh touch up, fat transfer to outer thight
	Joyce	03.10.09	inner & outer thigh, fat transfer to labia & face
	Kristi	03.11.09	outer & inner thigh, flanks, fat transfer to face
	Gentry	03.19.09	ab, luv handles
	Sherrie	03.20.09	abd, outer thighs
	Kristin	03.21.09	chin, neck, arm
	Sherri	03.26.08	abdomen and flanks
	Barbara	03.30.09	upper arms, fat transfer to breast
	Connie	03.30.09	arms, fat transfer to face
	Chris	04..20.09	abdomen, lateral waist
	Carole	04.01.09	arm & bra fat
	Sherri	04.07.08	Fat transfer to face
	Leslie	04.09.09	outer & inner thigh
	Jackie	04.10.09	outer & inner thigh & knees
	Patricia	04.13.09	abd, lat waist & thorax
	Nola	04.21.09	full abd, luv & flank
	Patty	04.21.09	abd touch up, bra fat
	Judy	04.22.09	neck
	Bruce	04.28.09	abdomen & luv handles
	Jackie	04.29.09	ankles, arms
	Cheri	04.30.09	neck
	MaryAnn	05.01.09	Upper & lower arms, fat transfer to face
	Kim	05.06.09	arm, fat transfer to breasts
	Kelly	05.07.09	knees, f/t to breast
	Debra	05.14.09	inner thigh, ft to face and breast
	Tina	05.19.09	full ab, flank, bra fat
	Alisa	05.20.09	abd, luv, bra fat, flank
	Kendra	05.29.09	full ab, armpit

Ed	05.30.09	abd, lateral waist & flank
Marion	06.01.09	leg, thigh, arm, chest wall, f/t to breast
Tina	06.02.09	outer thighs, f/t to buttocks scar
Letty	06.02.09	ab, luv, flank, f/t to butt
Lisa	06.03.09	abdomen, waist,bra fat, knees and right upper leg
Shanna	06.13.08	abdomen, lateral waist, inner & outer thigh, upper lat buttocks, fat transfer to face
Donna	06.17.09	outer thighs
Tara	06.15.09	neck
Donna	06.17.09	thighs
Cheryl	06.22.09	full ab, waist & flank
Cheryl	06.24.09	inner thigh,bra fat, fat transfer to breast?
Anthony	07.06.09	abdomen, lateral waist
Michelle	07.07.09	ab & fat transfer to face
Aaron	07.08.09	breast, neck
Jackie	07.30.09	full ab, love handles
Terri	07.31.09	abd, waist, neck f/t to breast
Stacy	08.19.09	full ab, waist ft to face/hands/breast
Keil	08.27.08	breast, full ab
Carrie	08.27.09	full ab, flank, inner/outer thigh
Glenn	09.03.09	abd, lateral waist & flank
Teresa	09.04.09	abdomen & waist
Teresa	09.04.09	abdomen and lateral waist
Chris	09.08.09	breast
Phyllis	09.17.09	abd anterior, lower inner thigh
Ann	09.21.09	full abd, lat waist & flank
Maureen	09.22.09	full abd, inner thigh
Carol	09.23.09	full abdomen
Jennifer	09.25.08	outer thighs
linda	09.25.09	arms
LaDoena	09.30.09	abd, flank
LaDoena	09.30.09	abd, flank, bra fat
gladys	10.01.09	ab,bra fat, fat transfer to breast
Tarena	10.02.09	abdomen, flank, love handles
Lori	10.14.09	Lower ab, neck,
Katie	10.21.09	outer & inner thigh f/t to breast
Minni	10.22.09	abdomen, flank
Lisa	11.13.09	love handle, flank, outer thigh
Brandy	11.16.09	abdomen, flanks
Helena	11.18.09	ab, love handles, neck
Jackie	11.19.09	upper knee, arms
Marion	11.20.09	ankle, calfs, inner thigh, axilla, flank,
ruth	11.23.09	knees, lateral waist
Julia	11.24.09	outer & inner thigh, fat transfer to breast
Theresa	11.25.09	abd, lat waist, neck f/t to breast
Ashley	12.04.09	abdome, lateral waist & flank
Jim	12.11.09	abd, waist, chest
Travis	12.14.09	neck
Alyson	12.15.09	abdomen, lat waist & flank
Becky	12.17.09	ab, luv, inner thigh
LeaAnn	12.18.09	abd, waist, butt f/t
Adrienne	12.18.09	outer thigh
Caiyun	12.21.09	ab, luv, bra fat,
Janina	12.23.09	abd, waist, neck f/t to breast
John	12.24.09	chest
Theresa	12.24.09	outer & inner thigh f/t to breast

Last Name	First Name	Date of Tx	procedures
	Tawnja	1.5.10	ab, flank bra
	Christine	1.8.10	thighs, waist
	Brandy	1.14.10	abd, flank, thigh
	nancy	1.25.10	neck, torso, lateral waist, thorax FAT transfer
	Julie	1.29.10	ab revision , FAT transfer
	olivia	2.4.10	abd FAT to lip
	Christine	2.5.10	abd, arms, inner thigh
Kerr	Susan	2.10.10	ab touch up
	Jennifer	2.10.10	lat outer thigh
	Linda	2.11.10	flank, FAT
	Stephen	2.17.10	neck
	HHaleena	2.18.10	ab
	Pamela	2.19.10	ab, flank, FAT face
	Linda	2.23.10	abd, flank
	Deborah	2.24.10	abd, flank
	Tina	3.1.10	Ab, flank
	Karrie	3.1.10	outer thighs
	Janet	3.3.10	thighs, FAT breast,face, hands
	Letty	3.4.10	abd, arm, FAT bust, butt
	Chris	3.5.10	chest touch up
	Jennifer	3.5.10	knees, abdomen, outer thigh
	Kelly	03.08.10	abd, lat waist
	Angie	3.11.10	inner, outer thigh, FAT breast
	Lisa	3.10.10	outer thigh, FAT breast
	Linda	3.10.10	REVision thighs
	Erin	3.12.10	flank, FAT breast
	Janet	3.16.10	neck, FAT to face
	Patricia	3.18.10	abd, arms, FAT to butt
	Jessica	3.19.10	abd, waist
	Michelle	3.22.10	abd, lat waist
	Dwayne	3.23.10	ab, flank
	Geo	3.24.10	abdm flank
	Elsie	3.25.10	abd, flank, FAT face
	Kim	3.25.10	abd
	Ruth	4.5.10	lat thigh touch up
	Julia	4.6.10	thighs
	Nancie	4.8.10	abd, flank, FAT
	Emily	4.9.10	outer thigh, inner FAT to breast
	Pauline	4.12.10	abd, arms,
	Sandy	4.13.10	abdomen FAT
	Elizabeth	4.14.10	abd, flank, inner thigh
	Sara	4.16.10	arms, FAT breast
	Joanna	4.16.10	abd, waist
	Phyllis	4.19.10	touch up
	Jackie	4.21.10	3 areas, touch up, FAT
	Denise	4.30.10	abd, FAT to face
	Sandy	4.13.10	abdomen FAT
	Patty	4.13.10	abd TU, bra, Fat transfer
	Pauline	4.19.10	inner & outer thigh
	Tiffany	4.21.10	flanks
	Rebecca	4.22.10	abd
	Kathleen	4.30.10	thighs
	Deborah	5.2.10	arms
	Jeanie	5.4.10	ab, flank, FAT to breast
	Marianne	5.6.10	3 areas FAT to butt
	Trina	5.7.10	abd, waist thigh, FAT BUTT
	Dianne	5.14.2010	abd, FAT to face

	Loretta	5.17.10	abd, flank, bra, FAT
	Rhonda	5.18.2010	Thighs, FAT breast & butt
	Bette	5.18.10	flanks, arms
	Melissa	5.20.10	ab, flank
	Gwen	5.25.10	fat transfer
	Debbie	5.26.10	inner, outer thigh, FAT breast
	Jackie	5.28.10	thighs, FAT thighs
	Paula	5.28.10	abd
	Barbara	6.2.10	ab, waist, bra fat
	Mary	6.3.10	abd, thighs
	Lucy	6.4.10	3 areas(abdomen) FAT to hands
	Megan	6.8.10	abd, flank FAT
	Sheri	6.8.10	neck, jowels
	Valerie	6.9.10	ab, flank
	Sally	6.16.10	outer thigh, flank, FAT
	Brianna	6.17.10	knees, thighs, flank
	Melinda	6.18.10	abdm, flank waist
	Deborah	6.20.10	abd, flank, bra
	Sara	6.21.10	ab, waist, bra fat,
	Pamela	6.22.10	neck, jaw, abd, FAT to face
	Tracy	6.24.10	abdomen, flank
	Brenda	6.25.10	breast, thigh
	Deborah	6.30.10	arms
	Carolyn	7.1.10	abdm flank, FAT to face
	Linda	7.7.10	abd
	Kaye	7.6.10	abd, flank, arms, FAT to breast
	Shawn	7.13.10	neck
Ballard	Krystal	07.21.10	full abdomen, luv handles, flank & fat transfer to butt
	Roxann	07.22.10	abd, lat waist
	BECKY	07.23.10	Abd, flanks, fat transfer breast
	Melinda	7.24.10	arms, FAT to breast
	Christopher	7.26.10	abd, flank, neck
	Barbie	7.27.10	jaw, neck
	Becky	7.28.10	ab, luvs, fat transfer breast
	Jessica	7.29.10	abd, lat, waist, flank, breast
	Melinda	7.30.10	thighs
	Beverly	8.3.10	neck
	WAFAA	8.4.10	Abd, lat waist, flank
	Mike	8.5.10	abd, flank
	Kristen	8.6.10	abd, flank
	Mary	8.13.10	abd, flank
	Becky	8.19.10	thighs
	Dennis	8.19.10	neck
	Bonnie	08.19.10	neck
	Josie	8.25.10	abd, fat transfer breast
	Vicki	08.30.10	upper & lower ab
	Rita	9.01.10	abd, fat transfer
	Orie	09.02.10	ab, flank, fat transfer
	Molly	09.03.10	ab, flanks,
	Christine	09.15.10	elbo, inner knee , thight
	Jackie	09.15.10	abd, upper ab, lat waist & back
	Lee	09.16.10	abd, chest
	Melinda	09.16.10	upper, lower abdomen large
	Melissa	9.20.10	arms
	Ginger	9.21.10	abs, flanks, luvs
	Scott	9.22.10	abd, flank
	Amy	9.23.10	arms, bra
	Cindy	9.24.10	abd, butt banana roll

	Melissa	9.27.10	abd, flank
	Ashley	9.28.10	abd, lat waist, flank
	Molly	09.30.10	inner outer thigh
	Leta	9.30.10	lat waist, flank, chest, fat transfer to face
	Scott	10.01.10	chest, axilla
	Trent	10.02.10	chest
	Elizabeth	10.04.10	abd, lat waist flank.
	Joanna	10.5.10	abd, flank, chest, fat transfer to butt, breastt
	Linda	10.14.10	lat waist touch up
	Bette	10.15.10	ant ab touch up
	Larraine	10.15.10	abd, flank
	Jini	10.15.10	arm, breast fat transfer
	Elizabeth	10.19.10	thighs, fat transfer breast
	Patricia	10.20.10	inner, outer thighs
	Janet	10.21.10	abs,flanks
	Jennifer	10.22.10	abd touch up
	Kim	10.22.10	abd, flank, inner, outer, fat to breasts
	Misty	10.25.10	abd, breasts, neck
	Christine	10.26.10	abd, flank, breast
	Mimi	10.28.10	lat waist, luv, flank touch up
	Vicky	10.28.10	arms
	Theresa	10.29.10	ankle, inner thigh
	Misty	11.2.10	flanks, butt fat
	Debra	11.3.10	flanks, fat transfer to hands
	Kelly	11.15.10	touch up ab
	Melissa	11.15.10	outer, inner thigh
	Holly	11.17.10	abd, flank, ftransfer breast
	Kathie	11.18.10	ab, waist, fat transfer
	Tracy	11.23.10	ab, breast fat transfer
	Nancy	11.29.10	chin, ab
	Sara	11.29.10	flanks, fat transfer to butt
	Cindy	11.30.10	flanks
	Amy	12.1.10	abd, flank
	Erica	12.2.10	abd, bra fat
	Todd	12.3.10	abd, flank
	Melody	12.08.10	abd, flank, fat transfer breast
	Tony	12.09.10	abd, flank
	Kristin	12.10.10	waist, breast fat trans
	Amy	12.20.10	inner outer thigh
	Heather	12.20.10	abd, flanks
	Theresa	12.22.10	upper ab, thighs
	Gene	12.23.10	abd, flanks
DR. KERR DID APPROX 4 LIPOS A WEEK . 44 WEEKS (8 WEEKS OF VACATION)			

EXHIBITS V, W and X

PATIENT:	BALLARD, KRYSTAL				
MR #:	000807064	Hosp. Serv:	ER - IPA	Dict. Prov:	BILLY R. MORGAN, MD***
VISIT #:	1020600274	Room/Bed:	3104-01	Att. MD:	TISHA K FUJII DO**
Date of Birth:	04/19/1983	Admit:	07/25/2010	DOS:	07/25/2010
EMPI:	4828667	Disch/Transfer:			

Job Number: 684099 **Version:** 1

CONSULTATION

SURGICAL CONSULT

CONSULTING FOR:
Dr. Fujii, critical care.

CHIEF COMPLAINT:
Sepsis, ARDS, hypotension, status post liposuction and transplantof fat to the buttocks.

HISTORY OF PRESENT ILLNESS:
This is a 27-year-old black female who apparently underwent liposuction with transplantation of the fat from the anterior abdominal wall to the buttocks on both sides. This apparently occurred on 07/21/2010. She apparently had it done at a MediSpa somewhere. Apparently they contacted a physician several times and subsequently she became increasingly ill on Friday, complaining of increasing pain in the transplantation site on her buttocks. She had no drainage from any of the wounds. She did not have a fever, no chills and apparently yesterday apparently passed out and early this morning was taken to the Elmore Emergency Room where she was seen and evaluated and subsequently transferred here. She arrived here at approximately 7:20 this morning and after a vigorous resuscitation she barely had a blood pressure, had significant findings on her chest x-ray and her CT is consistent with significant RDS in both lower lobes posteriorly. The patient had marked hypoxemia with a pO2 in the 40s and was admitted to the Coronary Care Unit by Dr. Fujii and she asked me if I would evaluate the patient. CT also showed that she has some stranding in the anterior abdominal wall anterior to the fascia consistent with her liposuction. She also has some subcutaneous air in the left posterior buttocks area in the soft tissues, but not in the muscle itself and not associated with the fascia according to my review of films.

LABORATORY VALUES:
In Elmore, showed a WBC of 14.7. Her hemoglobin was 10.3 and her hematocrit was 32.0. She had 189,000 platelets. She had 92 segs, 5 lymphs and 3 monos. Her CK-MB was 3.2. Her myoglobin was 277 and her T and I was 0.079 and her CK was 51. Again inconsistent with a necrotizing fasciitis. Her sodium is 142, potassium is 3.4, chloride is 102, her CO2 was 13, glucose was 93, BUN was 31, creatinine was 3.2. Her albumin was low at 2.4, total bilirubin was 1. Her total protein is 6.2 and her globulin was 3.8. Her alk phos was 73, AST was 19, ALT was 24. Her blood gas from the Elmore Emergency Room showed a pH of 6.99. Her pCO2 was 36. Her pO2 was 21 and her base excess was -22 and her bicarbonate was 8.7. Her O2 saturation, and her O2 saturation was minimal. She was seen in the Intensive Care Unit.

Patient: BALLARD, KRYSTAL
EMPI: 4828667

CONSULTATION

Chest x-ray from Elmore County shows bronchitis and bibasilar subsegmental atelectasis or scarring, minimal superimposed pneumonitis, aspiration of bronchiolitis not excluded and findings possibly a similar fat emboli syndrome. The patient is on a ventilator in the Intensive Care Unit.

OBJECTIVE:
VITAL SIGNS: Blood pressure at the time of my arrival is 105/60, heart rate in the 120s. Her O2 sat is not reading. CVP is 18. She does have a left femoral arterial line in.
HEENT: Shows that her pupils are sluggish and equal. She has bilateral mild proptosis and her sclerae are unremarkable. I see no petechial hemorrhages in and around the area of the sclerae or the upper and lower lids.
NECK: Supple, nontender, no step-offs or deformities. She has no jugular venous distension.
LUNGS: Clear to auscultation and percussion. Breath sounds are bilateral and equal in the upper lobes and marked rales in both bases. The cardiac exam shows a rapid rate and rhythm without murmurs or gallops.
CARDIAC: Echocardiogram done at the time of my evaluation shows that she has markedly hypokinetic segments in the apex and in both ventricles with an ejection fraction estimated by the tache at around 17-20%.
ABDOMEN: She has 4 Steri-Strips wounds in the anterior abdomen, 2 on each side with no subcutaneous emphysema or crepitance or redness or any sign of infection.
EXTREMITIES: Her extremities show 1+ edema times all four extremities.
BUTTOCKS: The patient's buttocks show 2 wounds 1 on the posterior superior iliac crest on each side with no crepitance to the subcutaneous tissue. No evidence of redness or inflammation and no drainage from the insertion sites for the fat transplants. The patient's current blood gas shows a pH of 6.84. Her pCO2 is 42. Her pCO2 is 38 and she has a bicarbonate of 7.2. Her calcium is 0.77 in ionized performed. Her O2 sat is 30%. The patient's EKGs are essentially show slight ST elevation in all leads.

IMPRESSION:
This most likely represents an unfortunate young black female who underwent liposuction with subsequent transplant of the fat into the buttocks on both sides 4 days ago. She now has what appears to be a probable fat emboli syndrome with significant ARDS, massive hypoxemia, unresponsive to ventilator modes from a surgical standpoint, I feel in light of the ejection fraction of 17% and a marked hypoxemia and a marginal cardiac output that she would not tolerate a trip to the Operating Room. I doubt very seriously that this represents necrotizing fasciitis in light of the CT scan, which only shows a small amount of air and no fluid anterior and/or posterior to the fascia in the buttocks. I have discussed these findings with Dr. Fujii, and will be available to continue to follow the patient and should there be any surgical needs.

Dictation electronically signed by
BILLY R MORGAN, MD***
on 07/26/2010 02:41:18

BILLY R MORGAN, MD***

Patient: BALLARD, KRYSTAL
EMPI: 4828667

CONSULTATION

BRM:lml
D: 07/25/2010 13:07:21
T: 07/25/2010 21:10:08
J: 684099
T: 3741605
cc:
JANA L PERRY, RN*

To: ELMORE MEDICAL* From: St. Als Regional Medical Cen...

ELMORE MEDICAL CENTER HOSPITAL DISTRICT MOUNTAIN HOME ID 83647

Patient: [redacted]
DOB: [redacted] EMPI: 04828667 Visit/Acct: 251680/251680
Site: ELM PT/MOD: ER/XR MRN: 228168
Ref. Prov: KARL H. OLSON MD* Exam: ELM251630 Room/Bed: /
Add. Providers: TRIWEST* ELMORE MEDICAL* ...

EXAM DATE: 7/25/2010 3:09 Contrast:

PROCEDURE: CHEST RADIOGRAPH, 2 VIEWS, FRONTAL AND LATERAL.

INDICATIONS: Shortness of breath. History of recent liposuction.

COMPARISON: None.

FINDINGS:
LUNGS: Perihilar opacities including bronchial wall thickening. Additional bibasilar heterogeneous opacities.
CARDIAC: Normal size cardiac silhouette.
MEDIASTINUM: Normal.
PLEURA: Normal.
BONES: Normal for age.
OTHER: Bilateral nipple piercings.

CONCLUSION: Bronchitis and bibasilar subsegmental atelectasis or scarring. Minimal superimposed pneumonitis, aspiration, or bronchiolitis is not excluded. Similar findings may be seen in setting of fat embolism.

Dictated by: Bertram Stemmler, M.D. on 7/25/2010 at 3:30
Approved by: Bertram Stemmler, M.D. on 7/25/2010 at 3:30

JUL 26 2010

FURTHER ACTION NEEDED?
YES ... NO ✓
DATE ... DATE 7.26.10
REVIEWED BY ...

EXHIBIT tabbies W CV.OC 1204792

Saint Alphonsus
Department of Medical Imaging
[illegible]

Gem State Radiology

Patient: BALLARD, KRYSTAL
DOB: 4/19/1983 EMPI: 04828667 Visit/Acct: 1020600274/1020600274
Site: SARMC PT/MOD: ER/XR MRN: 000807064
Ref. Prov: IRVIN SACKMAN* MD Exam: 43952233 Room/Bed: / ER
Add. Providers: EMERGENCY ZZPHYSICIAN

EXAM DATE: 7/25/2010 8:06 Contrast:

PROCEDURE: CHEST RADIOGRAPH, 1-VIEW FRONTAL PORTABLE

INDICATIONS: Abdominal pain and shortness of breath.

COMPARISON: Elmore Medical Center, XR. XR CHEST 2 VIEWS PA AND LAT, 7/25/2010, 3:09.

FINDINGS:
LUNGS: Bilateral diffuse patchy airspace disease significantly progressed since the prior study.
CARDIAC: Normal size cardiac silhouette.
MEDIASTINUM: Normal.
PLEURA: Normal.
BONES: Normal for age.
OTHER: Negative.

CONCLUSION: **Significant interval development of bilateral diffuse patchy air space disease. Given the patient's history of recent liposuction and rapid interval development of pulmonary airspace disease, findings may represent fat embolism, pulmonary edema, and/or adult respiratory distress syndrome.**

Dictated by: Howard Schaff, M.D. on 7/25/2010 at 8:24
Approved by: Howard Schaff, M.D. on 7/25/2010 at 8:24

EXHIBIT
tabbies
0019
CV OC 1204792

EXHIBIT I

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792

DEPOSITION

OF

DEAN E. SORENSEN, M.D., F.A.C.S.

AUGUST 21, 2013

REPORTED BY:

BARBARA BURKE, CSR No. 463

Notary Public

A. Pneumonia is an infection. Prostatitis is an infection. Bladders have infections.

Q. In your opinion, am I covered with bacteria -- my skin?

A. Outside and inside.

Q. I'm covered with it, aren't I?

A. Of course.

Q. Am I infected?

A. No. There're symbiotic.

Q. Pardon?

A. They're symbiotic. They're there to help you -- and you help them in many cases, for example.

Q. So just because there's bacteria present, that doesn't mean I'm infected?

A. No.

Q. Well, that's what I'm getting at.

So, in that context, what does infection mean?

A. I would say that infection -- are you talking about any infection with or without surgery?

Q. I'm talking about in order to classify something -- some process as an infection, does it require more than just the presence of bacteria?

A. Sure. It requires a response to it. I mentioned those responses.

Q. So part of the definition then of "infection"

quality of care in performing surgery, that infections can occur?

A. Yes.

Q. Do you think that infection is the primary nightmare of surgeons --

A. No.

Q. -- for postoperative complications?

A. No.

Q. Where does it rank, in your opinion, number two?

A. Well, it gets up there, but I think bleeding because it's more life-threatening would be one that you would think of first, you know.

Q. Okay.

A. And then infection is in there, but, you know, they're uncommon, so it needs to be mentioned and dealt with, but, you know, today we do so much to prevent it that it's one of the reasons it's rare.

I can go into detail if you want me to.

Q. Well, even if it's rare, under the best of circumstances and care it sometimes can't be prevented?

A. Yes.

Q. Okay. We were talking earlier about your knowledge of infections, and we discussed some things that go to your so-called "expertise," if any, with infections, and we didn't mention bacterial organisms.

autopsy, in part, because that's what they saw.

Q. But it's an assumption, isn't it?

A. Yes.

Q. There's no proof by any means of the fact at the time of the surgery these gram-negative bacteria went into her body, is there?

A. No.

Q. Okay. Have you formed an opinion as to what is the best evidence that a doctor utilizes appropriate sterile conditions during surgery, disinfectant procedures with equipment, operating room, and the entire area where the procedure is done, cleansing of instruments -- what's the best proof that that is being done appropriately? What would be the best proof?

A. I think lack of complications would be the best answer.

Q. Right. Did you ever hold any committee assignments or positions at St. Luke's -- or ever?

A. You know, yes, but it's been so long ago, I can't remember. You know, I did a lot stuff I just don't remember.

Q. Okay. Let's say the last five years. Have you held any --

A. Do you mean chairmanships or just being on a committee?

ORIGINAL

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Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF TERRENCE S. JONES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

STATE OF IDAHO)
: ss.
County of Ada)

Terrence S. Jones, having been first duly sworn upon oath, deposes and

says:

1). I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2). On Wednesday, November 13, I met with Dr. Geoffrey Stiller, one of our expert witnesses in this case for purposes of further preparing for trial. At the start of our meeting I informed Dr. Stiller of the Court's rulings on the Motions in Limine, specifically including the order regarding testimony and proof of other patient infections. I informed Dr. Stiller that per the Court's order, we would need to address this issue outside the presence of the jury first in order to get approval and that until that approval was given, no testimony in front of the jury on that issue could be given. Dr. Stiller indicated he understood this admonition.

3). I renewed this instruction and admonition to Dr. Stiller the morning of Thursday, November 14 both in my office during a second meeting and then a third time at the courthouse just prior to Dr. Stiller taking the stand. This issue was discussed in connection with my outline with Dr. Stiller for how the testimony would be presented so that I could timely request a break to address the issue with the court. On each of these occasions I reminded Dr. Stiller that the Motion in Limine issues, including the absence of infections involving other patients, was an issue that the court had said could not be presented to the jury without first bringing it up with her outside the jury to see if the Court would agree that such evidence and testimony should be allowed.

4). This was the very reason that I informed the court at the start of Dr. Stiller's testimony that morning that I had a matter that we would need to bring up later

that day outside the presence of the jury. My questions leading up to as well as the answer given by Dr. Stiller were not intended to elicit a response which violated the Court's Orders in limine. This is why I asked the Court prior to the lunch recess for the opportunity to review precisely what was stated by the witness because I did not then, nor do I now, believe that Dr. Stiller had rendered testimony which ran afoul of the Court's order. As the transcript submitted reflects, I was never given an opportunity to address the court or make any sort of record following the lunch recess.

FURTHER your Affiant saith not.

Terrence S. Jones

SUBSCRIBED AND SWORN to before me this 4th day of February, 2014.

(SEAL)

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF TERRENCE S. JONES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS by delivering the same to each of the following, by the method indicated below, addressed as follows:

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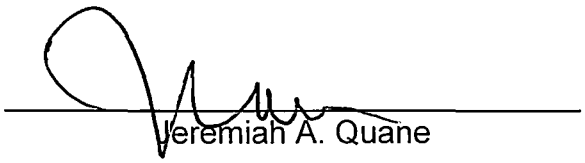

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF DR. GEOFFREY D. STILLER

STATE OF IDAHO)
: ss.
County of LATAH)

Geoffrey D. Stiller, M.D., having been first duly sworn upon oath, deposes and says:

1). The matters and facts specified and recited herein are based on your Affiant's actual personal knowledge and are true and accurate.

2). I was retained by counsel for the Defendants to act as an expert witness in this case and in that capacity I gave testimony on November 14, 2013 at the trial of this case. I have been provided with the attached Court Reporter's partial transcript of proceedings for my testimony on November 14, 2013 that is accurate and correct to the best of my knowledge and belief. In the afternoon of November 13, 2013 I met with attorney Terrence Jones in his office in connection with preparations for my trial testimony. At the beginning of our meeting, Mr. Jones informed me of the Court Order which precluded me from offering any testimony at trial regarding or related to the lack of prior infections of Dr. Kerr with other patients of his. The following morning, November 14, 2013 at his office, Mr. Jones repeated this admonition to me and he did so again on November 14, 2013 at the courthouse shortly before I took the witness stand to testify. On each of these occasions, Mr. Jones told me the Judge had said that I must not testify, in the presence of the jury, that Dr. Ker had not had any infections with other patients without first bringing the issue up outside the jury to see if the Judge would allow such testimony by me. I understood completely these instructions of Mr. Jones. Before November 13, 2013, I had been provided with and reviewed the medical records of Elmore Medical Center, Dr. Kerr, Silk Touch Laser, Saint Alphonsus Regional Medical Center, Dr. Campbell, Dr. Olson, Dr. Morgan and Dr. Fujii. The records of Dr. Kerr and Silk Touch Laser, reflect that there is no evidence of infection of Krystal Ballard on either July 21, 2010 or July 23, 2010. The records of Elmore Medical Center and Dr. Olson reflect that there is no evidence of infection of Krystal Ballard on July 25, 2010. The records of Saint Alphonsus Regional Medical Center, Dr. Campbell and Dr. Morgan

reflect that there is no evidence of infection of Krystal Ballard on July 25, 2010 and July 26, 2010. Based on these records, it is my opinion that Krystal Ballard did not have infection on the dates reflected in these records and I was going to testify to this until my testimony on November 14, 20130 was terminated. None of the questions and my answers leading up to the last question asked of me and my partial incomplete answer involved or related to the absence of any prior infections of patients of Dr. Kerr. The questions asked of me, page 22 of the Court Report transcript, are:

> Q. All right, do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?
>
> A. I do have an opinion.
>
> Q. What is your opinion?
>
> A. That that is incorrect.
>
> Q. What is your opinion based on?
>
> A. In order, well there's multiple different ways of looking at it. As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned as long as the machine basically said that it was adequate time. All the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition it's been sterilized. Okay. Spore counts don't matter. It's gram negative, okay. When you look at the process of liposuction and removing all of that tissue, and then injecting it back in, a far as it being done sterily, a gram negative rod coming from the colon to the uria or from one of his equipment, I don't see how it can happen. Let alone the fact of that no pertinent or persistent infections in the office. There is no history of the fact that...
>
> Mr. Haddad: Your Honor
>
> The Court: Sustained and we'll address it.

3). The foregoing questions and answers pertain solely to Krystal

Ballard and whether the gram negative bacteria from contaminated reusable medical instruments by Dr. Kerr. They do not ask for or involve prior infections of other patients of Dr. Kerr. The part of the answer to the last question, "let alone the fact of...that no pertinent or persistent infections in the office" is in reference to Krystal Ballard only and responsive to the last question. It means, in the opinion of Dr. Stiller, what he meant by this answer was the fact that Krystal Ballard had no infections pertinent or persistent in the office of Dr. Kerr. The word persistent means enduring, permanent, continuous, and has no relationship to prior infections or their absence of Dr. Kerr. This answer refers to the fact that Krystal Ballard was not infected when Dr. Kerr operated on July 21, 2010, evaluated Krystal Ballard on July 23, 2010, and the records of the subsequent treating physicians of Krystal Ballard of no evidence of infection. The word persistent does not mean or even imply anything to do with facts and events occurring before July 21, 2010 and the answer to the question is specifically in reference to Krystal Ballard and no one else.

4). The answer of your affiant was made in regard to Krystal Ballard and her lack of infection and did not violate the instructions received from Mr. Jones or the Court Order explained by Mr. Jones.

FURTHER your Affiant saith not.

Geoffrey D. Stiller, M.D.

SUBSCRIBED AND SWORN to before me this 23rd day of ~~December~~ January 2013.

KATI J HAEDER NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Moscow, ID
Commission expires 9-17-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF DR. GEOFFREY D. STILLER by delivering the same to each of the following, by the method indicated below, addressed as follows:

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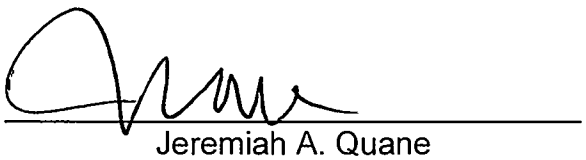

Jeremiah A. Quane

infected with gram negative bacteria as a result of contaminated reusable surgical instruments from Dr. Kerr's office being used on Krystal Ballard. You are aware of that?

A. I am.

Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?

A. I do have an opinion.

Q. What is your opinion?

A. That that is incorrect.

Q. What is your opinion based on?

A. In order -- well, there's multiple different ways of looking at it.

As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned as long as the machine basically said that it was adequate time. All the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay.

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negative; okay. When you look at the process of liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria (phonetic) or from one of his equipment, I don't see how it can happen.

Let alone the fact of -- that no pertinent or persistent infections in the office. There is no history of the fact that --

MR. HADDAD: Your Honor.

THE COURT: Sustained, and we'll address it.

MR. HADDAD: Thank you.

THE COURT: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.

(Jury Leaves.)

THE COURT: Is there some reason why you did not tell your witness about the order in limine?

THE WITNESS: He did; I apologize.

THE COURT: Well, that may not be sufficient.

MR. HADDAD: Well, Your Honor, at this time we are obligated, based upon the discussion with the Court earlier and the clear mandate by this Court on this very issue, not on other issues,

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
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CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

I. Introduction

This matter comes before the Court on Plaintiff's Motion made pursuant to Rule 37(e) seeking various sanctions against the Defense following the Court's grant of a

mistrial on November 14, 2013. Plaintiff goes to great lengths to cast aspersions upon Defense counsel associated with the mistrial, however, the transcript of what actually transpired in this case which is provided along with this memorandum speaks volumes to the contrary. The Court granted the Plaintiff's Motion for a mistrial based on the perceived belief that one of the Defense witnesses, Dr. Geoffrey Stiller, had made statements in answer to Defense counsel questioning in violation of the Court Order in Limine regarding lack of prior infections involving other patients.

After excusing the jury, the Court promptly questioned both Defense counsel, Terry Jones, and the witness on the stand about whether notice of the Court's Order had been relayed to the witness so as to avoid improperly addressing various issues in front of the jury without approval from the Court. As will be outlined below, the Court heard from the witness on the stand confirm that he, indeed, was told by Defense counsel on more than one occasion that he needed to avoid discussing certain topics until the matter could be addressed outside the presence of the jury. Even more telling, however, is the actual transcript of what was said by the witness which demonstrates that at no time did he run afoul of the Court's Order. As a result, there was no valid basis to grant the mistrial based on what Dr. Stiller testified to and/or the preceding question advanced by Defense counsel. The Court should therefore decline to enter an award of any sanctions against the Defendants and their counsel and reconsider and reverse its Order granting and declaring a mistrial.

II. Factual background

This case proceeded to trial on November 5, 2013. Per the pleadings, Plaintiff was represented by three different law firms including Scott McKay as local

counsel from Boise, Gregory Haddad from West Virginia and James Perrine from Alabama, both admitted *pro hac vice.* The Defendants were represented by one firm, with Jeremiah Quane and Terry Jones appearing as counsel of record. At the start of the trial, the Court took up the various motions in limine filed by the parties. The transcript of the Court's hearing on this issue is attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions as Exhibit D. As discussed in greater detail below, the Court granted and denied various motions in limine after stating that several of the Motions did not qualify as motions in limine and the issues they embodied would therefore have to be addressed during the trial when the issue came up.

The Court then allowed the parties to proceed with voir dire during which time the Court asked the prospective jury panel various initial questions regarding knowledge of the parties and witnesses, juror schedules, etc. before allowing the attorneys to question the remaining panel members. The Court made the decision to have only one alternate juror. The Court's Amended Scheduling Order dated September 9, 2013 specifically states this case was expected to continue for ten days. ***See*** Court's Amended Scheduling Order attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions as Exhibit B. By the wording of this Order, that meant that the trial in this case was expected to run for ten trial days or through November 20, 2013, taking into account weekends and Mondays when no trial would be held. On this basis, the Defense scheduled its witnesses for trial, estimating as best as possible when it might be able to start its case in chief. Keeping in mind the Amended Court Scheduling Order for ten trial days, the defense scheduled and planned its witnesses, lay and expert, to complete its case as scheduled within the time frame established by the Court.

Early on in the trial on November 8, the trial was stalled when Juror No. 11 failed to show that morning. The parties waited over two hours for the juror during which time the Court informed the parties that officials had been sent looking for Juror No. 11 at his work and home. Unable to find him, the Court ultimately excused Juror No. 11 after which the case proceeded with only twelve jurors. It was later disclosed to the attorneys by the Court that Juror No. 11 had been erroneously sent a notice by the jury commissioner stating that he was no longer needed. In other words, it was an error of the jury commissioner's office which resulted in the loss of the one juror.

During the second trial week, the Court provided notice to the parties that two of the remaining twelve jurors had reported a conflict due to work and/or travel plans and that they would not be able to attend the trial the following week or November 19 and 20. This was reported to the attorneys despite the fact that the time frame that the two jurors said they were no longer available was still within the original ten trial day time period that the case was scheduled to run. The Court granted the mistrial before this issue was resolved, however, it appears clear that had the Court not granted the mistrial on November 14, that it would have been forced to grant such a mistrial based on having less than twelve jurors the following week, had the Court excused the two jurors who were unavailable after November 15 or simply failed to return.

Had the Court waited to grant the mistrial the following week, no sanctions of any kind would have been available to award against any party since the mistrial would have been based on having an insufficient number of jurors per Rule 48(a). Based on the events of November 14, Plaintiff's counsel claimed all manner of prejudice both real and imagined in the presence of his client and the Court and demanded a mistrial without

even taking a break to consult with his client. After granting the mistrial, Plaintiff's counsel then requested all sorts of relief including costs, attorney fees, striking of defenses and even the disqualification of Defense counsel from further appearing in the case. Plaintiff's counsel's argued that a mistrial somehow benefitted the Defense and that the case should be promptly reset in order to obtain justice for his client. Despite his strenuous demands back in November, it is curious that Plaintiff's counsel then elected to wait over 3 weeks to file any motion for sanctions and has yet to request the trial be reset in this matter or to even provide the Court with any available trial dates. Indeed, by the time this pending Motion for Sanctions is scheduled for hearing, it will be three months after the grant of a mistrial with still no proposal for available trial dates from Plaintiff's counsel nor any sense of any urgency being advanced.

III. Argument

A. Plaintiff's reliance on Rule 37(e) is misplaced as this rule does not provide Plaintiff with a means to recover the sanctions requested following the grant of a mistrial in view of the existence of and requirements of Rule 47(u).

It is well settled in Idaho that "trial courts have broad discretion when ruling on a motion in limine." ***Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.,*** 139 Idaho 761, 767 (2004). Appellate Courts review a trial court's decision to grant or deny a motion in limine under an abuse of discretion standard. ***Id.*** at 768. A trial court may deny the motion and wait until trial to determine if the evidence should be admitted or excluded. ***Lanham v. Idaho Power Co.***, 130 Idaho 486, 492 (1997). If the trial court defers a ruling on the motion a party must reassert an objection at the time of the offer in order to preserve the issue. ***State v. Hester***, 114 Idaho 688 (1988). ***See also Gunter v. Murphy's Lounge, LLC***, 141 Idaho 16, 25 (2005). As outlined below, in this case the

issue involving the absence of infections regarding other patients was a deferred ruling.

A motion in limine does not involve a discovery order, but an order addressed to the presentation of evidence at the trial itself. A court's ruling regarding a motion in limine is subject to change when the case unfolds, particularly if the actual testimony differs from what was expected. ***U.S. v. Vasquez***, 840 F. Supp. 2d 564 (E.D. N.Y. 2011). The purpose of a motion in limine is to prevent the proponent of potentially prejudicial matter from displaying it to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. ***State v. Ciresi***, 45 A.3d 1201 (R.I. 2012). An order resulting from a motion in limine is a temporary protective order that is subject to change during the trial. ***State v. Breedlove***, 286 P.3d 1123 (Kan. 2012). A ruling on a motion in limine is not on the merits and only relates to the administration of the trial. ***Wert v. State***, 383 S.W.3d 747 (Tex. App. Houston 14th Dist. 2012). A "motion in limine" seeks a preliminary expression of the court's opinion as to the admissibility of the evidence. ***Smith v. City of St. Louis***, 395 S.W.3d 20 (Mo. 2013). ***See also***, 20 Am. Jur. Trials 441.

Based on the alleged violation of the Order in Limine, Plaintiff has filed his Motion for Sanctions pursuant to Rule 37(e) which provides as follows:

> General Sanctions - Failure to Comply With Any Order.
>
> In addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, or assess attorney's fees, costs or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules.

While recognizing that Rule 37(e) provides the court with broad authority to enter orders, there is a more specific rule which applies directly to sanctions following the

granting of a mistrial. The order at issue which the Plaintiff claims the defense violated was not a discovery order, but rather an order in limine involving the presentation of evidence to the jury and its admissibility. The defense contends that resolution of this matter is therefore not controlled by Rule 37(e), but rather by Rule 47(u) which sets forth what the court should consider when addressing the issue of sanctions following a mistrial.

Rule 47(u) provides:

Declaration of Mistrial - Sanctions.

> After trial is commenced, at any time prior to the rendering of a verdict, the court on its own motion or upon motion of any party may declare a mistrial if it determines an occurrence at trial has prevented a fair trial. If the court determines that a mistrial was caused by the deliberate misconduct of a party or attorney, the court may require the adverse party or the attorney, or both, to pay the reasonable expenses including attorney fees incurred by the opposing party or parties resulting from such misconduct. (Emphasis added).

Despite the existence of this rule and the requirements set forth within it, Plaintiff does not cite this rule anywhere in his moving papers nor does he discuss the required deliberate misconduct analysis. Instead, Plaintiff's counsel tries to exaggerate a prior entirely unrelated discovery issue from the fall of 2012 and suggest to this Court that it supports some pattern of bad behavior on the part of the defense. Using this bootstrap and suspenders approach, Plaintiff's counsel's moving papers engage in significant conjecture, overstatement and improper magnification of the circumstances at issue in order to support his Motion and attempt to influence this Court.

B. Plaintiff is not entitled to an award of sanctions against the Defendants or their counsel because per the requirements of Rule 47(u), the Defense did not engage in any deliberate misconduct

Per the above requirements of Rule 47(u), sanctions are only justified "If the court determines that a mistrial was caused by the deliberate misconduct of a party or attorney. . ." Only after making such a finding is the court then allowed to award against "the adverse party or the attorney, or both . . . the reasonable expenses including attorney fees incurred by the opposing party or parties resulting from such misconduct." Under the facts of this case, the witness in question, Dr. Stiller, was neither a party nor an attorney nor had he ever before testified as an expert witness. Dr. Stiller specifically stated under oath to the Court that he had been instructed by Defense counsel not to discuss certain topics, including the topic involving infections related to other patients. ***See*** also the affidavit of Dr. Stiller submitted in opposition to Plaintiff's Motion for Sanctions and the Affidavit of Mr. Jones.

In his moving papers, Plaintiff represents to this Court that the Defense asked Dr. Stiller "why he believed Defendants had not violated the standard of practice, to which Dr. Stiller responded that there had not been any other infections at Defendants' facility." ***See*** Plaintiff's Memorandum in Support of Motion for Sanctions at P. 8. <u>This representation by the Plaintiff is totally false</u> and further demonstrates that Plaintiff (whether intentionally or not) is misconstruing the record for the sole purpose of trying to improperly influence the Court. The actual exchange which occurred in Court went as follows:

> Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr.

Kerr?

A. I do have an opinion.

Q. What is your opinion?

A. That that is incorrect.

Q. What is your opinion based on?

A. In order – well, there's multiple different ways of looking at it. As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned as long as the machine basically said that it was adequate time. All the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay. Spore counts don't matter. Its' a gram negative; okay. When you look at the process of liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria (phonetic) or from one of his equipment, I don't see how it can happen. Let alone the fact of – that no pertinent or persistent infections in the office. There is no history of the fact that –

Mr. Haddad: Your Honor.

The Court: Sustained, and we'll address it.

Mr. Haddad: Thank you.

See November 14, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit C at p. 23, ll 1 to p. 26, ll 13.

Contrary to the statements by Plaintiff's counsel, Dr. Stiller did not state that his opinion was based on their being no other patient infections at Defendant's facility. The transcript conclusively proves that nothing even remotely close to that ever came out of Dr. Stiller's mouth. Moreover, the question posed by Defense counsel was not framed

to elicit an improper response. The interruption by Mr. Haddad of Dr. Stiller's testimony which the Court sustained without an objection even being made was totally premature considering the transcript reveals that Dr. Stiller did not testify contrary to, nor did Defense counsel ask a question contrary to the Court's Order in Limine. The Court should therefore reconsider the basis for the mistrial being based on the testimony of Dr. Stiller considering he did not violate the Order in Limine.

Dr. Stiller did not testify about an absence of prior infections involving other patients or that he had reviewed any chart or representations involving other patients. He simply stated "no pertinent or persistent infections in the office." Plaintiff interprets this statement to infer that Dr. Stiller must have been referring to infections involving other patients. While this interpretation represents nothing more than sheer speculation on the part of Plaintiff's counsel, the fact remains that an equally plausible interpretation by the jury was the fact the patient herself had never presented with any evidence of infection during her office visits and/or subsequent discussions with Dr. Kerr. There was simply no basis upon which the jury would have reasonably concluded Dr. Stiller was bringing in evidence related to other patients. As a result, there was no basis to conclude that the jury was somehow tainted with improper information based on what Dr. Stiller said such that a mistrial should have been granted or that Plaintiff was prevented a fair trial.

Plaintiff provides no case authority from any jurisdiction supporting such a proposition, nor is there any case authority in Idaho applying either Rule 47(u) or Rule 37(e) in such a fashion. There was only one Court Order issued on discovery matters and it was promptly obeyed by the Defense. The Defense did not violate any of the Orders

issued by the Court on the Motions in Limine and the Defendants and their counsel did nothing that amounted to a violation of the Court Order on evidence of prior infections of other patients of Dr. Kerr. In fact, counsel for the Defendants did everything possible and reasonable to prevent Dr. Stiller from offering testimony that was in violation of the Court Order. The question asked of Dr. Stiller that resulted in his answer that is in question, related solely to whether gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr and it defies logic to conclude that this question could be construed to include anything to do with the absence of infections of other patients of Dr. Kerr.

In the court reporter's transcript for the matters discussed and taken up after the noon recess on November 14, 2013, the Court made the following statement: "I said there was not to be any reference to any other infections." ***See*** Affidavit of Counsel in Opposition to Plaintiff's Motion for Sanctions, as Exhibit A. The question asked of Dr. Stiller referred to Krystal Ballard only and did not refer to other infections. The answer of Dr. Stiller was, among other testimony, "let alone the fact of that no pertinent or persistent infections in the office." (Emphasis added). It is logical that the jury would interpret the answer to mean the ordinary dictionary definition of the words pertinent and persistent. A standard dictionary definition of these words are: "Persistent, persevering or stubborn in a course or resolve. Enduring, permanent, continuous. Not falling away. Remaining past the time of majority." "Pertinent, related to or properly bearing upon the matter in hand, relevant." Applying these definitions, there is no basis for the conclusion that these words mean other infections, because the question related only to Krystal Ballard and whether gram negative bacteria found on her came from contaminated reusable medical

instruments by Dr. Kerr.

The questions of Dr. Stiller and his answers leading up to the testimony in question of Dr. Stiller, did not relate to or involve testimony that pertained to other infections. Presumably with knowledge of this fact, Plaintiff spends the majority of his brief trying to discredit and condemn the Defense on collateral issues which are not only disputed, but have absolutely nothing to do with the issue before the Court on why the mistrial was granted. In an attempt to manufacture evidence of alleged deliberate misconduct, Plaintiff's counsel fills his brief with inflated and half-truth statements aimed at maligning the Defense in hopes that the Court will award one or more of the requested sanctions. Plaintiff's moving papers are filled with statements which are not only irrelevant to the matter at hand, but are objectionable and clearly aimed at trying to create improper bias against the Defense.

For example, Plaintiff states that Mr. Quane turned his back on the Court somehow suggesting this was done as a sign of disrespect when in reality he was coughing, blowing his nose and conferring with his client about what the Court had stated. Mr. Quane is 79 years old and his hearing is not perfect as was demonstrated during the trial when he asked both the Court and various witnesses on occasion to repeat themselves. It is hard to imagine a physical disability like hearing loss and old age being relied upon by Plaintiff's counsel as a legitimate basis to award sanctions against a party and/or their attorney. Furthermore, as was obvious to all at the trial, both Defense counsel were ill during the trial which resulted in Mr. Quane being briefly sick. This did not justify the sanctions sought nor was it grounds for the mistrial.

Plaintiff further claims that the Defense was pleased about the fact that a

mistrial was granted. Nothing could be further from the truth. Frankly this is a totally disingenuous and baseless allegation for Plaintiff's counsel to advance. Trials are rare occurrences in today's practice and no one wants to have to prepare a second time or to expose their client to multiple trials. It is without question that significant time, money and effort had been put in to preparing the Defense case. Most assuredly the Defendants themselves, Dr. Kerr and his wife, do not want to spend another ten trial days away from their practice in order to attend a second trial. Plaintiff seems to forget and/or ignore the fact that by attending the trial to defend himself Dr. Kerr basically had to shut down the majority of his practice at great financial loss with no means of recovery.

In addition, the defense has already had to endure a significant financial penalty as a direct result of the mistrial being granted. In addition to Dr. Kerr, the defense expert witnesses were already scheduled and indeed, some were in route to testify when the mistrial was granted. The defense not only had to reimburse these experts for their time in preparing and for cancelling their respective practices so they could attend the trial, but now the defense will be forced to incur these costs a second time – again at significant expense. It is therefore clear that the respective costs of the mistrial are not lopsided to one party or the other, but rather to both parties.

Another example can be found in Plaintiff's characterization of Dr. Stiller's prior testimony. Plaintiff contends that Dr. Stiller and/or Defense counsel had done something improper by having Dr. Stiller engage in further conversation with Dr. O'Neil, the familiarizing local cosmetic surgeon. In response to Plaintiff's objection, the Court, during a break outside the presence of the jury specifically asked Dr. Stiller if he learned anything new about the local standard of practice as a result of his conversation with Dr.

O'Neil and he said he had not. This ended the issue and Defense counsel was instructed simply to avoid discussing the second conversation with the witness.

This issue has nothing to do with why the mistrial was granted and is simply another example of Plaintiff trying to unfairly characterize this issue and engage in mud-slinging against the Defense. There is no case authority in Idaho which states that a witness cannot discuss as many times as he/she wants to, issues with the familiarizing expert. Defense counsel cited the Court to an Idaho appellate case in which the district Court allowed the out of area expert to take a break in the trial to try and contact a familiarizing expert during the middle of the trial. ***See Gubler v. Boe***, 120 Idaho 294, 296, 815 P.2d 1034, 1036 (1991) (the trial court delayed the proceedings to allow Dr. Tune an opportunity to re-contact Dr. Groberg, or any other doctor, in an attempt to familiarize Dr. Tune with the local community standard of care).

Another example can be found in Plaintiff's characterization of the lack of prior patient infections issue as a whole. Without the opportunity to consider the issue, the Court initially compared it to the Defense trying to have the jury consider the absence of other car accidents as proof that the defendant was a good driver. ***See*** November 5, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit D at p. 9, ll 18 to p. 10, ll 6. However, this is not a fair comparison when taken in connection with the testimony of Plaintiff's expert, Dr. Sorensen, outlined below that he considered the lack of other patient complications to be the best evidence that Dr. Kerr and his staff were cleaning and disinfecting the equipment correctly.

Plaintiff's attorney took the deposition of Dr. Kerr on January 30, 2013 and

asked Dr. Kerr about post-operative infections of patients undergoing lipolysis, whether any patient's died, how any post-operative infections were diagnosed, and conditions of cellulitis that Dr. Kerr answered. Plaintiff's counsel never asked at that time for medical records of other patients. Instead, he elected to wait until after the end of discovery, as ordered in the Amended Notice of Trial Setting and Order Governing Further Proceedings dated September 9, 2013, to raise this issue to try and cast a shadow over the Defense in a deliberate effort to prevent relevant evidence from being admitted at the trial by claiming they had asked for information which the Defense failed to provide.

The Amended Notice of Trial Setting and Order Governing Further Proceedings provided in part that no later than 7 days before trial each attorney shall certify to the Court a descriptive list of all exhibits proposed to be offered in evidence. The same Notice provided that the last day for the taking of any discovery depositions shall be no later than 60 days prior to trial which was September 5, 2013.

The Defense submitted its list of trial exhibits that included exhibit number AA with a description that reads "Compilation of Operative procedures of Dr. Kerr from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 with the total number of liposuction procedures, consisting of 338." Exhibit number AA was produced at the Plaintiff's deposition of Dr. Coffman on August 20, 2013. No exhibits of the Defendants were listed that consisted of records and data of Silk Touch for infections. Exhibit AA was simply a list of the procedures of Dr. Kerr and nothing else and had nothing to do with patient infections.

On September 27, 2013, Plaintiff filed a Notice to take the video conference deposition duces tecum of Susan Kerr on October 2, 2013 that specified she produce at

the deposition records and data of Silk Touch for infections and patients among other things. September 27, 2013 was a Friday and on October 1, 2013, Terrence Jones sent an email to Mr. Haddad, objecting to the deposition of Susan Kerr, Exhibit F in the Affidavit of Jeremiah A. Quane. The Notice of Taking the Deposition of Susan Kerr and the date for the deposition were untimely and in violation of the Court Order for the last day for taking depositions, being September 5, 2013. The Notice of the deposition was not timely because it only allowed for slightly over 2 working days before the deposition was scheduled October 2, 2013 at noon, the same day the Plaintiff had scheduled the deposition of Dr. Laurence. The Notice of the deposition was received by Defense counsel the mid-afternoon at September 27, 2013 by fax transmission. The notice, being duces tecum, did not comply with Rule 34 that governs the procedure for taking depositions duces tecum. The short notice for the deposition of Susan Kerr made it impossible to assemble the records requested, redact the patient names, data and SS numbers in order to comply with HIPAA rules and the fact that Susan Kerr was not available to be deposed on October 2, 2013.

After being advised by Mr. Jones that an objection to the deposition of Susan Kerr was asserted, Mr. Haddad did not move the Court to compel the deposition or seek relief from the Court Order limiting the time frame for taking depositions, although there was time for him to do so before the trial on November 5, 2013. The certification of Defense counsel per the Amended Notice of Trial Setting and Order Governing Further Proceedings dated September 9, 2013, lists the exhibits of the Defendants, including exhibit AA and no exhibit is listed of the records of Silk Touch for infections or lack of infections of other patients. Plaintiff never challenged the objections advanced by

Defense counsel, but yet represents to this Court that the Defense did not comply with discovery of the Plaintiff and accused the Defense of somehow trying to hide information from the Plaintiff's counsel which was false. In the court reporter's transcript of November 14, 2013, Exhibit A to the Affidavit of Jeremiah A. Quane, the Court said in regard to the testimony of Dr. Stiller "He can talk about everything he reviewed and testified about in his deposition, and I hope he will and I hope the jury find it informative." This statement by the Court should be equally applicable to the deposition testimony of Dr. Kerr in his deposition taken January 30, 2013, that is described and set forth above. Again, this issue was raised for the first time during oral argument on the Motions in Limine and the Defense was never given an opportunity to advance argument on this issue, but was instead told the matter would be revisited during the trial outside the presence of the jury. Something the Defense was never allowed to do given the mistrial.

Plaintiff claims that the Defense was warned on three occasions that a violation of the Court's rulings would result in an award of costs and fees. Defendant would like to know precisely where in the transcripts of this case such citations can be found. The Defense has provided the Court with the only reference which could be found dealing with the risk of a mistrial with the attendant costs and fees and it dealt squarely with the issue of whether the Plaintiff would seek to remarry – not the issue of prior patient infections. ***See*** November 8, 2013 hearing transcript attached to the Affidavit of Counsel as Exhibit E.

Plaintiff's counsel claims that the Defense was somehow disrespectful to the Plaintiff himself. This is an absurd statement which has no factual basis in support and which should be ignored by this Court. After the mistrial was granted, Plaintiff's

counsel watched as the Defendants both personally went over and apologized to the Plaintiff for the fact that his wife had died and Defense counsel apologized directly to the Plaintiff that the events had led to a mistrial. The Defense did not want this case to result in a mistrial. Plaintiff claims that the Defense was somehow happy that the case resulted in a mistrial. This is not true. The Defense was barely into its second day of its case, had all of its witnesses, both lay and expert, still set to testify and was prepared to rebut and overcome both the standard of practice and causation arguments advanced by the Plaintiffs.

Suggesting that the Defense would intentionally try to sabotage the trial so that it would end prematurely is both offensive and absurd. Mr. Quane has handled and defended physicians in over 2,000 medical cases and matters of all types, and tried medical malpractice jury trials for physicians in many of these cases. He has conducted over 175 civil jury trials of all types in his career including those for physicians and never had any that ended or terminated with a mistrial. Mr. Jones has never been involved in a trial that was terminated by a mistrial. This was not the desired outcome for this case by the Defendants, and it is not fair to make the Defense the scapegoats for the costs of a retrial. Plaintiff's counsel made it perfectly clear that the only reason he was seeking a mistrial was based on one narrow issue of other patient infections, but yet now in support of sanctions Plaintiff is advancing the entire kitchen sink argument. After sustaining Plaintiff's counsel, the following exchange occurred after the lunch break on November 14:

> The Court: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.

(Jury leaves.)

The Court: Is there some reason why you did not tell your witness about the order in limine?

The Witness: He did; I apologize.

The Court: Well, that may not be sufficient.
Mr. Haddad: Well, Your Honor, at this time we are obligated, based upon the discussion with the Court earlier and the clear mandate by this Court on this very issue, not on other issues, this very issue, that if the issue of persistent history of infections or lack of infections came into this trial, that the Court would grant a mistrial and award attorneys' fees, costs and expenses to the party that violated that order. This is a clear violation of that order.

. . . .

See November 14, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit A. (Emphasis added).

The above comments by Mr. Haddad make it clear that he sought the mistrial **solely** on the issue of whether testimony had come in regarding the lack of other patient infections and this was the sole basis for the Court granting the mistrial. Despite making this claim crystal clear at that time he sought a mistrial, Plaintiff now argues everything under the sun in support of his claim that all manner of sanctions should be levied against the Defense. This is improper and should not be countenanced by this Court. Virtually all of the arguments advanced by Plaintiff relate to alleged "other bad conduct" to which he seeks to bootstrap his claim for sanctions as outlined above.

To the contrary, with the benefit of the transcript and in viewing the question and answer between Defense counsel and Dr. Stiller, the Defense contends there is nothing to indicate that he violated the Court's Order or that Defense counsel or the defendant engaged in any "deliberate misconduct", much less that it would justify granting

a mistrial or awarding costs and attorney fees or other sanctions against the Defense. Defense counsel suspected as much at the time and requested the opportunity to review the actual record of what was stated, but was never given the opportunity to address the Court at all regarding what was actually said:

> Mr. Jones: Your Honor, first of all, I did make that discussion on more than one occasion with this particular witness. So to the extent it came out, I'll take responsibility for it; he's my witness. But the discussion was had and was had more than once. **I would like to see exactly what the witness said so I can better comment on it to the judge on the issue of grounds for a mistrial.** I do know that when this judge – when Your Honor talked about this initially, the issue of costs and attorney fees and granting a mistrial was in response to bringing up the issue of whether the patient was going to remarry**. Now, I know there was subsequent discussions about the issue of other infections, and I don't believe what this witness just testified to and what he said - -**
>
> The Court: I said there was not to be any reference to any other infections. I don't see I have any choice but to grant a mistrial. And I will address the costs and attorney fees later, but it seems to me that this was something I addressed specifically. I said, "take it up outside the presence of the jury." This is a serious violation of the Court's prior order, and I don't see the Court has any choice but to grant counsel's request for a mistrial.

See November 14, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit A. (Emphasis added).

At no time after the noon recess was Defense counsel even allowed to address the Court to advance any argument in an attempt to dissuade the Court from granting the Motion for a mistrial. Finally, regarding the Motions in Limine, Defense counsel has found nothing in the Court transcripts obtained to date which stands for the proposition advanced by Plaintiff's counsel on the issue of other patient infections and that a violation of the Court's Order in Limine would result in an award of all costs and

attorney fees against the Defense.

On the first day of the trial, the Court addressed the Motions in Limine filed by the parties. Although no written decision was issued regarding the Court's ruling on the Motions in Limine, the transcript read as follows:

> Mr. Jones: Okay. Now, with respect to the issue involving other infections, we provided the Court with information regarding the opinions of the Plaintiff's own expert on the importance of other infections and how he testified in his deposition. And it's in our brief that he said that was the very best evidence; the very best evidence of whether or not someone is having problems with their sanitizing, disinfecting, sterilization procedures, is whether or not they are having issues with other infections. And so, I guess, for the benefit of making sure --
>
> . . . .
>
> Mr. Jones: Your Honor, there's two parts to it. The first is what the plaintiff's own expert said, where he said that was the best evidence to consider the infection issues.
>
> The Court: Okay.
>
> Mr. Jones: And so, whether or not we would offer testimony, we should be able to at least address, through the plaintiff's own expert, issues associated with his opinion. His opinion being that the best evidence in this case is to whether or not Dr. Kerr and his clinic are doing what they're supposed to so, is to look at either the presence of or absence of infections in other cases. So there's that aspect of it.
>
> The Court: Um-hmm.
>
> Mr. Jones: Secondly, you have, from an infectious disease standpoint, what they look at and consider for purposes of evaluating whether or not a facility has problems with their infection control. They look at infection rates and look at that data.
>
> As far as who gathered the information, Dr. Kerr has testified in his deposition regarding his knowledge, personally, of his own infection rates, and he should be able to testify regarding his knowledge, as opposed to concerns about, for example, a

non-physician looking at the charts, which I understand is one of the concerns. So there's another avenue, I guess, in terms of utilizing Dr. Kerr's testimony on that basis.

But we take the position that because of the plaintiff's own expert testimony on that issue, at the very least Dr. Kerr's knowledge of his own infections rates, that that data ought to be something that should be considered by the jury when they're being asked in this case to evaluate the sterilization procedures, cleaning procedures, things of that nature.

The Court: Um-hmm. Well, I can see how if the plaintiff's expert were to testify in that fashion, then there could be some relevance to problems that day or problems in the immediate time period proceeding. But, as a general rule, one doesn't get into the absence of other accidents in establishing whether there was or was not negligence on a particular occasion.

And so it sounds to me like that, again, is probably one that we should revisit once we have an opportunity to hear the testimony. And it sounds to me that would be reasonable to revisit again.

Just draw my attention to it prior to bringing out the evidence. We'll exclude the jury, because it sounds to me that could have some relevance. In particular, that's what an expert in the field would rely on, then I think that it could be an appropriate area, provided it's limited to day of and time period immediately proceeding.

It could be relevant without leading us into too many collateral matters. But I think it would be prudent to have that discussion outside the presence of the jury, since the absence of other injuries, as a rule, is not viewed as relevant.

So I'll revisit that one, if you'll – when you get ready to – when you feel it has reached the point where it may be relevant for some purpose, just draw my attention to it. We'll excuse the jury and we'll discuss it.

See November 5, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit D at p. 16, ll 1 to p. 20, ll 7.

By way of additional background for the Court, Plaintiff's expert, Dr.

Sorensen gave the following answer during his deposition regarding the importance of what he considered to be the best evidence of the adequacy of a physician's cleaning and disinfection procedures:

> Q. There's no proof by any means of the fact at the time of the surgery these gram-negative bacteria went into her body, is there?
>
> A. No.
>
> Q. Okay.··Have you formed an opinion as to what is the best evidence that a doctor utilizes appropriate sterile conditions during surgery, disinfectant procedures with equipment, operating room, and the entire area where the procedure is done, cleansing of instruments -- what's the best proof that that is being done appropriately? What would be the best proof?
>
> A. I think lack of complications would be the best answer.

See August 21, 2013 deposition transcript of Dean Sorensen, M.D. attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit J. (Emphasis added).

While Plaintiff's counsel seeks to crucify the Defense counsel for the mistrial in this case, the Court is obligated to review and address what actually transpired with the benefit of the above transcripts. Similar to the findings of the Ninth Circuit in the case of ***U.S. v. Meza-Soria***, the Defense contends "there was no good legal reason whatever to grant the mistrial, and that absence of a reason makes the grant an abuse of discretion." ***United States v. Meza-Soria***, 935 F.2d 166, 170-71 (9th Cir. 1991). In further support, Dr. Stiller submitted an affidavit in which he represents to the Court that the questions and answers which were being presented were not intended to come even remotely close to violating the Court's ruling that the prior patient infection issue needed to be addressed

outside the presence of the jury for approval before presenting evidence of that nature.

In fact, as further proof that the Defense was both aware of and being mindful of the Court's ruling, the Court should consider the transcript at the beginning of Dr. Stiller's testimony the morning of November 14. Defense counsel made it clear before starting the examination of Dr. Stiller that he would need to take up a matter outside the presence of the jury regarding the witness' testimony. The very reason this advance notice was given was to inform the Court that the lack of prior infections involving other patients was an issue that the Defense would need to discuss outside the presence of the jury in order to revisit it with the Court – just as Defense counsel had been instructed on day one of the trial. The statements of Defense counsel were as follows:

> Mr. Jones: Thank you, your honor. And also, with respect to the two in limine issues, there will be an offer of proof in about the middle of this witness that will need to be made. Perhaps, we can take it up during a break.
>
> The Court: That's a very good idea.
>
> Mr. Jones: I'm just letting the Court know.

See Exhibit A to the Affidavit of Jeremiah A. Quane.

Why would the Defense counsel and/or this witness intentionally run afoul of the Court's Orders in Limine while at the same time specifically state to the Court at the start of the witness' testimony that he wanted to address the issue outside the presence of the jury just as the Court had ordered him to do? The Defense contends this is strong evidence that the Defense did not engage in anything even remotely close to deliberate misconduct. Pursuant to Rule 47(u), the Defense contends that the necessary showing has not been made to support any award of sanctions against the Defense arising out of the Court granting the Plaintiff's Motion for a mistrial.

C. The range of sanctions available under Rule 47(u) does not include striking defenses or disqualifying Defense counsel.

In addition to costs and attorney fees, Plaintiff further seeks the imposition of even more harsh sanctions including striking the Defendant's defenses and disqualifying Defense counsel. In support, Plaintiff relies on the case of ***Adams v. Reed***, 138 Idaho 36, 57 P.3d 505 (Ct. App. 2002). ***Adams*** involved a personal injury action which followed a long and protracted discovery process that included multiple motions to compel, motions for mediation and motions to dismiss. The case was reset for trial multiple times in front of different judges over an extended time period. ***Id***. at 38. After repeated delays, Reed filed a motion to dismiss the action as a sanction for repeated discovery violations, noncompliance with pretrial orders, and untimely submission of the Adams' pretrial memorandum. The district Court concluded that dismissal was an appropriate sanction and granted the motion. ***Id***. at 39.

On appeal, the Court noted that "a trial Court's discretion is not unfettered, however, particularly where the ultimate sanction, dismissal of a party's claim, has been imposed." ***Id***. The Court explained that "a trial court possesses authority to sanction parties for failure to comply with discovery orders or pretrial orders and for failure to seasonably supplement responses to discovery." ***Id***. citing Rules 16(i), 26(e)(4), and 37(b). Permissible sanctions include those identified in Rule 37(b) which includes dismissal of an action. Citing ***Ashby v. W. Council, Lumber Prod. & Indus. Workers***, 117 Idaho 684, 791 P.2d 434 (1990), the court stated that there were several "factors that must be expressly considered by the trial court in deciding whether dismissal with prejudice is warranted:

> The two primary factors are a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one "aggravating" factor, including: 1) delay resulting from intentional conduct, 2) delay caused by the plaintiff personally, or 3) delay causing prejudice to the defendant. The consideration of these factors must appear in the record in order to facilitate appellate review.

Ashby, 117 Idaho 686–87 (citations omitted).

Analyzing the ***Ashby*** factors, the ***Adams*** court found evidence of a clear record of delay which included: "the Adamses were routinely late in responding to discovery, were repeatedly noncompliant with deadlines set out in pretrial orders, and on one occasion failed to engage in court ordered mediation." ***Adams***, 138 Idaho at 39. Regarding the ineffectiveness of lesser sanctions, "the district court found that during the hearings of October 30, 2000 and March 19, 2001, the Adamses were specifically warned that failure to comply with discovery could result in dismissal, and they were admonished to immediately respond to outstanding discovery requests." Per the ***Ashby*** decision, explicit warnings are among the lesser sanctions that are appropriate for the court to impose before imposition of the drastic sanction of dismissal. ***Ashby***, 117 Idaho at 687, 791 P.2d at 437.

Applying the ***Adams*** decision and the primary factors analysis used therein by the court to the facts of this case, the ***Adams*** decision strongly favors the Defense as there is no pattern of delay in this case that would support any monetary or dismissal sanctions including striking of defenses or exclusion of Defense counsel. Plaintiff has not demonstrated fulfillment of any of the ***Ashby*** factors outlined above. There has been no "pattern of delay" on any issue by the Defense which played any role in the granting of the mistrial which was based solely on the erroneous conclusion that Dr. Stiller had

rendered testimony in violation of a Court Order in Limine regarding testimony of infections involving other patients. As a result, the ***Adams*** decision cuts squarely against Plaintiff's motion for sanctions whether applying Rule 37(e) or Rule 47(u).

Plaintiff next cites to the case ***Crown v. Hawkins Co., Ltd.***, 128 Idaho 114, 910 P.2d 786 (1996) for the proposition that the Court should disqualify the Defense counsel as a sanction. ***Crown*** involved a bench trial as to the duties of a director of a warehouse corporation related to its bean grower members. As a sub-issue on appeal, the bean growers argued that Nungester's legal counsel should have been disqualified because a conflict of interest existed between Nungester and Hepworth, Lezamiz and the law firm. The growers asserted that if Nungester's actions as a director of the warehouse corporation were found to be negligent, the assets of the law firm and its partners would be implicated. They submitted that such a direct, personal stake in the outcome of the litigation violates Rule1.7(b) of the Idaho Rules of Professional Conduct. ***Crown***, 128 Idaho 122.

Relying upon the case of ***Weaver v. Millard***, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991), the ***Crown*** court stated:

> The moving party has the burden of establishing grounds for the disqualification. The goal of the court should be to shape a remedy which will assure fairness to the parties and the integrity of the judicial process. Whenever possible, courts should endeavor to reach a solution that is least burdensome to the client. Where the motion to disqualify comes not from a client or former client of the attorney, but from an opposing party, the motion should be reviewed with caution.

Crown, 128 Idaho at 123 (citations omitted).

After addressing Model Rule 1.7 and after concluding that the growers had waited almost five years before first seeking to file a motion to disqualify opposing

counsel, the court concluded the district court did not abuse its discretion in denying the motion to disqualify. ***Id.*** In the matter before the court, Plaintiff cites to ***Crown*** as support for excluding Defense counsel as a sanction for the mistrial. A review of the ***Crown*** decision aptly demonstrates that it supports no such proposition. The disqualification issue in ***Crown*** involved concerns over whether the attorney had an improper financial interest in the outcome of the case such that he should be disqualified from serving as counsel. The disqualification was not being sought as a sanction for alleged conduct resulting in a mistrial as Plaintiff claims in the instant motion.

Plaintiff's reliance on the ***Weaver v. Millard***, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991) is similarly misplaced. ***Weaver*** involved a commercial transaction to build fish ponds. The Court of Appeals ruled that the district court did not abuse its discretion in denying a motion to disqualify either the attorney for contractor or the attorney for third-party defendant partner, who were both represented by attorneys from same law firm. Again, this case involves potentially conflicted counsel and has nothing to do with the issues in this case.

Plaintiff next cites to Model Rule 3.2 and 3.4 in further support of their Motion for Sanctions. Rule 3.2 relates to making reasonable efforts to expedite the litigation consistent with the interests of the attorney's client. The portion of Rule 3.4 cited by Plaintiff states that an attorney shall not knowingly disobey an obligation under the rules of the tribunal. Since the mistrial was granted based on the belief that a trial witness, not a party, included in his answer to a question information otherwise subject to an Order in Limine, these rules have no application and do not serve to support Plaintiff's request to strike defenses or exclude Defense counsel. In addition, similar to the

language of rule 47(u) which requires the court to find an act of deliberate misconduct by a party or the party's attorney, Model Rule 3.4 refers to an attorney who "knowingly disobeys" the rules.

Because the question posed to Dr. Stiller, who admitted he was informed by Defense counsel of the court's limine rulings on other patient infections, did not request him to comment upon that topic in his answer, there is no evidence that Defense counsel engaged in conduct which would be considered in violation of Model Rule 3.4, nor is there any evidence that Defense counsel or the Defendant himself engaged in any "pervasive pattern of refusing to obey court orders." ***See*** Plaintiff's Memorandum in Support of Motion for Sanctions at p. 16. As a result, Plaintiff's Motion seeking the sanction of disqualifying Defense counsel is without merit and should be denied.

D. Because Dr. Stiller did not testify in violation of the Court's Order in Limine, the Plaintiff's Motion for a mistrial should not have been granted

Even if Dr. Stiller had made the improper disclosure being alleged, (which the Defense contends the above transcript clearly refutes) the Defense maintains that it would not have been grounds for a mistrial, especially given the lack of any effort at a curative instruction to the jury to disregard any perceived improper testimony. Furthermore contrary to the arguments of Plaintiff, the Court had not issued a number of prior cautionary instructions to the jury prior to granting a mistrial. The author of this document was not able to find any case authority in Idaho regarding the granting of mistrials in a civil case setting. In the criminal arena, however, there is some analogous case authority. Idaho Criminal Rule 29.1 states that "a mistrial may be granted only where there is an "error or legal defect in the proceedings, or conduct inside or outside of

the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial."

> Applying Rule 29.1, the Idaho Court of Appeals stated:
>
> > The admission of improper evidence does not automatically require the declaration of a mistrial. ***See, e.g., State v. Rose***, 125 Idaho 266, 269, 869 P.2d 583, 586 (Ct.App.1994). Where improper testimony is inadvertently introduced into a trial and the trial court promptly instructs the jury to disregard such evidence, the Idaho Supreme Court noted that "it is ordinarily presumed that the jury obeyed the court's instruction entirely." ***See State v. Hedger***, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989); ***State v. Boothe,*** 103 Idaho 187, 192, 646 P.2d 429, 434 (Ct.App.1982).
>
> No less an authority than the United States Supreme Court has proclaimed:
>
> > We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be "devastating" to the defendant. ***Greer v. Miller***, 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (citations omitted).

State v. Hill, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004).

In ***State v. Hill***, the Court of Appeals reviewed a case in which the trial court refused to grant a mistrial and instead instructed the jury to disregard the prosecutor's question which included reference to the defendant having been in jail. The court found that "the prosecutor's disclosure to the jury that Hill had been in jail could hardly be characterized as "devastating." Given that Hill was on trial for a criminal offense, even in the absence of the prosecutor's question, any reasonably knowledgeable juror likely would have surmised that Hill had at some point been in jail. Hill has not demonstrated that she was denied a fair trial. Accordingly, we hold that the district court did not err in

denying her motion for a mistrial." ***State v. Hill***, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004).

Likewise in this case, the above testimony by Dr. Stiller can hardly be considered "devastating" to the Plaintiff's case. There was nothing stated which "let the genie out of the bottle" regarding the issue of lack of prior infections involving other patients which the Court previously indicated it would revisit later in the trial, something that the Defense was never allowed to do by virtue of the mistrial being granted. Not only was the question about other patient infections not asked, but that issue never came out in Dr. Stiller's answer. Instead, Plaintiff's counsel, interpreted Dr. Stiller's statement as containing information which it did not and which the Defense contends the jury could not have possibly attached anywhere near the same meaning to it that Plaintiff's counsel claims.

The Court instructed the parties to bring this issue up outside the presence of the jury which is what the Defense was planning to do when it was time to present that issue. Had the Defense been given the opportunity to address with the Court the above testimony from Plaintiff's expert, Dr. Sorensen that the lack of other patient infections was the "best evidence" that Dr. Kerr was properly cleaning and sterilizing his equipment, then the Defense would have sought the right to ask a direct question to Dr. Stiller on that very subject referring to the deposition question and answer by Dr. Sorensen. The Defense contends that where the Plaintiff's expert has the opinion that the best evidence in an alleged failure to sterilize equipment is whether there is the presence or absence historically of other complications, that this is relevant and proper consideration by the jury which the Defense intended to pursue consistent with the Court's Order in Limine.

Plaintiff claims that there was some "pattern and practice" of misconduct, but yet cannot point to a single instance wherein the Court admonished the jury to disregard any statement made by either Defense counsel or a Defense witness. It is hard to understand how there could be any alleged pattern of conduct by the Defense where the jury has not been told on numerous occasions, much less even one time, to disregard a statement, opinion, question or comment of a witness. Thus, pursuant to the ***Adams*** decision outlined above, there has not been a showing as to the ineffectiveness of lesser instructions.

Based on what the transcript shows clearly transpired, it is unknown why Plaintiff's counsel, without even consulting his own client, would jump up and demand a mistrial. It suggests an alternative motive to seeking this drastic remedy which he repeatedly claims has unfairly prejudiced his client. Such an alternative motive would include knowledge of the fact that at least two jurors stated they would be unable to continue the trial into the following week. With knowledge that the lone alternate juror had been lost due to an error by the jury commissioner's office, there is no way the trial would have been able to continue into the third week and a mistrial would have, in all likelihood, have been granted at that time anyway. By demanding the mistrial when they did, Plaintiff's counsel was clearly trying to jump on this issue early by seeking to lay blame on the Defense so they could try and recover some of their costs against the Defense - whereas if the mistrial had been granted due to having less than twelve jurors they would have no one to blame.

Plaintiff seeks to bootstrap its claim by referring to a Motion to Compel it prevailed upon filed some fourteen months before the trial and the fact that no mediation

occurred. Despite the fact that Defense counsel advanced what he believed to be valid objections regarding the number of interrogatories and the topics covered, the issue was brought before the Court and the Defense was ordered to respond to the discovery. The Defense therefore complied with the one and only discovery Order entered in this case which clearly does not support Plaintiff's claim of any so-called pattern of conduct nor does it show that lesser sanctions were ineffective. Furthermore, Plaintiff's counsel makes several references to why mediation did not occur, but fails to concede the obvious fact that he had the ability to file a motion to request mediation at any time which he did not do. By virtue of the multiple sanctions requested in the Plaintiff's Motion, the Plaintiff seeks to be put in a position, sanction-wise, superior to the sanctions authorized by Rule 47(u). It is clear that the Court's Order on sanctions is confined to sanctions for having to declare a mistrial and none others. In this regard, Plaintiff's Motion that included enforcement of existing discovery and disclosure deadlines, is not pertinent to or the subject of the Court Order on sanctions related to the mistrial or sanctions authorized by Rule 47(u).

IV. Conclusion

What Plaintiff's counsel is truly trying to relay to this Court is that they do not want Jeremiah Quane and Terrence Jones to continue to be Defense counsel, taking into count that Jeremiah Quane's record in the defense of physicians is 98% total wins and that he has tried jury cases for physicians over the past 22 years, none of which, resulted in a verdict of negligence against a physician. Plaintiff's attorney seeks disqualification of defense counsel on a bogus argument of some other nefarious intent for the purpose of unfairly benefiting their own client, without consideration of the detriment to the

Defendants if Defense counsel is disqualified. Counsel makes numerous references to statements claimed to be contrary to Court Orders, but fails to present any actual evidence for the Court to consider.

The Defense, however, has presented the Court with the actual transcripts to see for itself what was said and by whom. These transcripts stand in stark contrast to the representations advanced by Plaintiff's counsel in its memorandum seeking sanctions. Plaintiff's counsel misrepresents to this Court the statements made by Dr. Stiller by suggesting that he testified about the reasons the Defendants had not violated the standard of practice was because there had not been any other infections at Defendants' facility. The actual transcript shows no such testimony was ever elicited by Defense counsel nor offered by the Defense witness, Dr. Stiller, such that the Court should reconsider the basis for its decision granting the mistrial considering the Court did not have all the facts at the time it ruled.

In the Plaintiff's case-in-chief, the medical records of Dr. Kerr, Elmore Medical Center and St. Alphonsus Regional Medical Center were admitted in evidence and these records were reviewed long before trial by Dr. Stiller. These records contain the reports of several doctors in which they state that there is no evidence of infection in Krystal Ballard which include the records of Dr. Kerr for his assessment of Krystal Ballard on July 23, 2010.

Dr. Billy Morgan, is a general surgeon at St. Alphonsus Regional Medical Center who evaluated Krystal Ballard at the request of Dr. Tisha Fujii, who was the primary treating physician of Krystal Ballard at St. Alphonsus Regional Medical Center. Dr. Morgan issued a report that covered his evaluation of Krystal Ballard on July 25, 2010

and the report states in pertinent part "she now has what appears to be a probable fat emboli syndrome with significant ARDS, massive hypoxemia, unresponsive to ventilator modes from a surgical standpoint." His report goes on to say in part in regard to the chest x-ray from Elmore Medical Center "findings possibly a similar fat emboli syndrome."

His Report also states in regard to the buttocks of Krystal Ballard, "The patient's buttocks show 2 wounds, 1 on the posterior superior iliac crest on each side with no crepitance to the subcutaneous tissue. No evidence of redness or inflammation and no drainage from the insertion sites for the fat transplants." Defendants' Exhibit U. On July 25, 2010, chest x-rays of Krystal Ballard were taken at Elmore Medical Center and Saint Alphonsus Regional Medical Center and interpreted by radiologists Dr. Stemmler and Dr. Schaff. They issued radiology reports for their respective interpretations of the chest x-rays, Defendants' Exhibits W and X. Exhibits U, W and X are identified in the Affidavit of Jeremiah A. Quane. Their reports collectively provide that similar findings may be seen in setting of fat embolism and findings may represent fat embolism.

The subject records, put in evidence by the Plaintiff, demonstrate that no pertinent or persistent infections existed which is the testimony of Dr. Stiller that resulted in the mistrial Order of the District Judge. At the time of the subject testimony of Dr. Stiller, the entries in the subject records had not yet been explained by witnesses although the records themselves that contained the entries of doctors of no evidence of infection in Krystal Ballard were in evidence at the doing of the Plaintiff. ***See*** also the Affidavit of Dr. Stiller. The foregoing litany of events and facts, give context to the testimony of Dr. Stiller that in fairness the Court may not have been aware of when the mistrial was declared.

Plaintiff's counsel has blatantly inflamed and exaggerated the nature of the testimony and the events at issue solely hoping to unfairly influence the Court and further their quest for sanctions. Pursuant to the requirements of Rule 47(u), Plaintiff can point to no "deliberate misconduct" by the Defense which resulted in the granting of the mistrial. Furthermore, Plaintiff cites to no case authority to support such an award of sanctions against a party in response to a mistrial whether applying Rule 37(e) or Rule 47(u). For these reasons, the Defense requests the Court deny Plaintiff's Motion for Sanctions in its entirety.

DATED this 5th day of February, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2014, I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS by delivering the same to each of the following, by the method indicated below, addressed as follows:

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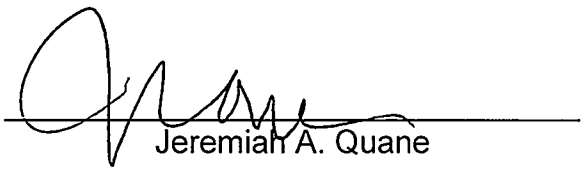

Jeremiah A. Quane

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

I. Introduction

This matter comes before the Court on Plaintiff's Motion made pursuant to Rule 37(e) seeking various sanctions against the Defense following the Court's grant of a mistrial on November 14, 2013. Plaintiff goes to great lengths to cast aspersions upon Defense counsel associated with the mistrial, however, the transcript of what actually transpired in this case which is provided along with this memorandum speaks volumes to the contrary. The Court granted the Plaintiff's Motion for a mistrial based on the perceived belief that one of the Defense witnesses, Dr. Geoffrey Stiller, had made statements in answer to Defense counsel questioning in violation of

the Court Order in Limine regarding lack of prior infections involving other patients.

After excusing the jury, the Court promptly questioned both Defense counsel, Terry Jones, and the witness on the stand about whether notice of the Court's Order had been relayed to the witness so as to avoid improperly addressing various issues in front of the jury without approval from the Court. As will be outlined below, the Court heard from the witness on the stand confirm that he, indeed, was told by Defense counsel on more than one occasion that he needed to avoid discussing certain topics until the matter could be addressed outside the presence of the jury. Even more telling, however, is the actual transcript of what was said by the witness which demonstrates that at no time did he run afoul of the Court's Order. As a result, there was no valid basis to grant the mistrial based on what Dr. Stiller testified to and/or the preceding question advanced by Defense counsel. The Court should therefore decline to enter an award of any sanctions against the Defendants and their counsel and reconsider and reverse its Order granting and declaring a mistrial.

II. Factual background

This case proceeded to trial on November 5, 2013. Per the pleadings, Plaintiff was represented by three different law firms including Scott McKay as local counsel from Boise, Gregory Haddad from West Virginia and James Perrine from Alabama, both admitted *pro hac vice*. The Defendants were represented by one firm, with Jeremiah Quane and Terry Jones appearing as counsel of record. At the start of the trial, the Court took up the various motions in limine filed by the parties. The transcript of the Court's hearing on this issue is attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions as Exhibit D. As discussed in greater detail below, the Court granted and denied various motions in limine after stating that several of the Motions did not qualify as motions in limine and the issues they embodied would therefore have to be addressed during the trial when the issue came up.

The Court then allowed the parties to proceed with voir dire during which time the Court asked the prospective jury panel various initial questions regarding knowledge of the parties and witnesses, juror schedules, etc. before allowing the attorneys to question the remaining panel members. The Court made the decision to have only one alternate juror. The Court's Amended Scheduling Order dated September 9, 2013 specifically states this case was expected to continue for ten days. ***See*** Court's Amended Scheduling Order attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions as Exhibit B. By the wording of this Order, that meant that the trial in this case was expected to run for ten trial days or through November 20,

2013, taking into account weekends and Mondays when no trial would be held. On this basis, the Defense scheduled its witnesses for trial, estimating as best as possible when it might be able to start its case in chief. Keeping in mind the Amended Court Scheduling Order for ten trial days, the defense scheduled and planned its witnesses, lay and expert, to complete its case as scheduled within the time frame established by the Court.

Early on in the trial on November 8, the trial was stalled when Juror No. 11 failed to show that morning. The parties waited over two hours for the juror during which time the Court informed the parties that officials had been sent looking for Juror No. 11 at his work and home. Unable to find him, the Court ultimately excused Juror No. 11 after which the case proceeded with only twelve jurors. It was later disclosed to the attorneys by the Court that Juror No. 11 had been erroneously sent a notice by the jury commissioner stating that he was no longer needed. In other words, it was an error of the jury commissioner's office which resulted in the loss of the one juror.

During the second trial week, the Court provided notice to the parties that two of the remaining twelve jurors had reported a conflict due to work and/or travel plans and that they would not be able to attend the trial the following week or November 19 and 20. This was reported to the attorneys despite the fact that the time frame that the two jurors said they were no longer available was still within the original ten trial day time period that the case was scheduled to run. The Court granted the mistrial before this issue was resolved, however, it appears clear that had the Court not granted the mistrial on November 14, that it would have been forced to grant such a mistrial based on having less than twelve jurors the following week, had the Court excused the two jurors who were unavailable after November 15 or simply failed to return.

Had the Court waited to grant the mistrial the following week, no sanctions of any kind would have been available to award against any party since the mistrial would have been based on having an insufficient number of jurors per Rule 48(a). Based on the events of November 14, Plaintiff's counsel claimed all manner of prejudice both real and imagined in the presence of his client and the Court and demanded a mistrial without even taking a break to consult with his client. After granting the mistrial, Plaintiff's counsel then requested all sorts of relief including costs, attorney fees, striking of defenses and even the disqualification of Defense counsel from further appearing in the case. Plaintiff's counsel's argued that a mistrial somehow benefitted the Defense and that the case should be promptly reset in order to obtain justice for his client. Despite his strenuous demands back in November, it is curious that Plaintiff's counsel then elected to wait over 3 weeks to file any motion for sanctions and has yet to request the trial be reset in this matter

or to even provide the Court with any available trial dates. Indeed, by the time this pending Motion for Sanctions is scheduled for hearing, it will be three months after the grant of a mistrial with still no proposal for available trial dates from Plaintiff's counsel nor any sense of any urgency being advanced.

III. Argument

A. Plaintiff's reliance on Rule 37(e) is misplaced as this rule does not provide Plaintiff with a means to recover the sanctions requested following the grant of a mistrial in view of the existence of and requirements of Rule 47(u).

It is well settled in Idaho that "trial courts have broad discretion when ruling on a motion in limine." ***Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.,*** 139 Idaho 761, 767 (2004). Appellate Courts review a trial court's decision to grant or deny a motion in limine under an abuse of discretion standard. ***Id.*** at 768. A trial court may deny the motion and wait until trial to determine if the evidence should be admitted or excluded. ***Lanham v. Idaho Power Co.***, 130 Idaho 486, 492 (1997). If the trial court defers a ruling on the motion a party must reassert an objection at the time of the offer in order to preserve the issue. ***State v. Hester***, 114 Idaho 688 (1988). ***See also Gunter v. Murphy's Lounge, LLC***, 141 Idaho 16, 25 (2005). As outlined below, in this case the issue involving the absence of infections regarding other patients was a deferred ruling.

A motion in limine does not involve a discovery order, but an order addressed to the presentation of evidence at the trial itself. A court's ruling regarding a motion in limine is subject to change when the case unfolds, particularly if the actual testimony differs from what was expected. ***U.S. v. Vasquez***, 840 F. Supp. 2d 564 (E.D. N.Y. 2011). The purpose of a motion in limine is to prevent the proponent of potentially prejudicial matter from displaying it to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. ***State v. Ciresi***, 45 A.3d 1201 (R.I. 2012). An order resulting from a motion in limine is a temporary protective order that is subject to change during the trial. ***State v. Breedlove***, 286 P.3d 1123 (Kan. 2012). A ruling on a motion in limine is not on the merits and only relates to the administration of the trial. ***Wert v. State***, 383 S.W.3d 747 (Tex. App. Houston 14th Dist. 2012). A "motion in limine" seeks a preliminary expression of the court's opinion as to the admissibility of the evidence. ***Smith v. City of St. Louis***, 395 S.W.3d 20 (Mo. 2013). ***See also***, 20 Am. Jur. Trials 441.

Based on the alleged violation of the Order in Limine, Plaintiff has filed his Motion for Sanctions pursuant to Rule 37(e) which provides as follows:

General Sanctions - Failure to Comply With Any Order.

> In addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, or assess attorney's fees, costs or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules.

While recognizing that Rule 37(e) provides the court with broad authority to enter orders, there is a more specific rule which applies directly to sanctions following the granting of a mistrial. The order at issue which the Plaintiff claims the defense violated was not a discovery order, but rather an order in limine involving the presentation of evidence to the jury and its admissibility. The defense contends that resolution of this matter is therefore not controlled by Rule 37(e), but rather by Rule 47(u) which sets forth what the court should consider when addressing the issue of sanctions following a mistrial.

Rule 47(u) provides:

Declaration of Mistrial - Sanctions.

> After trial is commenced, at any time prior to the rendering of a verdict, the court on its own motion or upon motion of any party may declare a mistrial if it determines an occurrence at trial has prevented a fair trial. If the court determines that a mistrial was caused by the deliberate misconduct of a party or attorney, the court may require the adverse party or the attorney, or both, to pay the reasonable expenses including attorney fees incurred by the opposing party or parties resulting from such misconduct. (Emphasis added).

Despite the existence of this rule and the requirements set forth within it, Plaintiff does not cite this rule anywhere in his moving papers nor does he discuss the required deliberate misconduct analysis. Instead, Plaintiff's counsel tries to exaggerate a prior entirely unrelated discovery issue from the fall of 2012 and suggest to this Court that it supports some pattern of bad behavior on the part of the defense. Using this bootstrap and suspenders approach, Plaintiff's counsel's moving papers engage in significant conjecture, overstatement and improper magnification of the circumstances at issue in order to support his Motion and attempt to influence this Court.

B. Plaintiff is not entitled to an award of sanctions against the Defendants or their counsel because per the requirements of Rule 47(u), the Defense did not engage in any deliberate

misconduct

Per the above requirements of Rule 47(u), sanctions are only justified "If the court determines that a mistrial was caused by the deliberate misconduct of a party or attorney. . ." Only after making such a finding is the court then allowed to award against "the adverse party or the attorney, or both . . . the reasonable expenses including attorney fees incurred by the opposing party or parties resulting from such misconduct." Under the facts of this case, the witness in question, Dr. Stiller, was neither a party nor an attorney nor had he ever before testified as an expert witness. Dr. Stiller specifically stated under oath to the Court that he had been instructed by Defense counsel not to discuss certain topics, including the topic involving infections related to other patients. ***See*** also the affidavit of Dr. Stiller submitted in opposition to Plaintiff's Motion for Sanctions and the Affidavit of Mr. Jones.

In his moving papers, Plaintiff represents to this Court that the Defense asked Dr. Stiller "why he believed Defendants had not violated the standard of practice, to which Dr. Stiller responded that there had not been any other infections at Defendants' facility." ***See*** Plaintiff's Memorandum in Support of Motion for Sanctions at P. 8. <u>This representation by the Plaintiff is totally false</u> and further demonstrates that Plaintiff (whether intentionally or not) is misconstruing the record for the sole purpose of trying to improperly influence the Court. The actual exchange which occurred in Court went as follows:

> Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?
>
> A. I do have an opinion.
>
> Q. What is your opinion?
>
> A. That that is incorrect.
>
> Q. What is your opinion based on?
>
> A. In order – well, there's multiple different ways of looking at it. As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned as long as the machine basically said that it was adequate time. All the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay. Spore counts don't matter. Its' a gram negative; okay. When you look at the process of

> liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria (phonetic) or from one of his equipment, I don't see how it can happen. Let alone the fact of – that no pertinent or persistent infections in the office. There is no history of the fact that –
>
> Mr. Haddad: Your Honor.
>
> The Court: Sustained, and we'll address it.
>
> Mr. Haddad: Thank you.

See November 14, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit C at p. 23, ll 1 to p. 26, ll 13.

Contrary to the statements by Plaintiff's counsel, Dr. Stiller did not state that his opinion was based on their being no other patient infections at Defendant's facility. The transcript conclusively proves that nothing even remotely close to that ever came out of Dr. Stiller's mouth. Moreover, the question posed by Defense counsel was not framed to elicit an improper response. The interruption by Mr. Haddad of Dr. Stiller's testimony which the Court sustained without an objection even being made was totally premature considering the transcript reveals that Dr. Stiller did not testify contrary to, nor did Defense counsel ask a question contrary to the Court's Order in Limine. The Court should therefore reconsider the basis for the mistrial being based on the testimony of Dr. Stiller considering he did not violate the Order in Limine.

Dr. Stiller did not testify about an absence of prior infections involving other patients or that he had reviewed any chart or representations involving other patients. He simply stated "no pertinent or persistent infections in the office." Plaintiff interprets this statement to infer that Dr. Stiller must have been referring to infections involving other patients. While this interpretation represents nothing more than sheer speculation on the part of Plaintiff's counsel, the fact remains that an equally plausible interpretation by the jury was the fact the patient herself had never presented with any evidence of infection during her office visits and/or subsequent discussions with Dr. Kerr. There was simply no basis upon which the jury would have reasonably concluded Dr. Stiller was bringing in evidence related to other patients. As a result, there was no basis to conclude that the jury was somehow tainted with improper information based on what Dr. Stiller said such that a mistrial should have been granted or that Plaintiff was prevented a fair trial.

Plaintiff provides no case authority from any jurisdiction supporting such a

proposition, nor is there any case authority in Idaho applying either Rule 47(u) or Rule 37(e) in such a fashion. There was only one Court Order issued on discovery matters and it was promptly obeyed by the Defense. The Defense did not violate any of the Orders issued by the Court on the Motions in Limine and the Defendants and their counsel did nothing that amounted to a violation of the Court Order on evidence of prior infections of other patients of Dr. Kerr. In fact, counsel for the Defendants did everything possible and reasonable to prevent Dr. Stiller from offering testimony that was in violation of the Court Order. The question asked of Dr. Stiller that resulted in his answer that is in question, related solely to whether gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr and it defies logic to conclude that this question could be construed to include anything to do with the absence of infections of other patients of Dr. Kerr.

In the court reporter's transcript for the matters discussed and taken up after the noon recess on November 14, 2013, the Court made the following statement: "I said there was not to be any reference to any other infections." ***See*** Affidavit of Counsel in Opposition to Plaintiff's Motion for Sanctions, as Exhibit A. The question asked of Dr. Stiller referred to Krystal Ballard only and did not refer to other infections. The answer of Dr. Stiller was, among other testimony, "let alone the fact of that no pertinent or persistent infections in the office." (Emphasis added). It is logical that the jury would interpret the answer to mean the ordinary dictionary definition of the words pertinent and persistent. A standard dictionary definition of these words are: "Persistent, persevering or stubborn in a course or resolve. Enduring, permanent, continuous. Not falling away. Remaining past the time of majority." "Pertinent, related to or properly bearing upon the matter in hand, relevant." Applying these definitions, there is no basis for the conclusion that these words mean other infections, because the question related only to Krystal Ballard and whether gram negative bacteria found on her came from contaminated reusable medical instruments by Dr. Kerr.

The questions of Dr. Stiller and his answers leading up to the testimony in question of Dr. Stiller, did not relate to or involve testimony that pertained to other infections. Presumably with knowledge of this fact, Plaintiff spends the majority of his brief trying to discredit and condemn the Defense on collateral issues which are not only disputed, but have absolutely nothing to do with the issue before the Court on why the mistrial was granted. In an attempt to manufacture evidence of alleged deliberate misconduct, Plaintiff's counsel fills his brief with inflated and half-truth statements aimed at maligning the Defense in hopes that the Court will award one or more of the requested sanctions. Plaintiff's moving papers are filled with

statements which are not only irrelevant to the matter at hand, but are objectionable and clearly aimed at trying to create improper bias against the Defense.

For example, Plaintiff states that Mr. Quane turned his back on the Court somehow suggesting this was done as a sign of disrespect when in reality he was coughing, blowing his nose and conferring with his client about what the Court had stated. Mr. Quane is 79 years old and his hearing is not perfect as was demonstrated during the trial when he asked both the Court and various witnesses on occasion to repeat themselves. It is hard to imagine a physical disability like hearing loss and old age being relied upon by Plaintiff's counsel as a legitimate basis to award sanctions against a party and/or their attorney. Furthermore, as was obvious to all at the trial, both Defense counsel were ill during the trial which resulted in Mr. Quane being briefly sick. This did not justify the sanctions sought nor was it grounds for the mistrial.

Plaintiff further claims that the Defense was pleased about the fact that a mistrial was granted. Nothing could be further from the truth. Frankly this is a totally disingenuous and baseless allegation for Plaintiff's counsel to advance. Trials are rare occurrences in today's practice and no one wants to have to prepare a second time or to expose their client to multiple trials. It is without question that significant time, money and effort had been put in to preparing the Defense case. Most assuredly the Defendants themselves, Dr. Kerr and his wife, do not want to spend another ten trial days away from their practice in order to attend a second trial. Plaintiff seems to forget and/or ignore the fact that by attending the trial to defend himself Dr. Kerr basically had to shut down the majority of his practice at great financial loss with no means of recovery.

In addition, the defense has already had to endure a significant financial penalty as a direct result of the mistrial being granted. In addition to Dr. Kerr, the defense expert witnesses were already scheduled and indeed, some were in route to testify when the mistrial was granted. The defense not only had to reimburse these experts for their time in preparing and for cancelling their respective practices so they could attend the trial, but now the defense will be forced to incur these costs a second time – again at significant expense. It is therefore clear that the respective costs of the mistrial are not lopsided to one party or the other, but rather to both parties.

Another example can be found in Plaintiff's characterization of Dr. Stiller's prior testimony. Plaintiff contends that Dr. Stiller and/or Defense counsel had done something improper by having Dr. Stiller engage in further conversation with Dr. O'Neil, the familiarizing local cosmetic surgeon. In response to Plaintiff's objection, the Court, during a break outside the

presence of the jury specifically asked Dr. Stiller if he learned anything new about the local standard of practice as a result of his conversation with Dr. O'Neil and he said he had not. This ended the issue and Defense counsel was instructed simply to avoid discussing the second conversation with the witness.

This issue has nothing to do with why the mistrial was granted and is simply another example of Plaintiff trying to unfairly characterize this issue and engage in mud-slinging against the Defense. There is no case authority in Idaho which states that a witness cannot discuss as many times as he/she wants to, issues with the familiarizing expert. Defense counsel cited the Court to an Idaho appellate case in which the district Court allowed the out of area expert to take a break in the trial to try and contact a familiarizing expert during the middle of the trial. ***See Gubler v. Boe***, 120 Idaho 294, 296, 815 P.2d 1034, 1036 (1991) (the trial court delayed the proceedings to allow Dr. Tune an opportunity to re-contact Dr. Groberg, or any other doctor, in an attempt to familiarize Dr. Tune with the local community standard of care).

Another example can be found in Plaintiff's characterization of the lack of prior patient infections issue as a whole. Without the opportunity to consider the issue, the Court initially compared it to the Defense trying to have the jury consider the absence of other car accidents as proof that the defendant was a good driver. ***See*** November 5, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit D at p. 9, ll 18 to p. 10, ll 6. However, this is not a fair comparison when taken in connection with the testimony of Plaintiff's expert, Dr. Sorensen, outlined below that he considered the lack of other patient complications to be the best evidence that Dr. Kerr and his staff were cleaning and disinfecting the equipment correctly.

Plaintiff's attorney took the deposition of Dr. Kerr on January 30, 2013 and asked Dr. Kerr about post-operative infections of patients undergoing lipolysis, whether any patient's died, how any post-operative infections were diagnosed, and conditions of cellulitis that Dr. Kerr answered. Plaintiff's counsel never asked at that time for medical records of other patients. Instead, he elected to wait until after the end of discovery, as ordered in the Amended Notice of Trial Setting and Order Governing Further Proceedings dated September 9, 2013, to raise this issue to try and cast a shadow over the Defense in a deliberate effort to prevent relevant evidence from being admitted at the trial by claiming they had asked for information which the Defense failed to provide.

The Amended Notice of Trial Setting and Order Governing Further Proceedings

provided in part that no later than 7 days before trial each attorney shall certify to the Court a descriptive list of all exhibits proposed to be offered in evidence. The same Notice provided that the last day for the taking of any discovery depositions shall be no later than 60 days prior to trial which was September 5, 2013.

The Defense submitted its list of trial exhibits that included exhibit number AA with a description that reads "Compilation of Operative procedures of Dr. Kerr from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 with the total number of liposuction procedures, consisting of 338." Exhibit number AA was produced at the Plaintiff's deposition of Dr. Coffman on August 20, 2013. No exhibits of the Defendants were listed that consisted of records and data of Silk Touch for infections. Exhibit AA was simply a list of the procedures of Dr. Kerr and nothing else and had nothing to do with patient infections.

On September 27, 2013, Plaintiff filed a Notice to take the video conference deposition duces tecum of Susan Kerr on October 2, 2013 that specified she produce at the deposition records and data of Silk Touch for infections and patients among other things. September 27, 2013 was a Friday and on October 1, 2013, Terrence Jones sent an email to Mr. Haddad, objecting to the deposition of Susan Kerr, Exhibit F in the Affidavit of Jeremiah A. Quane. The Notice of Taking the Deposition of Susan Kerr and the date for the deposition were untimely and in violation of the Court Order for the last day for taking depositions, being September 5, 2013. The Notice of the deposition was not timely because it only allowed for slightly over 2 working days before the deposition was scheduled October 2, 2013 at noon, the same day the Plaintiff had scheduled the deposition of Dr. Laurence. The Notice of the deposition was received by Defense counsel the mid-afternoon at September 27, 2013 by fax transmission. The notice, being duces tecum, did not comply with Rule 34 that governs the procedure for taking depositions duces tecum. The short notice for the deposition of Susan Kerr made it impossible to assemble the records requested, redact the patient names, data and SS numbers in order to comply with HIPAA rules and the fact that Susan Kerr was not available to be deposed on October 2, 2013.

After being advised by Mr. Jones that an objection to the deposition of Susan Kerr was asserted, Mr. Haddad did not move the Court to compel the deposition or seek relief from the Court Order limiting the time frame for taking depositions, although there was time for him to do so before the trial on November 5, 2013. The certification of Defense counsel per the Amended Notice of Trial Setting and Order Governing Further Proceedings dated September 9, 2013, lists the exhibits of the Defendants, including exhibit AA and no exhibit is listed of the records of Silk

Touch for infections or lack of infections of other patients. Plaintiff never challenged the objections advanced by Defense counsel, but yet represents to this Court that the Defense did not comply with discovery of the Plaintiff and accused the Defense of somehow trying to hide information from the Plaintiff's counsel which was false. In the court reporter's transcript of November 14, 2013, Exhibit A to the Affidavit of Jeremiah A. Quane, the Court said in regard to the testimony of Dr. Stiller "He can talk about everything he reviewed and testified about in his deposition, and I hope he will and I hope the jury find it informative." This statement by the Court should be equally applicable to the deposition testimony of Dr. Kerr in his deposition taken January 30, 2013, that is described and set forth above. Again, this issue was raised for the first time during oral argument on the Motions in Limine and the Defense was never given an opportunity to advance argument on this issue, but was instead told the matter would be revisited during the trial outside the presence of the jury. Something the Defense was never allowed to do given the mistrial.

Plaintiff claims that the Defense was warned on three occasions that a violation of the Court's rulings would result in an award of costs and fees. Defendant would like to know precisely where in the transcripts of this case such citations can be found. The Defense has provided the Court with the only reference which could be found dealing with the risk of a mistrial with the attendant costs and fees and it dealt squarely with the issue of whether the Plaintiff would seek to remarry – not the issue of prior patient infections. ***See*** November 8, 2013 hearing transcript attached to the Affidavit of Counsel as Exhibit E.

Plaintiff's counsel claims that the Defense was somehow disrespectful to the Plaintiff himself. This is an absurd statement which has no factual basis in support and which should be ignored by this Court. After the mistrial was granted, Plaintiff's counsel watched as the Defendants both personally went over and apologized to the Plaintiff for the fact that his wife had died and Defense counsel apologized directly to the Plaintiff that the events had led to a mistrial. The Defense did not want this case to result in a mistrial. Plaintiff claims that the Defense was somehow happy that the case resulted in a mistrial. This is not true. The Defense was barely into its second day of its case, had all of its witnesses, both lay and expert, still set to testify and was prepared to rebut and overcome both the standard of practice and causation arguments advanced by the Plaintiffs.

Suggesting that the Defense would intentionally try to sabotage the trial so that it would end prematurely is both offensive and absurd. Mr. Quane has handled and defended

physicians in over 2,000 medical cases and matters of all types, and tried medical malpractice jury trials for physicians in many of these cases. He has conducted over 175 civil jury trials of all types in his career including those for physicians and never had any that ended or terminated with a mistrial. Mr. Jones has never been involved in a trial that was terminated by a mistrial. This was not the desired outcome for this case by the Defendants, and it is not fair to make the Defense the scapegoats for the costs of a retrial. Plaintiff's counsel made it perfectly clear that the only reason he was seeking a mistrial was based on one narrow issue of other patient infections, but yet now in support of sanctions Plaintiff is advancing the entire kitchen sink argument. After sustaining Plaintiff's counsel, the following exchange occurred after the lunch break on November 14:

> The Court: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.
>
> (Jury leaves.)
>
> The Court: Is there some reason why you did not tell your witness about the order in limine?
>
> The Witness: He did; I apologize.
>
> The Court: Well, that may not be sufficient.
> Mr. Haddad: Well, Your Honor, at this time we are obligated, based upon the discussion with the Court earlier and the clear mandate by this Court on this very issue, not on other issues, this very issue, that if the issue of persistent history of infections or lack of infections came into this trial, that the Court would grant a mistrial and award attorneys' fees, costs and expenses to the party that violated that order. This is a clear violation of that order.
> . . . .

See November 14, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit A. (Emphasis added).

The above comments by Mr. Haddad make it clear that he sought the mistrial **solely** on the issue of whether testimony had come in regarding the lack of other patient infections and this was the sole basis for the Court granting the mistrial. Despite making this claim crystal clear at that time he sought a mistrial, Plaintiff now argues everything under the sun in support of his claim that all manner of sanctions should be levied against the Defense. This is improper and should not be countenanced by this Court. Virtually all of the arguments advanced by Plaintiff relate to alleged "other bad conduct" to which he seeks to bootstrap his claim for sanctions as outlined above.

To the contrary, with the benefit of the transcript and in viewing the question and answer between Defense counsel and Dr. Stiller, the Defense contends there is nothing to indicate that he violated the Court's Order or that Defense counsel or the defendant engaged in any "deliberate misconduct", much less that it would justify granting a mistrial or awarding costs and attorney fees or other sanctions against the Defense. Defense counsel suspected as much at the time and requested the opportunity to review the actual record of what was stated, but was never given the opportunity to address the Court at all regarding what was actually said:

> Mr. Jones: Your Honor, first of all, I did make that discussion on more than one occasion with this particular witness. So to the extent it came out, I'll take responsibility for it; he's my witness. But the discussion was had and was had more than once. **I would like to see exactly what the witness said so I can better comment on it to the judge on the issue of grounds for a mistrial.** I do know that when this judge –when Your Honor talked about this initially, the issue of costs and attorney fees and granting a mistrial was in response to bringing up the issue of whether the patient was going to remarry**. Now, I know there was subsequent discussions about the issue of other infections, and I don't believe what this witness just testified to and what he said - -**
>
> The Court: I said there was not to be any reference to any other infections. I don't see I have any choice but to grant a mistrial. And I will address the costs and attorney fees later, but it seems to me that this was something I addressed specifically. I said, "take it up outside the presence of the jury." This is a serious violation of the Court's prior order, and I don't see the Court has any choice but to grant counsel's request for a mistrial.

See November 14, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit A. (Emphasis added).

At no time after the noon recess was Defense counsel even allowed to address the Court to advance any argument in an attempt to dissuade the Court from granting the Motion for a mistrial. Finally, regarding the Motions in Limine, Defense counsel has found nothing in the Court transcripts obtained to date which stands for the proposition advanced by Plaintiff's counsel on the issue of other patient infections and that a violation of the Court's Order in Limine would result in an award of all costs and attorney fees against the Defense.

On the first day of the trial, the Court addressed the Motions in Limine filed by the parties. Although no written decision was issued regarding the Court's ruling on the Motions in Limine, the transcript read as follows:

Mr. Jones: Okay. Now, with respect to the issue involving other infections, we provided the Court with information regarding the opinions of the Plaintiff's own expert on the importance of other infections and how he testified in his deposition. And it's in our brief that he said that was the very best evidence; the very best evidence of whether or not someone is having problems with their sanitizing, disinfecting, sterilization procedures, is whether or not they are having issues with other infections. And so, I guess, for the benefit of making sure --

. . . .

Mr. Jones: Your Honor, there's two parts to it. The first is what the plaintiff's own expert said, where he said that was the best evidence to consider the infection issues.

The Court: Okay.

Mr. Jones: And so, whether or not we would offer testimony, we should be able to at least address, through the plaintiff's own expert, issues associated with his opinion. His opinion being that the best evidence in this case is to whether or not Dr. Kerr and his clinic are doing what they're supposed to so, is to look at either the presence of or absence of infections in other cases. So there's that aspect of it.

The Court: Um-hmm.

Mr. Jones: Secondly, you have, from an infectious disease standpoint, what they look at and consider for purposes of evaluating whether or not a facility has problems with their infection control. They look at infection rates and look at that data.

As far as who gathered the information, Dr. Kerr has testified in his deposition regarding his knowledge, personally, of his own infection rates, and he should be able to testify regarding his knowledge, as opposed to concerns about, for example, a non-physician looking at the charts, which I understand is one of the concerns. So there's another avenue, I guess, in terms of utilizing Dr. Kerr's testimony on that basis.

But we take the position that because of the plaintiff's own expert testimony on that issue, at the very least Dr. Kerr's knowledge of his own infections rates, that that data ought to be something that should be considered by the jury when they're being asked in this case to evaluate the sterilization procedures, cleaning procedures, things of that nature.

The Court: Um-hmm. Well, I can see how if the plaintiff's expert were to testify in that fashion, then there could be some relevance to

> problems that day or problems in the immediate time period proceeding. But, as a general rule, one doesn't get into the absence of other accidents in establishing whether there was or was not negligence on a particular occasion.
>
> And so it sounds to me like that, again, is probably one that we should revisit once we have an opportunity to hear the testimony. And it sounds to me that would be reasonable to revisit again.
>
> Just draw my attention to it prior to bringing out the evidence. We'll exclude the jury, because it sounds to me that could have some relevance. In particular, that's what an expert in the field would rely on, then I think that it could be an appropriate area, provided it's limited to day of and time period immediately proceeding.
>
> It could be relevant without leading us into too many collateral matters. But I think it would be prudent to have that discussion outside the presence of the jury, since the absence of other injuries, as a rule, is not viewed as relevant.
>
> So I'll revisit that one, if you'll – when you get ready to – when you feel it has reached the point where it may be relevant for some purpose, just draw my attention to it. We'll excuse the jury and we'll discuss it.

See November 5, 2013 hearing transcript attached to the affidavit of counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit D at p. 16, ll 1 to p. 20, ll 7.

By way of additional background for the Court, Plaintiff's expert, Dr. Sorensen gave the following answer during his deposition regarding the importance of what he considered to be the best evidence of the adequacy of a physician's cleaning and disinfection procedures:

> Q. There's no proof by any means of the fact at the time of the surgery these gram-negative bacteria went into her body, is there?
>
> A. No.
>
> Q. Okay.··Have you formed an opinion as to what is the best evidence that a doctor utilizes appropriate sterile conditions during surgery, disinfectant procedures with equipment, operating room, and the entire area where the procedure is done, cleansing of instruments -- what's the best proof that that is being done appropriately? What would be the best proof?
>
> A. I think lack of complications would be the best answer.

See August 21, 2013 deposition transcript of Dean Sorensen, M.D. attached to the affidavit of

counsel in opposition to Plaintiff's Motion for Sanctions attached as Exhibit J. (Emphasis added).

While Plaintiff's counsel seeks to crucify the Defense counsel for the mistrial in this case, the Court is obligated to review and address what actually transpired with the benefit of the above transcripts. Similar to the findings of the Ninth Circuit in the case of ***U.S. v. Meza-Soria***, the Defense contends "there was no good legal reason whatever to grant the mistrial, and that absence of a reason makes the grant an abuse of discretion." ***United States v. Meza-Soria***, 935 F.2d 166, 170-71 (9th Cir. 1991). In further support, Dr. Stiller submitted an affidavit in which he represents to the Court that the questions and answers which were being presented were not intended to come even remotely close to violating the Court's ruling that the prior patient infection issue needed to be addressed outside the presence of the jury for approval before presenting evidence of that nature.

In fact, as further proof that the Defense was both aware of and being mindful of the Court's ruling, the Court should consider the transcript at the beginning of Dr. Stiller's testimony the morning of November 14. Defense counsel made it clear before starting the examination of Dr. Stiller that he would need to take up a matter outside the presence of the jury regarding the witness' testimony. The very reason this advance notice was given was to inform the Court that the lack of prior infections involving other patients was an issue that the Defense would need to discuss outside the presence of the jury in order to revisit it with the Court – just as Defense counsel had been instructed on day one of the trial. The statements of Defense counsel were as follows:

> Mr. Jones: Thank you, your honor. And also, with respect to the two in limine issues, there will be an offer of proof in about the middle of this witness that will need to be made. Perhaps, we can take it up during a break.
>
> The Court: That's a very good idea.
>
> Mr. Jones: I'm just letting the Court know.

See Exhibit A to the Affidavit of Jeremiah A. Quane.

Why would the Defense counsel and/or this witness intentionally run afoul of the Court's Orders in Limine while at the same time specifically state to the Court at the start of the witness' testimony that he wanted to address the issue outside the presence of the jury just as the Court had ordered him to do? The Defense contends this is strong evidence that the Defense did not engage in anything even remotely close to deliberate misconduct. Pursuant to Rule 47(u), the

Defense contends that the necessary showing has not been made to support any award of sanctions against the Defense arising out of the Court granting the Plaintiff's Motion for a mistrial.

C. The range of sanctions available under Rule 47(u) does not include striking defenses or disqualifying Defense counsel.

In addition to costs and attorney fees, Plaintiff further seeks the imposition of even more harsh sanctions including striking the Defendant's defenses and disqualifying Defense counsel. In support, Plaintiff relies on the case of ***Adams v. Reed***, 138 Idaho 36, 57 P.3d 505 (Ct. App. 2002). ***Adams*** involved a personal injury action which followed a long and protracted discovery process that included multiple motions to compel, motions for mediation and motions to dismiss. The case was reset for trial multiple times in front of different judges over an extended time period. ***Id.*** at 38. After repeated delays, Reed filed a motion to dismiss the action as a sanction for repeated discovery violations, noncompliance with pretrial orders, and untimely submission of the Adams' pretrial memorandum. The district Court concluded that dismissal was an appropriate sanction and granted the motion. ***Id.*** at 39.

On appeal, the Court noted that "a trial Court's discretion is not unfettered, however, particularly where the ultimate sanction, dismissal of a party's claim, has been imposed." ***Id.*** The Court explained that "a trial court possesses authority to sanction parties for failure to comply with discovery orders or pretrial orders and for failure to seasonably supplement responses to discovery." ***Id.*** citing Rules 16(i), 26(e)(4), and 37(b). Permissible sanctions include those identified in Rule 37(b) which includes dismissal of an action. Citing ***Ashby v. W. Council, Lumber Prod. & Indus. Workers***, 117 Idaho 684, 791 P.2d 434 (1990), the court stated that there were several "factors that must be expressly considered by the trial court in deciding whether dismissal with prejudice is warranted:

> The two primary factors are a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one "aggravating" factor, including: 1) delay resulting from intentional conduct, 2) delay caused by the plaintiff personally, or 3) delay causing prejudice to the defendant. The consideration of these factors must appear in the record in order to facilitate appellate review.

Ashby, 117 Idaho 686–87 (citations omitted).

Analyzing the ***Ashby*** factors, the ***Adams*** court found evidence of a clear record of delay which included: "the Adamses were routinely late in responding to discovery, were repeatedly noncompliant with deadlines set out in pretrial orders, and on one occasion failed to

engage in court ordered mediation." ***Adams***, 138 Idaho at 39. Regarding the ineffectiveness of lesser sanctions, "the district court found that during the hearings of October 30, 2000 and March 19, 2001, the Adamses were specifically warned that failure to comply with discovery could result in dismissal, and they were admonished to immediately respond to outstanding discovery requests." Per the ***Ashby*** decision, explicit warnings are among the lesser sanctions that are appropriate for the court to impose before imposition of the drastic sanction of dismissal. ***Ashby***, 117 Idaho at 687, 791 P.2d at 437.

Applying the ***Adams*** decision and the primary factors analysis used therein by the court to the facts of this case, the ***Adams*** decision strongly favors the Defense as there is no pattern of delay in this case that would support any monetary or dismissal sanctions including striking of defenses or exclusion of Defense counsel. Plaintiff has not demonstrated fulfillment of any of the ***Ashby*** factors outlined above. There has been no "pattern of delay" on any issue by the Defense which played any role in the granting of the mistrial which was based solely on the erroneous conclusion that Dr. Stiller had rendered testimony in violation of a Court Order in Limine regarding testimony of infections involving other patients. As a result, the ***Adams*** decision cuts squarely against Plaintiff's motion for sanctions whether applying Rule 37(e) or Rule 47(u).

Plaintiff next cites to the case ***Crown v. Hawkins Co., Ltd.***, 128 Idaho 114, 910 P.2d 786 (1996) for the proposition that the Court should disqualify the Defense counsel as a sanction. ***Crown*** involved a bench trial as to the duties of a director of a warehouse corporation related to its bean grower members. As a sub-issue on appeal, the bean growers argued that Nungester's legal counsel should have been disqualified because a conflict of interest existed between Nungester and Hepworth, Lezamiz and the law firm. The growers asserted that if Nungester's actions as a director of the warehouse corporation were found to be negligent, the assets of the law firm and its partners would be implicated. They submitted that such a direct, personal stake in the outcome of the litigation violates Rule1.7(b) of the Idaho Rules of Professional Conduct. ***Crown***, 128 Idaho 122.

Relying upon the case of ***Weaver v. Millard***, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991), the ***Crown*** court stated:

> The moving party has the burden of establishing grounds for the disqualification. The goal of the court should be to shape a remedy which will assure fairness to the parties and the integrity of the judicial process. Whenever possible, courts should endeavor to reach a solution that is least burdensome to the client. Where the motion to disqualify comes not from a client or former client of the

> attorney, but from an opposing party, the motion should be reviewed with caution.

Crown, 128 Idaho at 123 (citations omitted).

After addressing Model Rule 1.7 and after concluding that the growers had waited almost five years before first seeking to file a motion to disqualify opposing counsel, the court concluded the district court did not abuse its discretion in denying the motion to disqualify. ***Id.*** In the matter before the court, Plaintiff cites to ***Crown*** as support for excluding Defense counsel as a sanction for the mistrial. A review of the ***Crown*** decision aptly demonstrates that it supports no such proposition. The disqualification issue in ***Crown*** involved concerns over whether the attorney had an improper financial interest in the outcome of the case such that he should be disqualified from serving as counsel. The disqualification was not being sought as a sanction for alleged conduct resulting in a mistrial as Plaintiff claims in the instant motion.

Plaintiff's reliance on the ***Weaver v. Millard***, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991) is similarly misplaced. ***Weaver*** involved a commercial transaction to build fish ponds. The Court of Appeals ruled that the district court did not abuse its discretion in denying a motion to disqualify either the attorney for contractor or the attorney for third-party defendant partner, who were both represented by attorneys from same law firm. Again, this case involves potentially conflicted counsel and has nothing to do with the issues in this case.

Plaintiff next cites to Model Rule 3.2 and 3.4 in further support of their Motion for Sanctions. Rule 3.2 relates to making reasonable efforts to expedite the litigation consistent with the interests of the attorney's client. The portion of Rule 3.4 cited by Plaintiff states that an attorney shall not knowingly disobey an obligation under the rules of the tribunal. Since the mistrial was granted based on the belief that a trial witness, not a party, included in his answer to a question information otherwise subject to an Order in Limine, these rules have no application and do not serve to support Plaintiff's request to strike defenses or exclude Defense counsel. In addition, similar to the language of rule 47(u) which requires the court to find an act of deliberate misconduct by a party or the party's attorney, Model Rule 3.4 refers to an attorney who "knowingly disobeys" the rules.

Because the question posed to Dr. Stiller, who admitted he was informed by Defense counsel of the court's limine rulings on other patient infections, did not request him to comment upon that topic in his answer, there is no evidence that Defense counsel engaged in conduct which would be considered in violation of Model Rule 3.4, nor is there any evidence that

Defense counsel or the Defendant himself engaged in any "pervasive pattern of refusing to obey court orders." ***See*** Plaintiff's Memorandum in Support of Motion for Sanctions at p. 16. As a result, Plaintiff's Motion seeking the sanction of disqualifying Defense counsel is without merit and should be denied.

D. Because Dr. Stiller did not testify in violation of the Court's Order in Limine, the Plaintiff's Motion for a mistrial should not have been granted

Even if Dr. Stiller had made the improper disclosure being alleged, (which the Defense contends the above transcript clearly refutes) the Defense maintains that it would not have been grounds for a mistrial, especially given the lack of any effort at a curative instruction to the jury to disregard any perceived improper testimony. Furthermore contrary to the arguments of Plaintiff, the Court had not issued a number of prior cautionary instructions to the jury prior to granting a mistrial. The author of this document was not able to find any case authority in Idaho regarding the granting of mistrials in a civil case setting. In the criminal arena, however, there is some analogous case authority. Idaho Criminal Rule 29.1 states that "a mistrial may be granted only where there is an "error or legal defect in the proceedings, or conduct inside or outside of the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial."

Applying Rule 29.1, the Idaho Court of Appeals stated:

> The admission of improper evidence does not automatically require the declaration of a mistrial. ***See, e.g., State v. Rose***, 125 Idaho 266, 269, 869 P.2d 583, 586 (Ct.App.1994). Where improper testimony is inadvertently introduced into a trial and the trial court promptly instructs the jury to disregard such evidence, the Idaho Supreme Court noted that "it is ordinarily presumed that the jury obeyed the court's instruction entirely." ***See State v. Hedger***, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989); ***State v. Boothe,*** 103 Idaho 187, 192, 646 P.2d 429, 434 (Ct.App.1982).
>
> No less an authority than the United States Supreme Court has proclaimed:
>
> We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be "devastating" to the defendant. ***Greer v. Miller***, 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (citations omitted).

State v. Hill, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004).

In ***State v. Hill***, the Court of Appeals reviewed a case in which the trial court refused to grant a mistrial and instead instructed the jury to disregard the prosecutor's question which included reference to the defendant having been in jail. The court found that "the prosecutor's disclosure to the jury that Hill had been in jail could hardly be characterized as "devastating." Given that Hill was on trial for a criminal offense, even in the absence of the prosecutor's question, any reasonably knowledgeable juror likely would have surmised that Hill had at some point been in jail. Hill has not demonstrated that she was denied a fair trial. Accordingly, we hold that the district court did not err in denying her motion for a mistrial." ***State v. Hill***, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004).

Likewise in this case, the above testimony by Dr. Stiller can hardly be considered "devastating" to the Plaintiff's case. There was nothing stated which "let the genie out of the bottle" regarding the issue of lack of prior infections involving other patients which the Court previously indicated it would revisit later in the trial, something that the Defense was never allowed to do by virtue of the mistrial being granted. Not only was the question about other patient infections not asked, but that issue never came out in Dr. Stiller's answer. Instead, Plaintiff's counsel, interpreted Dr. Stiller's statement as containing information which it did not and which the Defense contends the jury could not have possibly attached anywhere near the same meaning to it that Plaintiff's counsel claims.

The Court instructed the parties to bring this issue up outside the presence of the jury which is what the Defense was planning to do when it was time to present that issue. Had the Defense been given the opportunity to address with the Court the above testimony from Plaintiff's expert, Dr. Sorensen that the lack of other patient infections was the "best evidence" that Dr. Kerr was properly cleaning and sterilizing his equipment, then the Defense would have sought the right to ask a direct question to Dr. Stiller on that very subject referring to the deposition question and answer by Dr. Sorensen. The Defense contends that where the Plaintiff's expert has the opinion that the best evidence in an alleged failure to sterilize equipment is whether there is the presence or absence historically of other complications, that this is relevant and proper consideration by the jury which the Defense intended to pursue consistent with the Court's Order in Limine.

Plaintiff claims that there was some "pattern and practice" of misconduct, but yet cannot point to a single instance wherein the Court admonished the jury to disregard any statement made by either Defense counsel or a Defense witness. It is hard to understand how there could be any alleged pattern of conduct by the Defense where the jury has not been told on numerous

occasions, much less even one time, to disregard a statement, opinion, question or comment of a witness. Thus, pursuant to the ***Adams*** decision outlined above, there has not been a showing as to the ineffectiveness of lesser instructions.

Based on what the transcript shows clearly transpired, it is unknown why Plaintiff's counsel, without even consulting his own client, would jump up and demand a mistrial. It suggests an alternative motive to seeking this drastic remedy which he repeatedly claims has unfairly prejudiced his client. Such an alternative motive would include knowledge of the fact that at least two jurors stated they would be unable to continue the trial into the following week. With knowledge that the lone alternate juror had been lost due to an error by the jury commissioner's office, there is no way the trial would have been able to continue into the third week and a mistrial would have, in all likelihood, have been granted at that time anyway. By demanding the mistrial when they did, Plaintiff's counsel was clearly trying to jump on this issue early by seeking to lay blame on the Defense so they could try and recover some of their costs against the Defense - whereas if the mistrial had been granted due to having less than twelve jurors they would have no one to blame.

Plaintiff seeks to bootstrap its claim by referring to a Motion to Compel it prevailed upon filed some fourteen months before the trial and the fact that no mediation occurred. Despite the fact that Defense counsel advanced what he believed to be valid objections regarding the number of interrogatories and the topics covered, the issue was brought before the Court and the Defense was ordered to respond to the discovery. The Defense therefore complied with the one and only discovery Order entered in this case which clearly does not support Plaintiff's claim of any so-called pattern of conduct nor does it show that lesser sanctions were ineffective. Furthermore, Plaintiff's counsel makes several references to why mediation did not occur, but fails to concede the obvious fact that he had the ability to file a motion to request mediation at any time which he did not do. By virtue of the multiple sanctions requested in the Plaintiff's Motion, the Plaintiff seeks to be put in a position, sanction-wise, superior to the sanctions authorized by Rule 47(u). It is clear that the Court's Order on sanctions is confined to sanctions for having to declare a mistrial and none others. In this regard, Plaintiff's Motion that included enforcement of existing discovery and disclosure deadlines, is not pertinent to or the subject of the Court Order on sanctions related to the mistrial or sanctions authorized by Rule 47(u).

IV. Conclusion

What Plaintiff's counsel is truly trying to relay to this Court is that they do not want

Jeremiah Quane and Terrence Jones to continue to be Defense counsel, taking into count that Jeremiah Quane's record in the defense of physicians is 98% total wins and that he has tried jury cases for physicians over the past 22 years, none of which, resulted in a verdict of negligence against a physician. Plaintiff's attorney seeks disqualification of defense counsel on a bogus argument of some other nefarious intent for the purpose of unfairly benefiting their own client, without consideration of the detriment to the Defendants if Defense counsel is disqualified. Counsel makes numerous references to statements claimed to be contrary to Court Orders, but fails to present any actual evidence for the Court to consider.

The Defense, however, has presented the Court with the actual transcripts to see for itself what was said and by whom. These transcripts stand in stark contrast to the representations advanced by Plaintiff's counsel in its memorandum seeking sanctions. Plaintiff's counsel misrepresents to this Court the statements made by Dr. Stiller by suggesting that he testified about the reasons the Defendants had not violated the standard of practice was because there had not been any other infections at Defendants' facility. The actual transcript shows no such testimony was ever elicited by Defense counsel nor offered by the Defense witness, Dr. Stiller, such that the Court should reconsider the basis for its decision granting the mistrial considering the Court did not have all the facts at the time it ruled.

In the Plaintiff's case-in-chief, the medical records of Dr. Kerr, Elmore Medical Center and St. Alphonsus Regional Medical Center were admitted in evidence and these records were reviewed long before trial by Dr. Stiller. These records contain the reports of several doctors in which they state that there is no evidence of infection in Krystal Ballard which include the records of Dr. Kerr for his assessment of Krystal Ballard on July 23, 2010.

Dr. Billy Morgan, is a general surgeon at St. Alphonsus Regional Medical Center who evaluated Krystal Ballard at the request of Dr. Tisha Fujii, who was the primary treating physician of Krystal Ballard at St. Alphonsus Regional Medical Center. Dr. Morgan issued a report that covered his evaluation of Krystal Ballard on July 25, 2010 and the report states in pertinent part "she now has what appears to be a probable fat emboli syndrome with significant ARDS, massive hypoxemia, unresponsive to ventilator modes from a surgical standpoint." His report goes on to say in part in regard to the chest x-ray from Elmore Medical Center "findings possibly a similar fat emboli syndrome."

His Report also states in regard to the buttocks of Krystal Ballard, "The patient's buttocks show 2 wounds, 1 on the posterior superior iliac crest on each side with no crepitance to

the subcutaneous tissue. No evidence of redness or inflammation and no drainage from the insertion sites for the fat transplants." Defendants' Exhibit U. On July 25, 2010, chest x-rays of Krystal Ballard were taken at Elmore Medical Center and Saint Alphonsus Regional Medical Center and interpreted by radiologists Dr. Stemmler and Dr. Schaff. They issued radiology reports for their respective interpretations of the chest x-rays, Defendants' Exhibits W and X. Exhibits U, W and X are identified in the Affidavit of Jeremiah A. Quane. Their reports collectively provide that similar findings may be seen in setting of fat embolism and findings may represent fat embolism.

The subject records, put in evidence by the Plaintiff, demonstrate that no pertinent or persistent infections existed which is the testimony of Dr. Stiller that resulted in the mistrial Order of the District Judge. At the time of the subject testimony of Dr. Stiller, the entries in the subject records had not yet been explained by witnesses although the records themselves that contained the entries of doctors of no evidence of infection in Krystal Ballard were in evidence at the doing of the Plaintiff. ***See*** also the Affidavit of Dr. Stiller. The foregoing litany of events and facts, give context to the testimony of Dr. Stiller that in fairness the Court may not have been aware of when the mistrial was declared.

Plaintiff's counsel has blatantly inflamed and exaggerated the nature of the testimony and the events at issue solely hoping to unfairly influence the Court and further their quest for sanctions. Pursuant to the requirements of Rule 47(u), Plaintiff can point to no "deliberate misconduct" by the Defense which resulted in the granting of the mistrial. Furthermore, Plaintiff cites to no case authority to support such an award of sanctions against a party in response to a mistrial whether applying Rule 37(e) or Rule 47(u). For these reasons, the Defense requests the Court deny Plaintiff's Motion for Sanctions in its entirety.

DATED this 8th day of February, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 5th or 7th day of February, 2014, I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
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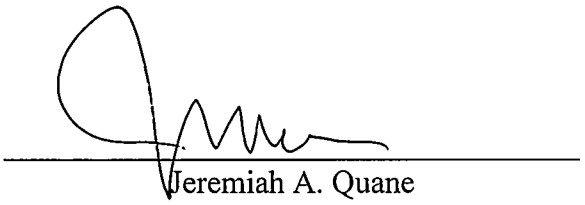
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' SECOND OVERLENGTH MEMORANDUM

ORIGINAL

Plaintiff Charles Ballard, through his attorneys, moves this Court to strike Defendants' Memorandum in Opposition to Plaintiff's Motion for Sanction filed on the afternoon of Friday, February 7, 2014 pursuant to Rules 7(b)(1) and 10(a)(1) of the Idaho Rules of Civil Procedure and Fourth Judicial District Local Rule 8.1. This Memorandum, like Defendants' first Memorandum filed without leave of Court on February 5, 2014, violates the pleading requirements of the foregoing Rules.

More specifically, Defendants on February 5, 2014 filed a Memorandum in Opposition to Plaintiff's Motion for Sanctions which was 36 pages long, excluding the certificate of service page. This Memorandum exceeded by 11 pages the 25 page limit set forth in Fourth Judicial District Local Rule 8.1. Rather than obtaining leave of court prior to filing this overlength Memorandum, Defendants instead filed a contemporaneous Motion for Leave to File Over Length Brief in Response to Plaintiff's Motion for Sanctions presumably assuming the Court would allow *nunc pro tunc* their overlength filing.[1]

On February 7, 2014, the parties were informed by the Court that the Defendants' Motion for Leave to File Over Length Brief was denied. (*See* Letter dated February 7, 2014, from attorney Jeremiah Quane to the Court attached hereto as Exhibit "A.") In response, Defendants' filed the same Memorandum later that day which they asserted had now been "reformatted ... in conformance with Rule 10(a)(1)." (*Id.*) According to defense counsel, "[w]ith these formatting changes only, our Memorandum now falls within the 25 page limit of

[1] Plaintiff filed his motion for sanctions on December 6, 2013, leaving Defendants two months in which to obtain leave to file an overlength brief and file their responsive pleading. Rather than requesting leave during this period, Defendants waited until the very last day to file their responsive pleadings so as to leave Plaintiff's counsel with only the minimum amount of time to respond to their lengthy, overlength filing.

local Rule 8.1." *(Id).*

Defendants' second Memorandum is not in conformity with I.R.C.P. 10(a)(1) which governs the form of pleadings and requires that the body of such memoranda "be typed with double line spacing or one-and-one half (1 ½) line spacing with pica standard typing of not more than 10 letters to the inch." A double spaced document using Times New Roman 12 text, which Defendants state they used, will generally have 23 lines of text per page. Defendants' second Memorandum has 32 lines of text per page and it is clear to even the naked eyed that it is not double spaced. It is further clear that the text of Defendants memoranda far exceeds the pica standard of 10 letters to an inch to the extent Defendants used line spacing of one and one-half (1½).[2]

Accordingly, Defendants' second Memorandum should be stricken. Defendants, in response to the Court's ruling, have simply crammed together, without regard to the pagination and formatting requirements set forth in our local rules and the Idaho Rules of Civil Procedure, their prior overlength Memorandum, which was rejected by the Court. In so doing, Defendants continue to flout the rules applicable to them and the rulings of this Court.

Plaintiff does not seek oral argument on this motion.

---

[2] Defendants' second Memorandum also is untimely pursuant to Rule 7(b)(3)(E) – "[a]ny responsive briefs shall be filed with the court, and served so that it is received by the parties, at least seven (7) days prior to the hearing."

Dated this 10th day of February, 2014.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2014, I served a true and correct copy of the foregoing by delivering the same to the following by hand delivery:

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DS

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DECLARATION OF P. GREGORY HADDAD IN SUPPORT OF PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS

ORIGINAL

002016

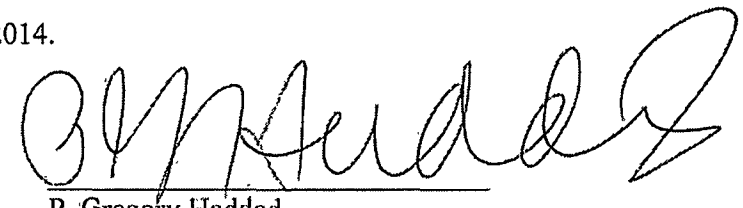
1. I am an attorney, duly licensed to practice law in the State of West Virginia, and a partner with the law firm of Bailey & Glasser LLP in Morgantown, West Virginia. I am admitted *pro hac vice* in this case, and I am lead counsel for Plaintiff Charles Ballard.

2. A true and accurate copy of the Reporter's Partial Transcript of Proceedings held in the above case on November 14, 2013, is attached hereto at **Exhibit A**.

This ends my declaration.

I declare under penalty of perjury, pursuant to the law of the State of Idaho, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated this 10th day of February, 2014.



P. Gregory Haddad

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2014, I served a true and correct copy of the foregoing ***Declaration of P. Gregory Haddad in Support of Plaintiff's Reply Memorandum in Support of Motion for Sanctions*** by hand delivering the same to the following:

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Terrence Jones
QUANE, JONES, McCOLL
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101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

District Court of the Fourth Judicial District

in and for the County of Ada

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Held on November 14, 2013, before

Deborah A. Bail, District Court Judge,

sitting with a jury.

Reported by
Roxanne K. Patchell, RPR, CSR
Idaho CSR No. 733
California CSR No. 12057

EXHIBIT A

District Court of the Fourth Judicial District
in and for the County of Ada

----------x Case No. CV OC 1204792

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

----------x

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Held on November 14, 2013, before

Deborah A. Bail, District Court Judge,

sitting with a jury.

Reported by
Roxanne K. Patchell, RPR, CSR
Idaho CSR No. 733
California CSR No. 12057

Boise, Idaho
November 14, 2013

THE COURT: I understand you have something to take up; please proceed.

MR. JONES: Your Honor, on the defense side for our case this morning we have an out-of-town witness with a scheduling issue, kind of like Dr. Sorensen, and we would like to call him this morning first thing.

THE COURT: Who is that?

MR. JONES: Dr. Stiller, Jeffery Stiller.

THE COURT: And did you advise counsel that he would be one of your witnesses today?

MR. JONES: Yes, ma'am.

THE COURT: Okay. Comments?

MR. McKAY: Yes.

THE COURT: Briefly.

MR. McKAY: Yes, thank you, Your Honor.

I hope I have earned the reputation over the years of being reasonable and accommodating reasonable requests from opposing counsel. This is not reasonable. Counsel chose to spend all day yesterday with Dr. Kerr on direct examination examining him on things like his

anaesthesia and the practices that he uses and how he does a procedure when it involves the heart, things that are completely irrelevant to this case. And it's true, they did accommodate Dr. Sorensen, but that was only because he spent two hours talking to Dr. Sorensen --

THE COURT: I know. I think that -- I agree with you that jury time is not being used well at all. The examinations tend to cumulative. They tend to be wandering all over the place. And they tend not to be beneficial.

And there was some relevance in it, which is getting a little idea of perhaps what an anesthesiologist might do, so I think that was fair. But, yes, I have concerns as well that jury time is being used very poorly and there is substantial and unnecessary repetition, but I don't see how that relates to whether a witness should be called out of order.

And I think sometimes -- my experience has been that sometimes when attorneys have been in situations for a considerable period of time, they find it a bit aggravating and have a tendency to "kitchen sink" objections. And I don't know that that is beneficial. The focus right now

is -- I agree with you, things have not moved anywhere close, anywhere close to a desirable pace.

And I will be emphasizing to the jury the need to give fair treatment to the case and to remember their functions as judges of the facts because I would hate to think that using their time poorly was deliberate.

MR. HADDAD: So I understand Your Honor, and maybe at the risk of sounding self-serving here, you gave us two weeks to try the case. We've done everything we can to present our case in a way that it can be tried in two weeks.

THE COURT: And you are going to talk to me about how this affects Dr. Stiller because you will, of course, not give in to the temptation to the "kitchen sink" because you are frustrated?

MR. HADDAD: I understand the Court's comments and I'll sit down now.

THE COURT: I'll allow this witness to be called out of order.

MR. HADDAD: Your Honor, can we take up one other thing?

THE COURT: One other thing.

MR. HADDAD: And just so that we don't get

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into a situation where we have to try to raise an issue that might be better served outside the presence of the jury, there's some CT scans that Mr. Jones had raised the issue of using some of those CT scans of Ms. Ballard in Dr. Stiller's presentation of evidence.

Those CTs were not presented as part of the materials that Dr. Stiller had at the time of his deposition. In fact, the plaintiffs -- I'm sorry -- the defendants did not get those until they subpoenaed those from St. Al's, I believe, the end of October.

THE COURT: Oh, so this was something that was not previously used and not previously disclosed? Was it was disclosed as a potential exhibit?

MR. HADDAD: As an exhibit, and they had identified the radiologist that read them, and that may be appropriate under some circumstances. But with this witness, he didn't have the benefit of those, didn't have them with him, didn't comment on them. In fact, they didn't get the X-rays or CTs until sometime at the end of October.

So to use those with Dr. Stiller in

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their presentation on his direct examination would be improper because there's been no cross-examination availability on that.

THE COURT: Okay. I think that is a serious issue. What is your response?

MR. JONES: Your Honor, the radiology report of the CT that interprets the very images that are simply represented by the films themselves, have been in their possession the whole time.

THE COURT: Wasn't that witness asked what he relied on in his deposition?

MR. JONES: Yes, Your Honor.

THE COURT: And did he rely specifically on these CT scans?

MR. JONES: He relied on the St. Al's records, which include the report of the CT scan. All this is is the image itself. The CT scan report --

THE COURT: Okay. I'm sustaining the objection.

I think that -- frankly, I'm perturbed by the pattern in this case of pulling out exhibits and items that haven't previously been disclosed and then try to end run around the fact that when a person at a deposition is asked what's

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their opinion, what's it based on, and they respond in a certain way, then I see no reason to allow information to slip in later that they did not rely on when they formed their opinion and related their opinion a very brief time ago.

I don't think that is fair or reasonable. And I'm not going to permit it.

MR. JONES: So I'm clear, Your Honor. He is certainly capable, then, of talking about the reports which he reviewed and replied upon.

THE COURT: He can talk about everything he reviewed and testified about in his deposition, and I hope he will and I hope the jury find it informative.

MR. JONES: Thank you, Your Honor.

And also, with respect to the two in limine issues, there will be an offer of proof in about the middle of this witness that will need to be made. Perhaps, we can take it up during a break.

THE COURT: That's a very good idea.

MR. JONES: I'm just letting the Court know.

THE COURT: All right. I'm very concerned that we are not using our jury time well.

MR. JONES: I'll try to move quickly this

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morning, Your Honor.

THE COURT: Counsel, I have confidence that you will make every effort, so I'll look forward to it.

MR. JONES: Thank you.

THE COURT: All right. Well, let's bring in our jury.

(Jury enters courtroom.)

THE COURT: Well, the members of the jury are present. We'll be taking a witness out of order again for scheduling reasons. Normally, you'll -- this doesn't happen on a regular basis, but it does tend to happen from time to time when we have physician witnesses because the parties are balancing their professional responsibilities. And so it is sometimes necessary to call a witness out of order.

Also, I do have some concerns that our pace is off the pace that I anticipated the trial to be. And I think the most important thing -- absolute most important thing is that a case be decided fairly and impartially and based on the evidence received in court and the jury's wise and independent evaluation of that evidence.

And I know that feeling pressured by

Page 9

your personal schedule can sometimes get in the way. Although, I have faith that you all know the case is important to everybody and you will give it your best consideration.

But to help me and to help the parties, I'd like you to write down and put down any schedule issues you have and write it down and pass to the bailiff to pass it along to me. Because we will do what we can to make it possible for you to do the best job that you can. And so if there are things that we can do and adjustments we can make, we'll do so.

Counsel assures me today that he will be presenting an efficient presentation to you, but I need to know where you are. As a general rule, within the first couple of days of the trial, I have a pretty good estimate on how we are proceeding and let's just say that I have now developed concerns about our schedule. And I need to know what your concerns are.

So if you'd just write it down, give it to the bailiff and we'll do what we can to make it work for everybody. Because absolutely the most important thing in any trial is that the case be decided fairly and impartially by jurors who don't

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feel unduly pressured or harassed by life. So if we can make adjustments to our schedule to make things work better for you, we will.

Please call your witness.

MR. JONES: Thank you, Your Honor. Defense calls Dr. Stiller.

Madam Clerk, this witness will need a few exhibits and I'll tell what you they are so we can have those. Exhibit G. And I can get started with the witness while you get started with that, if you want to write these down. G, H, I, J, K, L, M, N, O.

GEOFFREY DAVID STILLER,
having been sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q. Good morning.
A. Good morning.
Q. Please introduce yourself to the jury.
A. I'm Geoffrey David Stiller.
Q. And what is your occupation?
A. Can you hear me well enough? Okay.

Page 11

I'm a general and cosmetic surgeon.

Q. Where do you reside?
A. In Spokane, Washington.
Q. Where do you practice?
A. In Moscow, Idaho; Pullman, Washington; and Colfax, Washington.
Q. Are you are a retained expert in this case for the defense; are you not?
A. I am.
Q. And the court clerk is getting Exhibit G, which is -- Defense Exhibit G, which is an admitted exhibit of your CV.

While she is getting that, if you could tell the jury a little bit about your background training and education?

A. Absolutely. So I did medical school at the University of Minnesota from '92 to '96. And then a general surgical residency at Graduate Hospital in Philadelphia, which is part of the University of Pennsylvania system when I started.

After I finished my residency training, I then entered the Air Force and was stationed at Mountain Home Air Force base -- was stationed there as a general surgeon and became chief of the medical staff for a short amount of time. I spent

Page 12

four years there as a general surgeon.

When I completed my four years in the Air Force, I moved up to Moscow/Pullman area and started a general surgical practice called Palouse Surgeons. After practicing for three years, I finally got to do what I wanted to do which was go off and do some training in cosmetic surgery. And I did a fellowship in cosmetic surgery in Seattle.

After that, I practiced for about a year and a half in North Carolina and made my back to Spokane. Practiced there for two years. And then finally came back to my original practice in Moscow and Pullman. And I'm now practicing there.

Q. And just to kind of summarize that. How many years of medical school, residency, fellowship, how many years was your training total?
A. Four years in medical school, five years in residency, one year in fellowship, so a total of ten.
Q. And you've currently been practicing in the Moscow area for the last how many years?
A. About a year and a half, almost two years now.
Q. Now, in looking at Exhibit G, it

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indicates you were in the Air Force. You said that briefly. When you were stationed at Mountain Home Air Force here south of Boise, tell the jury a little bit about what you did there.

A. Sure. I was a staff general surgeon. There were two of us stationed there and at times three of us stationed there. We would take care of all of the dependents of the Air Force as well as the Air Force members, as well as retirees.

Even to the point where I would come and practice occasionally up here at the V.A. and do my larger cases, my thoracic cases, vascular cases.

Q. And let's talk about that a little bit. With your background in general surgery, can you give the jury kind of a brief flavor of the types of surgeries that you perform in general surgery.

A. Sure. General surgery a lot right now is minimally invasive, so your small incisions taking out gallbladders, doing colon cancer surgeries that way. I will even take out parts of a liver or the spleen through small incisions.

I also do trauma surgery. Occasionally we'll have to do some vascular surgery if it's from trauma. I try to stay away from that as much

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as possible now because it has now become specialized. We do thoracic surgery, so if I have somebody with a lung injury, I'll take care of that. Or a lung cancer, I can take out the lung cancer as well.

Other than that, biopsies of the skin, a wide array of anything that, basically, can come in that is not an orthopaedic we handle in general surgery.

Q. Do you have hospital privileges currently?

A. I do.

Q. Where?

A. At Griffin Medical School in Moscow, Idaho. I have Pullman Regional Hospital in Pullman, Washington. And then at Whitman Health and Medical Center in Colfax, Washington.

Q. Colfax?

A. Colfax, correct.

Q. So the catchment area for your patients is that whole Palouse area up there?

A. It really is. It's from Spokane down to about Boise. We will get patients coming from three or four hours away.

Q. Now, with respect to your cosmetic

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practice, you said you started doing after you completed your tour of obligation to the Air Force, correct?

A. A couple of years afterwards. I spent my four yours in the military and my goal was always to do cosmetics. But I had a few kids and a family to take care of, so I had to earn enough money to go back to a resident's salary, so I did that.

Q. Can you tell us a little bit -- tell the jury a little bit about the nature of your cosmetic practice currently.

A. Sure. So I'm considered by my practice 50 percent general, 50 percent cosmetic.

Now, my cosmetic practice really entails from head to toe, so I do liposuction. I'll do fat grafting. I will do tummy tucks. I will do complete body lifts. I'll do facelifts, rhinoplasties, breast reductions, and I do some cancer reconstruction for breast cancer.

Q. Now, also in your CV, Exhibit G, I see there is a reference to faculty appointments.

A. Correct.

Q. Could you describe that to the jury.

A. So in here I have Affiliate Faculty at

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the University of Washington Medical School WWAMI program. The University of Washington, how it functions is it takes students from Wyoming, Washington, Alaska, Montana, and Idaho. And they will all go for a number of years at U-Dub in Seattle, but their first year, they stay in the state where they are at.

So if they are an Idaho student, there will be a program here in Boise where physicians will teach them. The same thing happens in Moscow, Idaho. So I have medical students with me every week that I'm teaching them surgery as well as clinical medicine.

As far as the Faculty of the National Society of Cosmetic Physicians, that is a national program or group that I do lectures and I'll do training of different physicians for.

Q. And I see in your CV you have a reference to a number of presentations. Do you provide physicians with presentations on cosmetic surgery issues?

A. I do.

Q. And could you discuss briefly with the jury what that entails and the topics that you cover.

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A. Sure. So at national conferences, so there will be people from all over the world coming to these conferences. I'll lecture on different aspects of medicine.

You can see -- well, I assume you will have a copy of all of these -- but you will see the case presentations. But just recently in September, I lectured there and I did a lecture of art of beauty, a lecture on like lipo-abdominoplasties, breast augmentation and techniques, and as well as circumferential body lifts.

Q. Have you provided lectures to physicians on the topic of fat transfers?

A. Many times, to be specific, Brazilian butt.

Q. And tell the jury a little bit about who your audience is and what your training involves.

A. So during the lectures or during a training course?

Q. Both.

A. Both, okay. So for the lectures it will be for nurses and doctors that are interested in cosmetic surgery. It can be the staff of

Page 18

physicians as well. I start from a basic approach of how to evaluate a patient all the way to what the goals are to even in my presentations I show a video of a procedure.

So it gives the doctors the opportunity to see if this is something they are going to augment their practice with. Or if it's a physician, it gives them the opportunity to say, "Hey, I do it this way," and we can have a discussion regarding the procedure itself.

When I do courses, I do them in Idaho, so they are not hands-on courses. But it's clinical physicians coming in and they will spend between one and five days with me going through different cases. And what I do with that is I ask them, "Okay, what kind of procedures do you want to see that you are interested in?" And I will have my schedule filled up with that.

And we'll have a course curriculum on what we are going over starting again from the complete basics to advanced procedures, and then they get to watch me do procedures.

Q. Now, these trainings courses that you are referring to, have you been involved directly in training physicians on the topic of liposuction

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and fat transfers?

A. Yes.

Q. And about how many years have you been involved in providing that sort of training?

A. About 4 or 5 years. When I was in my fellowship, we also did trainings and there were international students coming and we would always have physicians coming in during training and spending the week with us.

So I guess I can add that up to five years then.

Q. With respect to the types of physicians that attend these training classes, whether the seminars are at big conferences or the ones that are coming directly to your practice to shadow with you, can you tell the jury the types of specialists those physicians are, generally.

A. I've trained anywhere from family practice docs to cardiologists to plastic surgeons, so it can be a wide array of someone wanting to get into the cosmetic aspect of medicine.

Q. And, in fact, with respect to the plastic surgeons that you've trained, do you have an understanding as to why they are coming to you

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as cosmetic surgeon for training on those topics?

A. Well, one of them -- a lot of the plastic surgeons are coming in for more advanced training or using lasers, which if they went and did their residency more than ten years ago, laser hypologist, which is ultrasound guided by hypologist wasn't around.

So if they have later training, they have to be trained some way to how to do it, and so they will come to somebody like myself and do that. However, a lot of plastic surgeons -- I do all outpatient surgery so when I talk about circumferential body lift, which is a tummy tuck all the way around as an outpatient, most plastic surgeons have never done anything like that so they will come and spend time with me.

Q. Do the training of the surgeons -- or excuse me -- the training of the physicians that you have performed in the last five years, do they include as some of the specialities anesthesiologists?

A. Wouldn't be unheard of. I don't recall an anesthesiologist training with me, but it wouldn't out of the realm of possibility.

Q. Looking at your CV again, doctor, I see

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a reference to some publications. Could you talk to the jury just briefly about what you have published in what capacity.

A. Sure. So when I was in residency, in surgery residency, I did -- we did a paper on alternative approaches to antegrade catheter-directed thrombolysis in a case of phlegmasia cerulean dolens -- I apologize. It is a mouth full.

MR. JONES: I have the spelling, ma'am court reporter.

THE WITNESS: And this is actually before catheter-directed thrombolysis. Now, catheter-directed thrombolysis, which is basically when someone has a blood clot, you will slide a catheter up through a vessel to that blood clot and directly infuse a clot buster, EPA or (inaudible) or (inaudible).

When I was in residency, we were one of the first people to try it on a patient who had blood clots in her leg so no blood flow was coming out of the leg, and the leg was basically dying. So we did the catheter-directed thrombolysis with that and had good success. And that was the beginning stages of starting to do those.

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The next was neoadjuvant chemotherapy and radical resection of the intraoperative --

THE COURT: You need to slow down just a tad.

MR. JONES: A little fast again, sorry, Your Honor.

THE WITNESS: I apologize. I'm from the east coast.

THE COURT: You need to slow down for our court reporter.

THE WITNESS: I've seen smoke coming out of her ears.

Neoadjuvant chemotherapy and radical resection of the intraoperative. So basically at my institution, I was working with our surgical oncologist and we would have people that would have cancers at the base of the esophagus, beginning of the stomach.

And as part of the operation, what we would do is instead of just going in and resecting it, we would start them first with chemotherapy to try and reduce their tumor side, their tumor burden. And then during surgery we would do interoperative radiation, so we actually operate on them, take out their tumor, and then have a

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radiation oncologist radiate them and then put them all back together. So they didn't have to have any postoperative radiation or chemotherapy and found the success rate. So, again, that is why we published that.

The third one I published after my fellowship is a unique method of body contouring after massive weight loss. Now, this journal, again, is talking about doing circumferential body lifts, which I've mentioned a couple of times, as an outpatient with no drains. And we presented 26 patients and the outcomes of those 26 patients.

BY MR. JONES:

Q. So that particular article, the last one you referred to was published in the American Journal of Cosmetic Surgery?

A. Yes.

Q. Is that a peer reviewed journal?

A. Yes.

Q. And can you describe for the jury what "peer review" means.

A. So a peer review journal -- when you look at multiple different aspects of journals, you can just publish -- you can write a letter to a magazine and it's a publication.

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Now, what a peer review journal means is that there are multiple other people that are in your specialty reviewing the journal to see what efficacy it has in medicine. And so if it passes the, I guess, the test, it gets published.

Q. And in this instance with respect to that last one that was published in the American Journal of Cosmetic Surgery, it passed peer review and was selected for publication?

A. It did. And, again, that was one of the reasons I was able to present that at that last conference.

Q. And what year was that one published?

A. In 2011.

Q. In what states are you licensed, doctor?

A. Currently I'm a licensed in Idaho and in Washington.

Q. And what are your board certifications?

A. I'm board certified by the American Board of Surgery. I'm board certified by the American Board of Cosmetic Surgery.

Q. When did you obtain the certification for cosmetic surgery?

A. I believe it was 2011.

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Q. All right. Thank you for sharing your CV with the jury.

You indicated that you are currently about 50 percent between cosmetic and general surgery, correct?

A. At least that's what my contract says.

Q. Tell the jury a little bit about what is the nature of your current practice in terms of where you worked, the various locations, just briefly.

A. Sure. So I have a practice in Moscow, Pullman, and Colfax. We have two offices, one in Pullman and one in Moscow. My cosmetic practice is solely in Moscow. However, I will do some surgical procedures if I'm doing a tummy tuck at the same time they are doing a hysterectomy, I'll do that in Pullman if it's being done robotically at their hospital.

Now, according to my contract, it says 50/50. That being said, about 95 percent of my time is spent cosmetically. The 50/50 comes down to the fact that I take calls for general surgery, meaning that 25 percent of the time. So every Monday night I'm on call and one weekend a month I'm on call, just for general surgery.

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Q. Now, with respect to your cosmetic practice, you indicated that that is focused in Moscow, correct?

A. Right.

Q. And where specifically? Describe the facility where you are practicing your cosmetic surgery.

A. So we have -- I practice my cosmetic surgery in multiple different places, but my office base setting, there's four doctors -- four surgeons in our group and one GI doctor in our group. So we have an office, multiple rooms. And I have four operating rooms in the back that are office-based suites for surgery.

Then I also do operations at each of the four hospitals, and we also have a surgery that is owned by one of the hospitals that I will do cases at as well.

Q. Do you perform liposuction and fat transfer grafting procedures in your office-based practice?

A. Almost exclusively.

Q. Do you combine those procedures sometimes?

A. Well, you always have to do some

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liposuction to get the fat to harvest, so yes.

Q. All right. Now, with respect to the area of Moscow, is it pretty common for you to have patients to come see you that are, say, greater than 45 minutes to an hour away from your office?

A. I have patients still coming in from North Carolina that I operated on there or I operated on there that fly into Moscow for me to operate on them.

Q. Can you describe to the jury, just briefly, the challenge it faces or it poses to you as a physician having patients that are located remotely from you.

A. It's very challenging in the fact that, one, you can't just say, "Come on into my office. I want to see you." You have to be respective of their distance, especially if they are coming from multiple hours away. So it does make it a little bit more challenging. And, oftentimes, I will have patients to stay for a night at least in the hotel close by so I can see them the next day if they are from a further distance.

When I have patients fly in from North Carolina, oftentimes I tell them that I want

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them to stay for a week. And then I still have friends back there that I will arrange for them to follow up with if there's any concerns.

Now, the nice thing about cosmetics, is a lot of -- a lot of what we do is visual. So if they are having concerns, a lot times they can pick up the phone. I can talk with them. I can have them text me a picture, and we can talk about what is going on from that circumstance.

Q. Do you in your cosmetic practice, specifically, with procedures like liposuction and fat transfer, employ the use of prophylactic antibiotics?

A. All of my patients are actually given Keflex in the morning, the night before. They are given Cephalexin the morning of and are continued on an 8-day course of Keflex or if they are allergic, then I use something different.

Q. But for the jury's benefit, Keflex and Cephalexin are what?

A. They are both sefalasporin?

Q. An antibiotic?

A. Yes.

Q. And can you explain to the jury why that is part of your procedure.

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A. It's really what we are trying to do is prophylactically treat an infection. Now, when we do any type of surgical procedure in the hospital, if I'm doing a hernia repair, I give them a dose of antibiotics.
Q. And again, that is prophylactically treating them for infection?
A. In cosmetics it's very common and just about everybody I talk to, and everybody in my training, recommend using some antibiotics afterwards.
Is there any science behind it? I don't rightfully know, but that's what we do in cosmetics.
Q. When you were in the Air Force and you indicated you were a healthcare provider out at Mountain Home Air Force base, when you were treating members of the military, were there any requirements associated with how you would treat someone from the military in terms of, say, if they needed a surgical procedure, would they have to come see you if you were doing the surgery and would that impact their status in any way as an active duty person?
MR. HADDAD: Objection relevance,

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Your Honor.
THE COURT: Sustained.
BY MR. JONES:
Q. To your knowledge as a physician that was involved in the Air Force, when a patient would -- an airman, for example, would seek to undergo a surgical procedure, was that something that you would be required to see the patient for and to sign-off on in any way?
MR. HADDAD: Objection. Relevance, Your Honor.
THE COURT: Sustained.
BY MR. JONES:
Q. Now, I want to come back to your practice a little bit, doctor, with respect to seeing patients in the hospital, how much of your time are you spending -- since you've indicated about 95 percent cosmetic and 5 percent general, how much of your time are you actually seeing patients in a hospital as opposed to within your clinic setting?
A. I only see patients in the hospital when I'm on-call. So every Monday I will do rounds for whatever patients we have in the hospital. Obviously, if I'm doing an operation in

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the hospital, I'll see that patient, but -- so every Monday I'll do it. Otherwise, one weekend a month I take calls and see hospitalized patients at that point in time as well.
Q. Are you aware, given your status in Idaho as a cosmetic physician who performs surgical procedures in your office, are you aware of any requirement in order to perform and provide that care to your patients of any certification or license of any kind that you need in order to be able to perform, for example, liposuction and fat transfers in your office?
A. I believe the only license you would be required would be your medical license.
Q. Do you believe it's safe for you to perform cosmetic procedures, like liposuction and fat transfer, in an office-based setting as opposed to an hospital?
A. Absolutely.
MR. HADDAD: Objection, Your Honor. Overly broad, relevance.
THE COURT: It is a broad question, but I think it's relevant so the objection is overruled.
THE WITNESS: Absolutely. I think it's safe. I do it daily.

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BY MR. JONES:
Q. Okay. Now, you weren't here for an expert that testified for the plaintiff, a Dr. Sorensen who has testified in this case.
He was asked questions regarding the use of general anesthetic for liposuction. Do you use general anesthetic for your liposuction procedures?
A. No.
Q. And can you explain to the jury why you don't.
MR. HADDAD: Objection. Relevance, Your Honor.
THE COURT: I'm going to sustain the objection. What the relevance is not what he does in a different community, but what he does -- whether he's familiar with the applicable standard of care as it existed in this area at the time and place that this occurred and then how it relates. So I think it would be helpful --
MR. JONES: I'll tie it up, Your Honor.
THE COURT: -- to tie it up now.
MR. JONES: I'll circle around to that, Your Honor.
THE COURT: Well, if you want to go

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directly, that would be useful, too.
BY MR. JONES:
Q. Let me ask you this, doctor. As a result of your work in this case, have you engaged in any discussions with any physicians from Boise who practice cosmetic surgery here in Boise in the year 2010?
A. I have.
Q. Who did you speak with?
A. Dr. O'Neil.
Q. Who do you understand Dr. O'Neil to be?
A. I believe he is a family doc who actually practiced here who did cosmetic procedures here during that time frame. He is now in California.
Q. Okay. Did you know Dr. O'Neil before this case?
A. I did not.
Q. Were you asked to call him in order to discuss standard of practice issues for Boise?
A. I was.
Q. Did you do so?
A. I did.
Q. And can you share with the jury some of the information you learned based on your

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conversation with Dr. O'Neil?
A. Regarding what aspects?
Q. Well, for example, did your discussion with Dr. O'Neil focus on a specific time frame?
A. It did. It was during 2010.
Q. Did it focus on a specific type of practice?
A. A non-surgical based cosmetic practice.
Q. Did your discussion with Dr. O'Neil involve the facts of this case?
A. It did.
Q. And did you discuss with Dr. O'Neil issues relating to the performance of liposuction and fat transfer?
A. We did.
Q. And can you describe to the jury what you talked about in general regarding those topics.
A. We talked about what kind of procedures he was performing and people like him were performing, the other physicians in the area, whether they did it at surgery centers, in their office, what they felt comfortable with. And as far as that is concerned, what kind of anesthetics they used.

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We briefly discussed some aspects of cleaning and sterilization, but we didn't go into -- during our conversation, we didn't go into that. But since then, we have discussed it more thoroughly.
MR. HADDAD: Your Honor, may we approach because that is new opinion, new testimony as to the foundation for his opinions. That was not disclosed to us.
THE COURT: All right. Well, let's excuse the jury briefly and have you all stretch. Please don't start talking about the case and don't express or form an opinion, and I will see you shortly.
(Jury Leaves.)
THE COURT: Okay. Proceed.
MR. HADDAD: Thank you, Your Honor.
In the deposition of Dr. Stiller that took place July 19th of this year, he was asked about how he availed himself of knowledge of the standard of care in Idaho, specifically Boise.
He said he spoke with Dr. O'Neil. I asked him on how many occasions. And he said, "Once." And now it appears he's had subsequent calls that we were not made aware of and have not

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had a chance to delve into on cross-examination.
MR. JONES: May I respond, Your Honor?
THE COURT: Yes, you may.
MR. JONES: Your Honor, I struggle with this continued reference to depositions. When Rule 26(b) specifically states that the way in which an expert's opinions may be learned is based not only on deposition, but on interrogatory responses.
And in this particular case, interrogatory responses which predated Dr. Stiller's deposition go into nauseating detail on the nature and discussion that he had to learn about the standard of healthcare practice in Boise, Idaho, in 2010. And that he would be coming here today to testify fully on that topic.
THE COURT: I see. And you answered, no doubt, in general terms about how he familiarized himself with the standard of care in Boise during that time period.
MR. JONES: In more than general terms, Your Honor.
THE COURT: Well, let me see your response.
MR. JONES: Well, it's about 15 pages for Dr. Stiller's portion and --
THE COURT: And I would be delighted to see

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it.
MR. HADDAD: Your Honor, just for your attention -- and I think the Court has hit the nail on the head -- they said Dr. Stiller will testify how he became aware of the standard in care. In that very generality.
That's why when I deposed him, I said, "How did you become aware?"
"I spoke with Dr. O'Neil."
How many times?
"Once."
So I was given a very vague disclosure. I asked him in his deposition to find out what, in fact, those opinions would be based on. I was told he spoke with Dr. O'Neil one time.
MR. JONES: I have the disclosure. I would be happy to provide it to the Court, Your Honor.
THE COURT: Yes, please.
MR. JONES: May I approach?
THE COURT: Yes.
MR. JONES: It starts on this page, Your Honor, and --
THE COURT: All right.
MR. JONES: There are a number of references throughout.

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And I have some additional points after you've had a chance to look at that, Your Honor.
THE COURT: Okay. Let me give this back counsel.
MR. JONES: Thank you, Your Honor.
May I further my argument, Your Honor?
THE COURT: Not right yet.
What appears to me from reading the interrogatories is that the interrogatory, that is not all that unusual, contains simply the general statement that the witness has familiarized himself with the appropriate standard of care. I noted that the responses were filed on May 31st, and it's my understanding that the deposition was in July.
MR. HADDAD: That's correct, Your Honor.
THE COURT: And then he discussed his familiarity with the standard of care.
And if the court reporter could give me the specific question once again that prompted our objection, that would be helpful.
(Last question was read by the reporter.)
THE COURT: All right. I think that is a proper question.
MR. HADDAD: I apologize, Your Honor. I

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think he asked -- I think it was a question on how many occasions did he speak with Dr. O'Neil. I thought that's what prompted the objection.
THE COURT: Okay.
THE REPORTER: Okay. Let me just recheck.
MR. JONES: I don't remember asking that question, but...
THE COURT: Well, it is proper for him to discuss generally what he talked about in terms of as I indicated, you know, the procedures -- what the general practice was, what the procedures were with respect to performing liposuction and fat transfer. An it's appropriate that he discussed those general topic areas and familiarize himself with the standard of care in this area.
MR. HADDAD: I thought he said that he had spoken -- he had called him on more than one occasion. That is really what prompted this because when I spoke -- and just to give the Court a heads up -- first of all, when I deposed him, he brought his file. There is a letter dated May 17, 2010 -- 2013, I'm sorry -- from Mr. Quane to him saying, "Call Dr. O'Neil. He will tell you what the standard of care is."
In July, I deposed him and he said he

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spoke to him once.
THE COURT: Okay.
MR. HADDAD: And just for the Court's edification, he said he did not ask Dr. O'Neil what cleaners he used. He didn't ask Dr. O'Neil disinfectants he used.
THE COURT: You can bring that up in your cross-examination, counsel.
MR. HADDAD: Well, the problem is, if he's spoken -- if after the deposition all of a sudden he goes out and now he learns it, I can't cross examine him on later learned evidence. That is the prejudice and that is the case law because, quite frankly, after taking Dr. Stiller's deposition, I anticipated this is exactly what was going to transpire.
I was going to depose him, ask him all the relevant questions. "What did you know? What did you talk about to avail yourself of the standard of care?" And then I was going to come into court and he was going to use after-acquired information to expand upon what he said he knew at the time of his deposition. And I would have no chance of cross examine him, except to say you didn't tell me that in July. That is meaningless

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if he says, "I spoke with Dr. O'Neil."
The prejudice is compounded by the fact, Your Honor, that Dr. O'Neil -- if the Court remembers, the Court granted a motion in limine to keep out his board of medicine issues.
If you read the 2008 order, because that's when Dr. O'Neil applied for licensure was late 2007, and the disciplinary action came about in 2008, Dr. O'Neil was not permitted under that restriction to do fat transfers.
So if, in fact, he said, "I spoke to Dr. O'Neil about his practice of doing fat transfers in 2010," I should be entitled to cross examine him saying, "Well, did you know the Board of Medicine in Idaho restricted his license such that he could not do those?" Because that goes to the credibility and honesty of the person he has spoken with.
THE COURT: Well, that is an unusual situation.
MR. JONES: Your Honor, if I may, I haven't had a chance to respond to any of that, if I could.
THE COURT: Yes.
MR. JONES: First of all, if I had written

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Mr. Haddad a letter and said, "Dr. Stiller has called and the questions that you asked him about in his deposition, he has since followed up to see if there was additional information that he could obtain," the Ramos versus Dixon -- I believe -- and a couple of other med-mal decisions, specifically on this issue of people who are at trial and have failed to qualify their expert witness have been given breaks in the trial to go out and place a phone call to try and learn about the standard of practice. There hasn't been an issue that has been unfair for the opposing party to not be able to depose that person about whatever it was that they talked about.
In this instance, they've know that Dr. O'Neil was involved all along. They never sought to take his deposition. If they wanted to question or challenge his veracity or his knowledge, they certainly --
THE COURT: I don't think that is particularly relevant. Talk to me about the specific issue whether it's violative of any rule to allow your witness to supplement his prior testimony in some more major way.
MR. JONES: Well, two issues there.

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Number one, this is foundational information. These don't relate to his opinions. He hasn't added new opinions as a result of having an additional phone call with Dr. O'Neil.
THE COURT: So he hasn't added new opinions as a result --
MR. JONES: He hasn't added new opinions. This was simply -- he was asked, "Did you know or did you talk to Dr. O'Neil about this issue involving what happened in Boise, or this issue?" It's not that he didn't already have a basic understanding of what the local standard of practice is. And that is set forth in his deposition quite clearly. And I can read sections out of it for the Court if the Court would like.
The issue is when he asked him the question, for example, "Do you know if Dr. O'Neil used spore counts?" And he didn't know the answer to that question. So he called and talked to Dr. O'Neil again. "Do you use spore counts?" Why? Not because it will change his opinions that he is going to render in this case, but in order to address the question that Mr. Haddad wanted to say, which was you don't even know if he takes spore counts. He can say he knows he didn't take

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spore counts.
The basis for which he seeks to cross examine him on, is the same basis he has now and would have had even if he had taken a second deposition of Dr. Stiller. Nothing has changed. So for him to claim that he is somehow unfairly prejudiced because Dr. Stiller had a second conversation after his deposition to address some of the concerns that were advanced by saying, "Well, you didn't ask Dr. O'Neil this specific question" is not improper.
MR. HADDAD: It is absolutely improper because he's -- the whole issue is me being able to cross examine him on how he availed himself of knowledge about what the local standard of care is with respect to cleaning, disinfecting, and sterilizing medical equipment.
If he says, "I did that" -- and quite frankly, and I think Dr. Stiller will tell you this, he in March of 2012 -- 2010, I'm sorry -- he was still in North Carolina, not in this area. He had not been to this area since 2007 when he was in Washington doing his fellowship training.
He goes back to Washington in 2010 and practices in Spokane. He didn't even come to

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Idaho until 2012. So he wouldn't even have, based on his own knowledge, known what's going on in Boise, even arguably, until he came --

THE COURT: All right. So he is not himself familiar with the general practice in Boise on 2010.

MR. JONES: Your Honor, for example, on page 70 in his deposition, he was asked:

"QUESTION: When you were talking to him" -- meaning Dr. O'Neil -- I'm on page 70, line 17 -- "did you ask him how he was trained both in and through medical school, residency, and in cosmetic procedures?

"ANSWER: No. I asked him about the standard of practice in Boise at that point in time."

And now there's a number of other discussions about him where he said he talked to Dr. O'Neil about sterilization. And if the Court would like, I can try to provide an exhaustive list of exactly what was discussed, but the issue is whether or not Dr. Stiller can lay a foundation that he has actual knowledge of the standard of healthcare practice in Boise in 2010 applicable to Dr. Kerr.

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Now, if plaintiff wants to challenge that by virtue of cross-examination on the questions and the depth of the discussion that he had, it wouldn't matter if he had talked Dr. O'Neil 12 times or if he talked to him 5 minutes ago before he came in here.

He can still challenge the basis and suggest to the jury if he wants, "Well, you didn't ask Dr. O'Neil this question or that question." The fact that he hadn't asked him every question under the sun when he had his deposition taken, doesn't mean he didn't have an adequate foundation to be able to testify.

All I'm trying to do by having him have an additional discussion with Dr. O'Neil is prepare him to oppose some of these questions that Hr. Haddad is going to try to beat on him with on cross-examination.

MR. HADDAD: The whole issue in this case, despite the defense presentation of examination, has been: Was the standard of care met in Boise, Idaho, in July of 2010 with respect to the cleaning, disinfecting, and sterilization of the equipment.

So that for this witness, Dr. Stiller

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would have to avail himself of the standard of care of 2010, in July, in Boise, with respect to what is the appropriate method of cleaning, disinfecting, and sterilization. And that's why I asked him specifically, "What did you ask to avail yourself of the information on those issues that are the issues that are directly relevant to the plaintiff's case." You said he never asked.

Now they want to come back and say, "Oh, that's irrelevant to him being able to go back and supplement what is a complete derth of basis of knowledge with respect to the standard of care on those key issues and now they have him go back without.

And, quite frankly, again, I've looked in the issue (inaudible) and (inaudible) says, if you are going to supplement, you have to reasonably supplement. If he is going to go back and say, "I am now aware of the standard of care with regarding with cleaning, disinfecting, and sterilization, then he should have let me know that.

This is akin, quite frankly, Your Honor, as to what happened with Dr. Garrison. And if you remember, at his deposition was the

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first time in September that he knew he had an opinion about fat embolysis. And he admitted that wasn't part of his disclosure.

At that point, quite frankly, Your Honor, we were prepared and did file a motion in limine. Defense counsel ultimately allowed us to re-depose Dr. Garrison on that issue. And, therefore, I did not raise the issue of what was a very late disclosure, but nonetheless, the opportunity to cure that by a second deposition so I could ask those questions and be adequately prepared to cross examine Dr. Garrison on that.

That's how big boys play. This is trial by ambush, quite frankly, Your Honor.

MR. JONES: Page 77, Your Honor --

THE COURT: All right. I don't really need any -- I have questions specifically.

Idaho Rule of Civil Procedure Rule 26(e) requires the responses be supplemented. It is particularly required under 26 (e)(1b) that the identity of person expected to be called as an expert witness, the subject matter in which the person is expected to testify, and the substance of the person's testimony is specific subject to duty to supplement.

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A party under Idaho Rule of Civil Procedure 26(e)(2) has a duty to seasonably supplement. Under subsection b, "If the party knows that the response, though correct when made, is made no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment."

And so it seems to me that there's no question. It's always -- it has been a very long time in this case, a critical issue about how the equipment used in the procedure was sterilized and maintained and used. And that is a central issue in this case.

The focus of expert testimony at a trial of this type is whether the practitioner negligently failed to meet the applicable standard of healthcare of the community in which the care was provided as the standard existed at the time and place of the alleged negligence.

So it is the central issue in the case that certain conduct did not meet the standard of care for a practitioner of that type in this area in 2010. That's the central issue. And it is a central issue in a medical malpractice case that all experts be familiar with the local standard of

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care.

So I find that I do have some concerns about two things. I have some concern about the fact that the expert engaged in additional inquiry into the standard of care after his deposition which was not disclosed to counsel by way of supplementation.

And I must say, I do have some concern about some of the issues being raised with respect to whether the source of this information was a person who was himself adequately familiar with the standard of care for the procedure at the time and place the care was rendered.

It is not, in my experience, terribly uncommon for a deposition to flag issues that a party feels then should be addressed more fully by their expert. I don't think that is unusual, so I don't see anything incorrect in and of itself for Dr. Stiller to have, after a deposition, sought to clarify with the person he was relying on to provide standard of care information, additional information that the deposition raised questions about. That doesn't seem to me to be improper or unusual.

The problem I do have, though, is

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whether then counsel's obligation would be to supplement that response because that is so particularly material.

MR. HADDAD: I know the Court's thinking, Your Honor. Can I say one more thing very briefly?

We had prepared a motion in limine on this very subject matter. And even after receipt of that, we were never provided with anything that would give us a clue that he had availed himself of additional information.

MR. JONES: Counsel, I disagree with that representation --

THE COURT: Well, I'm going to let you have a response now, so go right ahead.

MR. JONES: I disagree that there was something in the motion of limine that specifically raised the concern about whether or not Dr. Stiller or any of the defense experts had had further discussions with Dr. O'Neil. And I would love to see plaintiff's counsel point to somewhere in his brief where he could say --

THE COURT: Wait. Wait.

MR. HADDAD: I apologize. I didn't mean to say that. I just mean to say the issue of what

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was said at the deposition of Dr. Stiller with respect to his lack of knowledge about the cleaning, disinfecting, and sterilization. Because I asked specifically, "Do you know what cleaner? Do you know what disinfectant? Do you know if he takes spore counts?" He said, "No. No. No."

I raised that as a failure to avail himself of sufficient knowledge on the court issues of the motion in limine. That's what I meant. I apologize if counsel misunderstood my statement.

MR. JONES: And to the suggestion that Dr. Stiller had no information at the time of his deposition, there are a few key passages we can point to in the deposition.

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"QUESTION: All right. Let me ask you this. You talked about alcohol, Hibiclens and, obviously, you couldn't have much discussion about the appropriateness of some unknown cleaner, correct?

"Correct.

"QUESTION. All right.

"Well, we talked also about autoclave,

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the steam autoclave and the fact that he did use a chemical marker."

And then going to page 75.

"Now, when you say you discussed the sterilization and the adequacy of the sterilization as described, are you talking about, as Dr. Kerr described in his deposition?

"Yes."

THE COURT: Wait a minute. You talking about Dr. Kerr's practices?

The issue that is before me right now is whether this expert familiarized himself with the applicable standard of care from his other expert. Now, of course -- and, as I looked at the plaintiff's motion in limine which was filed before the Court October 22, 2013, at page 21 of that brief filed by the plaintiffs, specific concerns are raised with respect to whether Dr. Stiller had had a sufficient conversation with Dr. O'Neil to familiarize himself for the standard of practice for cosmetic surgeons in Boise in 2010. That is a specific issue that's raised and it's flagged on October 22nd.

Now, I am concerned about the lack of further supplementation. Let me -- so you talked

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with Dr. O'Neil after your deposition and asked about some things that the deposition had raised.

THE WITNESS: (Witness shakes head).

THE COURT: So how many times did you talk to him?

THE WITNESS: One more time.

THE COURT: Just one more time. And when did you talk to him?

THE WITNESS: Last night.

THE COURT: Well, that makes that tricky for supplementation. Can you just kind of fill us in a little bit.

THE WITNESS: Sure. Specifically we were trying to address, okay, the sterilization that was done, his chemical cleaning apparatus, whether he was using Hibiclens, what he was doing this for, what he had talked to other people in the area that he was doing; okay.

Again, his opinion was, and I agreed with that, Hibiclens and alcohol used to clean an instrument and then using a cleaner afterwards is fine. But the most important part is sterilization with an autoclave. That's what kills the bacteria that the cleaning and disinfecting don't.

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And the only way to test that is by chemical markers, which is again, what I had said beforehand regarding --

THE COURT: And you had said that at your deposition.

THE WITNESS: Exactly.

MR. HADDAD: Your Honor, I would just point to his deposition. He doesn't know and didn't ask what disinfectants were used. Doesn't know and didn't ask if he even uses an autoclave. That is on page 71 of his deposition.

THE COURT: Okay. Now, wait a minute. Does Dr. O'Neil use an autoclave?

MR. HADDAD: He didn't even bother to ask and there was no discussion about an autoclave even being used by Dr. O'Neil.

THE WITNESS: Ma'am, could I answer that?

THE COURT: Yes, please do.

THE WITNESS: The only way to sterilize something is by an autoclave, so it's a redundant question.

MR. HADDAD: Doesn't know and doesn't ask if he used biological markers. I mean, if he doesn't know, that is the point. If you are asking the only person that's been flagged as being the guy

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you're supposed to go to and you don't even bother to find out if he is the one doing the autoclaving, how he does it, whether it's steam or some other type, whether he takes spore counts, how am I to know? And now he has a conversation last night with -- and quite frankly, I have serious concerns that Dr. O'Neil was never here.

THE COURT: Well, would you be able to render your opinion without discussing what came of last night?

THE WITNESS: Absolutely. My opinion hasn't change.

THE COURT: All right, then. I think that probably cuts to the chase. We'll just skip last night's discussion because his opinion hasn't changed. I think he can explain his reasons for his opinion without any discussion last night. And I think that would address the problem that is created.

Because I do think -- it isn't uncommon for people after depositions to double check with people to see about this or that issue that may have come up, as long as it's reasonably supplemented. I think the best thing to do is just to stick with what he did at the deposition.

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If it didn't change your opinion, we are probably spending way too much time on this. The jury needs to understand the basic issues in the case and my goal in the case is to make sure that the jury fairly and completely has adequate information, that both sides have had a fair time to explore it.

So if we stick with what he has already disclosed since he said it doesn't change the opinion, then I think that will be sufficient.

MR. HADDAD: If I ask the questions, obviously, what I asked in deposition and got the answers I got, am I somehow going to be opening the door to some conversation he had last night?

I mean, that's my concern is all of a sudden, well, you didn't know if Dr. O'Neil even used an autoclave, do you? Oh, yeah I do because I talked to him. And then it opens that door for that whole --

THE COURT: Well, I assume he is familiar with what Dr. Kerr did. And Dr. Kerr said he used an autoclave.

MR. HADDAD: I'm talking about Dr. O'Neil.

THE COURT: Yes, I know. But I don't think that -- I therefore think that this is an

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appropriate area for him to discuss as long as he limits himself to his prior opinion and the basis for that.

And at this point, we'll ask the witness not to discuss anything that was discussed last night, not to go into that, not to reference it. But I think we are consuming a good deal of time on something that perhaps doesn't warrant this level of concern.

I don't think you are necessarily opening the door for it, but I would recommend that -- I mean, this witness has just said that he hasn't changed his opinion since he gave his deposition. And at the time of his deposition, he had talked to Dr. O'Neil one time.

We know that he will have reviewed Dr. Kerr's records, and he will know from Dr. Kerr's records for himself that he used an autoclave. And certainly, this witness has the expertise to talk about what the desired results would be for that process.

MR. HADDAD: Obviously, it raises the issue again, Your Honor, of Dr. O'Neil, and I want to make an offer of proof at this time. So we are here on the motion of limine for both the Court's

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reconsideration as well as make an offer of proof.

Dr. O'Neil applied for licensure in the state of Idaho in late of 2007. Because of some misrepresentations on his application, it became the subject of a disciplinary action. He had been disciplined once before and his license revoked once before in the state of Idaho.

When he came in 2008, he entered into an agreed order that limited his practice to chemical peels and liposuction. It also said, very interesting, Your Honor, that if Dr. O'Neil intends to come to practice in Idaho, he is to let the Board of Medicine know by way of written letter. He was not practicing in at least 2008 --

THE COURT: Okay.

MR. HADDAD: So I want to get into the issues of obviously that I think that sets a tenure that is much different --

THE COURT: Okay. Stop. Stop. Stop. Board of Medicine restriction is he can only do liposuction?

MR. HADDAD: And chemical peels.

THE COURT: Liposuction and chemical peels. The fact that he may not be able to do the fat transfers does not necessarily mean that he is not

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familiar with the local standard of practice in Boise.

And it seems to me that you can get into the fact that he himself does not -- that Dr. O'Neil -- was the witness aware that Dr. O'Neil did not do fat transfers without getting to other areas that we've previously addressed. Of course, the question is would that make any difference in your opinion.

THE WITNESS: If you look at the expert witness, he doesn't do -- for the defendant, he doesn't do fat grafting either.

MR. JONES: You mean the plaintiff.

THE WITNESS: The plaintiff. I'm sorry.

MR. HADDAD: Of course, if you heard the testimony you would know that he practiced alongside his partner --

THE WITNESS: But he didn't do it --

THE COURT: Don't. Don't. Don't. Don't. Don't.

MR. JONES: If I may just respond --

THE COURT: Okay.

MR. JONES: -- to the coloring of Dr. O'Neil. The suggestion that he made a misrepresentation, there was an extensive amount

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of information that was provided in our briefing about his license application and how there was a Utah company that was hired to complete the application, and then they were provided with the information.

THE COURT: Right. And that's why we are not going to go into all of those collateral matters. It is sufficient that Dr. O'Neil does not do fat transfers.

And that is a fair question and I'll allow him to ask if he knows if Dr. O'Neil does not do fat transfers and the answer to that is no Dr. O'Neil does not do fat transfers. And then we move on because that still doesn't mean that he wouldn't be aware of the standard of practice in the area, even though he doesn't do it.

Because I do think that the fact that it is pretty clear from the testimony that the doctors can be aware of the standard of care with respect to the procedures that they don't necessarily do. And I think we are consuming too much time on this.

So, no. I don't want him to talk about what he talked about last night. And, certainly, he can respond to the question, "Does Dr. O'Neil

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do fat transfers?" "No, he doesn't."

MR. JONES: Well, he didn't whether he was in Idaho, but he does them. I mean, when he had his conversation with --

THE COURT: Well, yeah, that he did not perform fat transfers in 2010 himself is a fair question. And it doesn't implicate all of these collateral matters that we would have to get into if we were going to have to be totally stirred off track into a discussion about Dr. O'Neil's issue.

So I think we can deal with this cleanly. And since we've been dealing with this for a while, let's take a five-minute break and we'll resume.

(Short break taken.)

THE COURT: All right. Please proceed.

MR. JONES: Thank you, Your Honor.

BY MR. JONES:

Q. Before the break, Dr. Stiller, we had been discussing your conversation that you had had with Dr. O'Neil. Do you recall where we were at?

A. No.

Q. All right. Basically, my question that I'm wanting you to answer to the jury is to discuss with them what you learned as a result of

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your conversation prior to, say, June of this year with Dr. O'Neil.

A. Our conversation really -- what I wanted to know is whether the standard of practice was met with what Dr. Kerr had done, so we had discussed liposuction and the aspects of liposuction and discussed the way that Dr. Kerr had done his sterilization and whether it was within what was considered the standard of practice in the Boise at that.

Q. As a result of your discussion with Dr. O'Neil on those topics, do you believe you have actual knowledge of the standard of practice applicable to Dr. Kerr regarding the cleaning, disinfecting, and sterilizing of reusable surgical equipment in Boise in 2010?

A. I'm sorry. Could you repeat that one more time?

Q. I'm sorry. There's a lot there. A lot of it is just to comply with lots of things.

Do you believe that as a result of your discussion with Dr. O'Neil regarding the topics of cleaning, disinfecting, and sterilizing of reusable medical equipment that you actually have actual knowledge of the standard of practice

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applicable to Dr. Kerr in Boise in 2010 on that issue?

A. Yes.

Q. With respect to your own practice, doctor, your own office-based practice, are you certified -- is your facility certified in any way?

A. It is not.

Q. Now, I want to circle back for a minute to this discussion that you had with Dr. O'Neil. Did your discussion with Dr. O'Neil prior to June of 2003 include discussing whether or not his facility or facilities for cosmetic surgeons in Boise in 2010 were board certified?

A. His -- Dr. O'Neil's was not, and he felt that the other non-plastic surgeon cosmetic physicians were not certified.

Q. Did you have an occasion during that discussion to discuss with Dr. O'Neil, in addition to the fact that the facility itself, the surgical facility, didn't have any requirements to be certified, whether the staff involved in cleaning, disinfecting, and sterilizing reusable surgical equipment were required to have any special certifications, licenses, designations?

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A. I do not believe there is any certifications, licenses, or designations for a person who sterilizes equipment.
Q. During your discussion with Dr. O'Neil, the time period we've focused on prior to June of 2013, did you have a discussion regarding the care and treatment that was provided by Dr. Kerr to Krystal Ballard?
A. One more time. I'm sorry. I lost you there.
Q. Sure. I'm putting my preface -- all of my questions will be relating to the discussion that you shared with the jury with Dr. O'Neil prior to June of 2013.
Did you have a discussion with him as part of your conversation about the care and treatment Dr. Kerr provided to Krystal Ballard in this case?
A. We did. That was the focus of our conversation.
Q. And if you could provide the jury, to the extent you haven't, with information about what you discussed.
A. We discussed, first of all, the surgical procedures, what other non-plastic

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cosmetic surgeons were doing, what kind of liposuction were they performing, whether it was laser liposuction, traditional liposuction, whether it was done under anesthesia or not, whether it was done just solely with the tumescent anesthesia.
And it got more specifically involved in the case regarding the rendering of care that Dr. Kerr had performed as far as follow up whether, you know, it was necessary to do blood work post procedure or not. And we discussed those issues as well. And regarding the case itself, what he had thought as far as his -- Dr. Kerr's handling of this patient.
Q. Now, as a result of your discussion, did you confirm that Dr. O'Neil was familiar with the standard of practice in Boise for cosmetic surgeons in 2010 regarding the performance of both liposuction and fat transfer procedures?
MR. HADDAD: Objection; foundation.
THE COURT: Overruled.
MR. JONES: You may answer.
THE WITNESS: Okay. Did I confirm that he had a knowledge of fat transfer as well as liposuction, yes.

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BY MR. JONES:
Q. All right. As a result of your conversation with Dr. O'Neil, did you learn of there being any significant differences between how things were done in Boise in 2010 and how you were doing things in your own cosmetic practice in 2010?
MR. HADDAD: Objection. Relevance to his practice, Your Honor, because he was not in this area in 2010.
THE COURT: Sustained. Rephrase your question.
BY MR. JONES:
Q. Dr. Stiller, as a result of your conversation with Dr. O'Neil, did you learn anything about the standard of practice in 2010 that was different from how you were conducting your own practice at that time?
MR. HADDAD: Same objection.
THE COURT: Overruled.
THE WITNESS: No. It is very similar to the way I practice.
BY MR. JONES:
Q. For example, do you know if Dr. O'Neil himself cleans his own instruments as a result of

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your discussion with him, the conversation that you had with him?
A. I don't know if we actually discussed whether he cleaned his own instruments.
Q. Do you know whether or not he has a separate room, a standalone room that he uses to perform the -- or for his employees or himself to perform the cleaning, disinfecting, and sterilizing of his reusable medical equipment?
A. He did not do the cleaning and sterilizing in the operating room. So, yes, it was in a separate room.
Q. Okay. Do you know if he had -- for example, if there was more than one sink, a dedicated sink that was used specifically for the purpose of one aspect, or more than one aspect, of the cleaning, disinfecting, and sterilizing of reusable medical equipment?
A. He had a sink that he did it in. I don't know if it was specifically just for that.
Q. Now, you were asked in your deposition about the issue of spore counts. Do you remember you were taken -- a deposition was taken by Mr. Haddad. What is your understanding given your position in a cosmetic surgical practice that you

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have in Moscow; do you take spore counts?
A. I don't personally, but my tech does.
Q. Do you have an understanding as to what spore counts do as it relates to bacteria?
A. From what I understand, it's a biological marker so you are trying to see if there is any bacteria or spores left behind after you've done a sterilization process.
Q. What is a spore?
A. Basically, I define it like an egg, something that can grow into a bacterium.
Q. Do you know whether or not a spore count will tell you if your autoclave is killing gram negative bacteria?
A. Gram negatives don't cause spores.
Q. Explain your answer.
A. Spores are caused by gram positive bacteria, not gram negatives.
Q. So to the extent there's been criticism advanced in this case by Dr. Sorensen that Dr. Kerr was not taking spore counts, do you have an opinion as to whether or not if Dr. Kerr had been taking spore counts, there would have been any identification of any gram negative bacteria; do you have an opinion?

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A. Absolutely.
Q. What is your opinion?
A. My opinion is that gram negative rods or gram negatives do not give spores. Your spore count won't be elevated, changed, or anything, whether he checked it or not. They don't develop spores.
Q. So regardless of whether Dr. Kerr or his facility had been keeping spore counts, it would not have had any bearing on his ability or inability to identify the presence of a gram negative bacteria; is that correct?
A. Correct.
Q. Based on your answer a moment ago that you didn't learn anything new about the way things were done in Boise, is it a true statements that the opinions you are rendering here today are your opinions?
A. They are.
Q. As a result of your background, training, and experience in cosmetic surgery, including your discussion with Dr. O'Neil and your review of the medical records and the depositions in this case, do you believe you have actual knowledge of the standards of practice for a

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cosmetic surgeon like Dr. Kerr practicing in Boise in 2010?
A. I do.
Q. And are you prepared to offer opinions to the jury today in this case based on your knowledge of this standard and your review of the case?
A. I will.
Q. All right. Now, I asked you to review some records and depositions in this case; did I not?
A. You did.
Q. And can you share with the jury, and to the extent you can recall, the items that you were asked to review.
A. Sure. I was asked to review the depositions of Dr. Kerr, Mrs. Kerr, their daughter Brianna, Ms. Berg. I was asked to review the medical records from Elmore County, the ambulance transfer, the lifeflight records, St. Alphonsus' records, as well as the autopsy records. And I was given the -- part of the testimony of Dr. Sorensen from yesterday.
Q. Did you also have the opportunity -- when you said "autopsy record," you mean the

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coroner's records?
A. Correct, I'm sorry. Yes.
Q. Did you also have the opportunity to review any of the Air Force medical records?
A. I looked at a part of the medical records of Ms. Ballard from the Air Force.
Q. All right. And the portion of Dr. Sorensen's testimony was a portion of his cross-examination that was given in this trial, correct?
A. Correct.
Q. All right. Now, I asked you to come to this court and discuss and explain to the jury the facts of the case, the standards of practice involving cosmetic surgery, and the cause of death of this patient; correct?
A. Correct.
Q. All right. I left out Dr. Kerr's records, Silk Touch records.
A. Oh, yes. I did look at the Silk Touch records as well.
Q. Now, I've agreed to reimburse you for your time spent away from your practice of medicine. You have a full-time practice in Moscow as you've shared, right?

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A. Correct.
Q. You have staff and requirements to pay for your employees and your building and overhead, correct?
A. Correct.
Q. All right. I've agreed to reimburse you for traveling and coming down here to Boise to testify and be involved in this case; have I not?
A. Correct.
Q. And I'm reimbursing you at the rate of $5,000 for your time today to be away, to travel, and to be here today, correct?
A. Correct.
Q. All right. Now, the opinions that you hold and that you are prepared to render today, do you hold those opinions to a reasonable degree of medical certainty?
A. Yes.
Q. If at any point I ask you a question or you provide us an opinion that is not so based on reasonable certainty, would you please let me know?
A. Yes.
MR. JONES: Could the witness be handed those other exhibits, please?

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THE COURT: Except I'm going to require that Exhibit 5, instead of H be used. There is not sense in having duplicate Dr. Kerr records, so go ahead.
MR. JONES: Just while that is being done, Your Honor, obviously, that wasn't going to be shown to the jury but there are differences.
THE COURT: Right. Please proceed.
BY MR. JONES:
Q. Now, let's talk just a little bit before we get into your opinions, Dr. Stiller, about your own experience performing cosmetic surgery.
Can you kind of describe for the jury a little bit about the frequency and volume of the type of procedure in this case, a liposuction, that was done and fat transfers, just kind of describe that and explain your experience to the jury.
A. As far as liposuction is concerned, I do a lot of liposuctions because any time I do an aspect of a breast lift, a liposuction, some aspect of it, obviously, with liposuction, all different parts of the body -- and any time I do a tummy tuck, I do liposuction as well -- so as far

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as a weekly basis, I'll be doing three to ten, it depends.
As far as fat grafting, I would say really about 20 to 50 a year I will do some aspect of fat grafting, although, that is starting to increase with doing breast reconstruction because fat grafting for breast reconstruction is actually increasing.
Q. Now, with respect to the fat grafting, is fat transfers to the buttocks something that you do in your practice?
A. It is, yes.
Q. Okay. The other types of cosmetic procedures that you do, for example, are you involved in Botox or fillers and things like that?
A. I am.
Q. What else do you do in your practice, your strictly cosmetic practice?
A. My strictly cosmetics, so for non-invasive, we are starting up a laser program. So I'll do laser hair removal as well as lesions on the face, blood vessels.
As far as injectables, I do Botox, (inaudible), which is a different type botulism, toxin, (inaudible) -- (inaudible) -- sorry --

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which are fillers to pump up the face. However, almost every patient I have with a filler, I will actually transfer them into doing fat into their face because it's a longer lasting volumizer.
Then starting from the head to toe, I do brow lifts, so I will do an incision across the forehead or just endoscopic. With the brow, I do blepharoplasties; facelifts; rhinoplasties; otoplasties, which are ears.
I do transgenders, so I will do feminization to the face, tracheal shavings. I do -- as far as breasts, I do breast augmentation, breast reduction, gynecomastia with liposuction versus just excisions. Arms, liposuction of the arms. Liposuction just about everywhere. Tummy tucks. I'll do thigh lifts, butt lifts, back lifts. So if somebody has loose skin, we can pretty much lift it someplace.
Q. Let's talk about the types of patients that you have. Are all of the patients that you see on your cosmetic practice, are they just trying to fight the effects of time or are they there for other reasons?
A. Well, everybody does it for different reasons. The majority of the reasons -- well, I

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guess, everybody does it for different reasons.
You will have patients that just have a crink in their nose and never liked it or they don't want to look like their mom anymore, so we do it from that standpoint.
And certainly, ageing is a process, but you look at the age range where we do cosmetic surgery. The youngest person I've done an operation on was 16 years old where I did a breast reduction versus the oldest person has been 86 and I did a facelift on her, so it's a wide range for different reasons.
Q. Your cosmetic patients include trauma victims?
A. No.
Q. Cancer victims?
A. No.
Q. Do --
A. Well, I should say that they may have had cancer, but they are not seeing me for that cosmetic reason typically. I consider that part of my general surgical practice.
Q. Is there an art to what you do as a cosmetic surgeon?
A. It's all art.

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Q. Describe to the jury what you mean by that.
A. It's art in a lot of different ways in just the way you deal with a patient trying to understand what they are trying to really achieve. Because most people can say, "I don't like this," but they don't know what it is they don't like. So just the art of trying to get a patient to relate to you what they want.
When you get into the surgical procedure, especially with liposuction, the goal of liposuction isn't taking away the fat. It's sculpting the body. It is all art.
And then when you get into the fat grafting aspect of it, trying to change the buttock in a different way, it depends on the individual. You talk about African American woman, they will want it differently than a Hispanic or Caucasian woman. They all want it differently and it's all an artistic approach on how to reach that.
Q. Now, with respect to your practice and the types of patients that you treat, do you have occasion to review medical records from other places for your patients?

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A. That, as well as working in the hospital, we have to do medical reviews on charts all the time.
Q. All right. So this isn't the first instance where you've been asked to look at somebody's records and discuss the care?
A. No.
Q. All right. Now, on that topic, have you ever testified before in a court in any fashion?
A. I have not, no.
Q. Have I ever asked you to review a case for myself or my office ever before?
A. Just this one.
Q. Now, with respect to Dr. Kerr's records, which you were handed Exhibit 5, and I'll ask you to have those records handy so we can discuss a little bit of the care.
Have you got Exhibit 5 handy?
A. Yes.
Q. Now, anytime you need to refer to those exhibits that you've been provided with to address some of my questions, they've been admitted exhibits and feel free to do so.
Now, you are aware in this case,

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doctor, that the patient first presented on July 13, 2010?
A. Correct.
Q. And she was there for a pre-op evaluation and discussion?
A. Correct.
Q. All right. Based on your review of the records of that encounter with Silk Touch and the staff and folks there, did you see any evidence or indication that the patient had a health concern of any kind?
A. She doesn't mark any and none is noted.
Q. Is there anything that indicates she was sick or infected at that time?
A. There was not.
Q. All right. Now, have you Exhibit O in front of you, which the jury has seen those photographs yesterday, the preoperative photographs were taken of Krystal Ballard.
Do you see anything in those photographs, and I believe there are 21 of them, anything in those photographs that would in any way disqualify or raise a red flag of concern for doing a liposuction or fat transfer procedure on Krystal Ballard?

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A. I apologize. I will look at these real quickly. The only ones I had were photocopies.
Q. Okay. So, these are the color ones. And while you are doing that, doctor, why don't you explain --
THE COURT: Wait until he can answer his question.
THE WITNESS: No. She actually looks like a great candidate for both liposuction and fat grafting.
BY MR. JONES:
Q. And what I was going to ask you, what are you looking at when you are looking at those pictures?
A. Sure. So when you are looking at it, and specifically, when I'm looking at the abdomen, what I'm looking for is whether there's any stretch marks or if there's any scarring that might be going across -- having had a previous appendectomy or abdominal operation to make it a little more challenging as far as that is concerned. Looking at the areas of adiposity and what she is trying to achieve as far as her fast grafting. I'm looking at all of those possibilities. Now, when I look at somebody that

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has darker skin, I'm always more apt to say they are a great candidate for liposuction if they don't have any significant loose skin because their skin bounces back so much better than a Caucasian individual does.
Q. So in your experience, you have seen a difference in the quality of the outcome depending on the race of the patient?
A. Oh, absolutely. Somebody that is Caucasian, I may not offer liposuction to. I would rather do a tummy tuck than do liposuction because of the quality of their skin.
Q. And was it your opinion in looking at those that the patient was what, as far as qualified or not qualified?
A. She was phenomenal and would be a great candidate for liposuction and fat transfer.
Q. Now, again, keeping in mind Dr. Kerr's records, when the patient came in, you understand the procedure was done later in July?
A. Yes.
Q. Do you know what day it was?
A. I believe it was the 23rd.
Q. 21st.
A. 21. I'm sorry.

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Q. All right. Do you have -- I would like you to turn to that page in the record, if you could. And what I'm interested in sharing with the jury is based on your view of these records.
Do you see anything in the records, including in that the deposition testimony that you've reviewed and considered for Dr. Kerr and his staff, which at that point in time as of the date of surgery, would raise any red flags or concern about Krystal Ballard undergoing this liposuction fat transfer?
A. No. As far as her candidacy in the procedure itself, it looks like everything went just as you would expect.
Q. Now, with respect to your knowledge of the standard of practice in Boise, an issue has been raised in this case regarding the taking of a complete blood count or additional laboratory work prior to a patient, like Krystal Ballard, undergoing liposuction.
And I would like you -- first of all, do you have an opinion on whether or not any preoperative testing of any kind was required by the standard of practice on Krystal Ballard?
A. No. And --

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Q. I asked you if you have an opinion.
A. Yes, I have an opinion.
Q. All right. And what is your opinion?
A. My opinion is that as far as the standard of practice with people doing that, again, discussing that with Dr. O'Neil, a CBC, I don't think is necessary or any urinalysis beforehand.
Now in my own clinical practice, I will judge on -- depending on how much fat I'm going to be taking out on whether I will actually take out -- whether I will do a blood count beforehand on somebody who is a low volume, which is what she is. I wouldn't check the blood count.
As far as a urinalysis, the only reason to do that is was she symptomatic. And she never expressed any symptoms of a urinary tract infection. So I wouldn't do that as a standard practice. I don't do it for my hernia repairs.
Q. Now, just to make sure that the jury understands, describe for them what a complete blood count is and what that information gives you as a physician.
A. When you looking at a complete blood count, you are looking at your white blood cells,

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your hematocrit, which is a measure of what the hemoglobin is. It's three times normal hemoglobin, and your platelet count.

And it will give you a bunch of other information regarding what size are the cells to tell you whether you have any iron deficiency anemia or they have something else going on. So in a young individual, really the pertinency of it is really low because you are not worried about them having a GI bleed anywhere else or having anemia for an unknown reason, especially in a healthy individual.

Q. Now, do you -- as part of your practice in Idaho, do you routinely perform whether it's complete blood counts, urinalysis, a blood culture, a urine culture, anything like that on a patient such as Krystal Ballard?

MR. HADDAD: Your Honor, I would just object to relevancy. We have not make a claim that a preoperative CBC urinalysis condition exists.

THE COURT: Okay. So why are we discussing this, Counsel.

MR. JONES: It was an issue that was raised by Dr. Sorensen as I understand his testimony --

THE COURT: I don't recall that but I'll

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give a little leeway. Let's finish on the key issues, that would be great.

MR. JONES: This will be the last question.

THE WITNESS: So on a patient like Krystal Ballard, no.

BY MR. JONES:

Q. And we'll move on, Doctor.

What is your understanding in this case as to how Dr. Kerr cleaned, disinfected, and sterilized his reusable medical equipment?

A. As far as cleaning and disinfecting, he used Hibiclens and an alcohol solution. And for the cleaning aspect, he used some type of enzymatic cleaner after that. And then he put it in a steam autoclave to autoclave it.

Q. And is enzymatic cleaner, is that synonymous to you as a detergent?

A. Basically that's what it is.

Q. Is that similar to how you clean equipment?

A. I don't clean equipment. It's similar to how my staff does it for me.

Q. And who do you have that cleans your equipment at your office-based practice?

A. My surgical scrub.

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Q. And is that somebody that -- are they a physician or a physician's assistant, or what is their background?

A. No. It's a surgical scrub. Whenever we do operations, we surgeons need someone to hold our hands. That is what a surgical scrub does.

Basically, they are the people who pass us instruments. They prep the patient to make sure everything is ready for us in the operating room. And then at the end of the procedure, they are the ones who cleans everything.

In a hospital, we will send it to a central supply or central area and you will have somebody who all they will do is clean instruments. And in a office-based setting or surgery center, your surgical scrubs will be the one who clean the instruments and put it them in the autoclave for you.

Q. I want to talk about a little bit more in depth about this procedure used by Dr. Kerr at his office for cleaning, disinfecting, and sterilizing the equipment, the reusable medical equipment that would be used in, for example, liposuction, such as was done on Krystal Ballard.

Can you explain to the jury your

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understanding of what is happening at each of these stages, the cleaning, disinfecting, and sterilization.

A. Sure. So you can kind of look at it a couple of different ways. I'll attribute it to kind of washing your dishes; okay.

You eat your dinner. You get your dish. You run it over water. You run water over it. That is your cleaning. Your disinfecting would be like taking the soap and putting a scrub brush on it and brushing it. That is your disinfecting.

So you are looking at taking away the gross contamination and then scrubbing it further would be the disinfecting aspect where you are trying to get more of the process out, more of whatever is left behind out. And then you are going to put it in the dishwasher, your sterilizer, which is going to then further clean it.

The sterilizer, the dishwasher is really the one that really cleans it.

Q. Now, describe to the jury, they've heard a little bit about there term Hibiclens. Briefly, what is Hibiclens?

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A. It's basically a soap product, an antibacterial soap.
Q. So based on your testimony, the process is remove gross debris, try to clean off the equipment; but it's the third process that is the key process?
A. The sterilization, correct.
Q. Okay. Is there any magic solution, to your knowledge, that is required to either clean or disinfect reusable medical equipment?
A. I wish there were, but no there isn't.
Q. What is the goal you are trying to achieve prior to placing your reusable medical equipment into a autoclave?
A. Is taking away gross contamination.
Q. Now, another issue that -- my memory is -- was raised during Dr. Sorenson's testimony on direct during the plaintiff's case, had to do with the existence or lack of existence of written policies or procedures regarding the cleaning, disinfecting, and sterilization of reusable medical equipment.
Do you yourself at your practice in Moscow, Idaho, your office-based surgical practice, do you have any such written policies or

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procedures?
A. We do not at this time.
Q. Does the absence of written policies or procedures concerning the cleaning, disinfecting, and sterilization of reusable medical equipment impact the ability of your staff to clean the equipment?
A. No.
Q. What is your understanding as to the basis for having it in writing?
A. The only reason I would put it in writing is if I was going for standardization or getting certification for my operative procedure, in on my office-based procedure room.
Q. So in other words, if you wanted to certify your facility as a surgical center?
A. Correct or office-based surgery.
Q. There is it a requirement that you have these written policies?
A. Basically that's what certification is. It's a requirement for policies.
Q. It doesn't mean that you don't have one in terms of what the staff do?
A. No.
Q. Now, there's been some discussion in

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this case regarding an autoclave, and I would like you to give the jury based on your understanding, a brief discussion and description of an autoclave.
A. So an autoclave, there are multiple different types. And the main type and what really is mostly used in facility, especially in office-based surgery center is steam autoclave.
So it's using water rather than gas; okay. And what you are doing is you are putting your instruments in there and you're and heating it and pressuring it to a certain temperature and pressure that will kill bacteria.
And if it maintains at that pressure for 15 minutes, all the bacteria will be gone. And that's the whole point is to kill the bacteria or fry them.
Q. Do you use an autoclave in your office-based practice?
A. I do.
Q. All right. What -- you used the term "fry." What is your understanding -- when you use that term you say it kills everything that's on the instrument?
A. That's the whole point.

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Q. All right. It doesn't segregate as to what it kills and what it doesn't. The idea is to kill everything?
A. Correct.
Q. Do you use a chemical indicator with your autoclave?
A. I do.
Q. What is the purpose of using a chemical indicator?
A. So the chemical indicator is to tell you that it's reached the temperature that is appropriate for sterilization.
Q. Does the presence of the indicator help to tell you whether or not the autoclave is working properly?
A. It tells you that you have reached adequate temperature, so yes.
Q. Now, the autoclaves that exists, do they just have -- for example, are you aware of the type of autoclave that Dr. Kerr has?
A. I'm aware that it's a steam autoclave, correct.
Q. Now, in your experience with autoclaves, do you just have a start button or will it tell you whether it's run a cycle or do

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you know?
A. In all honesty, I've never started an autoclave myself.
Q. Okay. Fair enough. With respect to these chemical indicators, you indicated that they help to tell you whether or not three things have happened. It's time, temperature, and pressure.
A. Well as far as pressure, pressure is going to -- depending on the pressure, it's going to depend on how hot the temperature has to get. So you change the temperature -- you change the pressure, it's going to change the temperature you have to good to.
As far as the chemical indicators and what they indicate is only that it has reached temperature. That's all it indicates. It doesn't tell you time. It doesn't tell you pressure. But, then again, pressure is going to be related to temperature.
Q. All right. In Dr. Sorenson's testimony cross-examination before this jury, he was asked this question. This is on page 14 of his cross-examination.
"QUESTION: Is there any temperature degree that you are safe in concluding will kill a

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bacteria?
"ANSWER: I don't think that number is available."
Q. Do you agree with Dr. Sorensen?
A. No.
Q. Can you explain to the jury why?
A. Because depending on your pressure, if you are at a pressure of 26, usually it's between 26 PSI and 30. At 26 PSI, you have to be at a temperature of 121 celsius. At 30 PSI, you have to be at 130 degree celsius.
So actually, it's well documented on what pressure you have to be at. That's why the chemical indicators are made.
Q. So if you achieve that pressure and that temperature, you have achieved sterility?
A. As long as it lasts 15 minutes.
Q. Another issue that Dr. Sorensen raised had to do with whether or not Dr. Kerr needed to have a third party come in and handle checking up on his autoclave or servicing his autoclave.
Do you have an opinion in this case as to whether or not the standard of practice required Dr. Kerr to have some third party involved in that fashion with his autoclave? Do

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you have an opinion?
A. If there was --
Q. Do you have an opinion?
A. Do I have an opinion, yes.
Q. What is your opinion?
A. My opinion is if there was some indication to say his autoclave was broken, he should have somebody come fix it. If there is no indication that it's broken, there is no need to check.
Q. In your own practice you indicate you don't clean your instruments in Moscow, correct?
A. Correct.
Q. In your discussion with Dr. O'Neil, in your knowledge and experience as a cosmetic surgeon, in your opinion, does the standard of healthcare practice applicable to Dr. Kerr in Boise in 2010 require that he personally be the one handing the cleaning, disinfecting, and sterilization of his reusable medical equipment?
A. No. I don't believe it requires him to do it.
Q. Did the standard of practice require Dr. Kerr to have any of his employees certified in any fashion in order for them to be able to clean,

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sterilize, and disinfect his reusable medical equipment?
A. I don't believe there is any certification for that.
Q. Now, you likened cleaning, disinfecting, and sterilization to the use of the dishwasher at home. When you were in the military in the Air Force, did you have to perform sterilization in a field setting?
A. When I was at Mountain Home, I was on the -- I was deployable, which means -- and it was right after 9/11, so obviously, they geared us all up to ship. And Mountain Home at the point in time was a base where the whole base could up and move and you would have a whole fighting team because we had the bombers and everything. So as the surgeon, yeah. They sent me to all kinds of training to do that.
I had to do something called C4, which is combat, casualty, and something training. And during that we had to set up a tent and we had to set up an autoclave as well. Did I run the autoclave myself? Did I do the cleaning? No. Again, I had scrub techs there, but I was in the process of -- I was with the process of setting up

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the operating room and having that all available for us while.

We were there it was actually the same equipment we would deploy with.

Q. And this was out in a field setting, not inside a building somewhere?

A. It was in a tent.

Q. And you were able to reach sterility?

A. As best as we can in a tent, yes.

Q. During Dr. Kerr's examination by the plaintiff, he was asked about a manual that exists for the Vaser machine?

A. Okay.

Q. A sound surgical technology manual. Have you had an opportunity chance to see that manual?

A. I have.

MR. HADDAD: Your Honor, this was not provided to him prior to his deposition. We've had no supplementation on any opinions regarding the significance or lack of significance of the Vaser manual. It was produced in discovery by the defendants long ago. It was available. They didn't provide it to him.

MR. JONES: Your Honor, this is consistent

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with his disclosure, which predated --

THE COURT: Which I've read.

MR. JONES: -- a deposition.

THE COURT: All right. Well, I'm going to allow him to respond to the question. The objection is overruled.

BY MR. JONES:

Q. I'd asked you if you had occasion to see that document.

A. I have.

MR. JONES: All right. And I don't remember which exhibit that was of yours, counsel.

Could I have the overhead? If the witness could be handed Exhibit 48.

BY MR. JONES:

Q. Now, there were two sections that were discussed with Dr. Kerr. One had to do with the fragmentation hand piece and the other had to do with the Vaser System Ventex Control Users guide.

And for ease of use so you don't have to dig through there and find it, I'm going to put them up on the overhead. One is page 8 of 14. And if I remember the instructions the judge gave me, if I zoom in, it will get better. And it does.

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The other page that talks about cleaning and sterilization, you've seen both guys; haven't you?

A. I have.

Q. All right. Now, the representation was made in questioning of Dr. Kerr that this manual in that second, I guess, it would be the third paragraph in the first sentence as well up at the top where it says, "This section described cleaning procedures and sterilization procedures and must be used to ensure clean system." Do you see that?

A. I do.

Q. And then you go down to the fourth paragraph where it says, "Follow the cleaning procedures and guidelines recommended by your institution. The following are guidelines that may be used in conjunction with your institution's procedures and guidelines." Did I read that correctly?

A. I believe so.

Q. All right. Now, my question to you regarding these two documents, which are identical, is simply this: Based on your understanding of the standard of healthcare

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practice applicable to Dr. Kerr in Boise in 2010, was he required to clean, disinfect, and sterilize his reusable surgical equipment as is discussed on this overhead document?

A. Well, he did on the second portion, not the first portion. And that being said, we've already discussed there is no magical wash, so he did follow within the standard of care.

Q. Okay.

A. Or standard of practice, excuse me.

Q. Thank you. That's all I have for that document.

Now, during the surgery -- get us back to our timeline here on July 21, 2010. I want you to assume that Dr. Kerr utilized reusable medical equipment during the liposuction and fat transfer which had been cleaned, disinfected, and sterilized as he described in his deposition as we've discussed here today. All right?

A. Okay.

Q. All right. Now, with that assumption, you are aware of the autopsy findings in this case that observe the presence of gram negative bacteria; are you not?

A. I am.

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Q. All right. And the jury already has some idea of gram negative bacteria, but just so they know you know, can you just in a nutshell tell us what gram negative bacteria are.
A. So again we talk about two different types of staining for bacteria, negative and positive. Gram negative bacteria are a class of organisms that can be both aerobic and anaerobic. Anaerobic means can't use -- it will die in the presence of oxygen. Aerobic means it has to have oxygen.
So when you talk about a gram negative rod, it could be E coli or bacteroides or it could be pseudomonas so that is basically what you talk about with gram negatives.
Q. So there are different types?
A. There are.
Q. All right. Is there a more common type of gram negative bacteria that you are aware of?
A. The most common types, at least on humans, in humans would be E coli's and bacteroides.
Q. And the jury has heard that they live in the intestinal track.
A. Correct.

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Q. All right. Are bacteria capable, in your opinion, Doctor, from being killed or eliminated from reusable surgical equipment?
A. That's the whole point of sterilization, yes.
Q. Is that the whole point of the autoclave?
A. That is the whole point of the autoclave.
Q. All right. And I have this question for you, Doctor: Is the presence of gram negative bacteria being found at the autopsy of Krystal Ballard at her buttock, is that proof to you that Dr. Kerr did anything wrong?
A. No.
Q. Explain your answer, please.
A. Gram negative rods or gram negative bacteria can come at any point in time. It's in your stool. If she wiped herself in the wrong way and put her hand on her buttock, it can go into the wound. So it isn't directly applicable to the surgical therapy.
Q. Now, Dr. Sorensen has rendered the opinion that he believes the patient became infected with gram negative bacteria as a result

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of contaminated reusable surgical instruments from Dr. Kerr's office being used on Krystal Ballard. You are aware of that?
A. I am.
Q. All right. Do you have an opinion in this case whether or not the gram negative bacteria found on Krystal Ballard came from contaminated reusable medical instruments by Dr. Kerr?
A. I do have an opinion.
Q. What is your opinion?
A. That that is incorrect.
Q. What is your opinion based on?
A. In order -- well, there's multiple different ways of looking at it.
As far as the process of sterilization, we know that a chemical marker was done so we've reached sterilization as far as the temperature is concerned. As long as the machine basically said that it was adequate time, all the autoclave machines will have a register on it saying whether it has reached adequate time or not. So by that definition, it's been sterilized; okay.
Spore counts don't matter. It's a gram negative; okay. When you look at the process of

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liposuction and removing all of that tissue, and then injecting it back in, as far as it being done sterilely, a gram negative rod coming from the colon to the uria or from one of his equipment, I don't see how it can happen.
Let alone the fact of that no pertinent or persistent infections in the office. There is no history of the fact that --
MR. HADDAD: Your Honor.
THE COURT: Sustained, and we'll address it.
MR. HADDAD: Thank you.
THE COURT: All right. We'll break for the noon recess. Please remember my usual reminder and I will see you at 1:30.
(Jury Leaves.)
THE COURT: Is there some reason why you did not tell your witness about the order in limine?
THE WITNESS: He did; I apologize.
THE COURT: Well, that may not be sufficient.
MR. HADDAD: Well, Your Honor, at this time we are obligated, based upon the discussion with the Court earlier and the clear mandate by this Court on this very issue, not on other issues, this very issue, that if the issue of persistent

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history of infections or lack of infections came into this trial, that the Court would grant a mistrial and award attorneys' fees, costs, and expenses to the party that had violated that order. This is a clear violation of that order.

Based upon the activities in this trial, I am suspect as to the serendipity of that statement being made in the presence of this jury by this witness, but we move for a mistrial at this point in time, Your Honor, and ask you to enforce your admonition to these parties as you made earlier and on numerous occasions.

MR. JONES: Your Honor, first of all, I did make that discussion on more than one occasion with this particular witness. So to the extent it came out, I'll take responsibility for it; he's my witness. But the discussion was had and was had more than once.

I would like to see exactly what the witness said, so I can better comment on it to the judge on the issue of grounds for a mistrial. I do know that when this judge -- when Your Honor talked about this initially, the issue of costs and attorney fees and granting a mistrial was in response to bringing up the issue of whether the

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patient was going to remarry.

Now, I know there was subsequent discussions about the issue of other infections, and I don't believe what this witness just testified to and what he said --

THE COURT: I said there was not to be any reference to any other infections.

I don't see I have any choice but to grant a mistrial. And I will address the costs and attorney fees later, but it seems to me that this was something I addressed specifically. I said take it up outside the presence of the jury.

This is a serious violation of the Court's prior order, and I don't see the Court has any choice but to grant counsel's request for a mistrial.

MR. KERR: Your Honor, can I --

MR. JONES: No. No.

THE COURT: We'll recess. I'll see you all at 1:30.

(Court recessed, lunch break.)

(Proceedings had outside the presence of the jury.)

THE COURT: I have reviewed extensively all of the orders and arguments in limine that we had

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the first day of the trial. And I specifically reviewed the testimony relating to the absence of other infections.

I discussed in general terms the general rule that the absence of other accidents is not generally admissible to prove the absence of negligence in a particular case. There are exceptions, and those exceptions require a foundation of a significant nature to establish why the evidence would be relevant and admissible in a particular case.

As our discussion on that issue continued, I was advised by plaintiff's counsel that they had not been provided the underlying data that went into the summary that there had, in fact, been no other infections. The failure to provide the data, which would support the conclusion, then played directly into my decision to grant the order in limine with respect to the absence of other infections as being not permissible and to direct counsel not to address that unless we had a discussion outside the presence of the jury and a foundation was laid.

But it was particularly of concern to me that the underlying records had not been

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provided to the plaintiffs so that the plaintiffs could independently verify whether that was a conclusion which could be drawn from the records. So there were a number of -- there were a number of problems that were flagged that were discussed by counsel on the first day of trial.

And at approximately 2:40 in the afternoon on the first day of trial, I said I'm granting an order in limine and I will not allow evidence of absence of other infections. And I expressly outlined the normal procedure to follow when counsel wants that revisited, which is draw my attention outside the presence of the jury and we would discuss it. But it was particularly critical because of the failure to disclose the underlying data.

I am therefore declaring a mistrial in this case, and I will award expert witness's cost to be paid to the plaintiff prior to the retrial.

And I will ask counsel that you take a look at your calendars and see when you would next be available. I know you will have to meet with various witnesses and consult with them so we can have -- so that we can proceed.

MR. HADDAD: Your Honor, are you only

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awarding expert witness costs?
THE COURT: I'm awarding expert witness fees. I'm reserving the issue on attorney fees. I'm not denying it. I said that it was something that I would consider if my orders in limine were violated, and I will consider it. I just, at the very outset, I think at a minimum, the plaintiff's experts -- because we have to retry this -- that is a fair cost.
MR. HADDAD: I'm going to let Mr. McKay speak to other issues, but I would ask, at least at this juncture understanding the Court's holding a ruling on attorney's fees, that we likewise be reimbursed other ancillary costs associated. Meaning, obviously, Mr. Ballard had to travel here. I did with my paralegal. We have stayed in a hotel. Those kind of costs as well.
THE COURT: I think you can submit all appropriate costs. I'm not denying them. I'm only reserving them so you can submit those.
MR. McKAY: Your Honor, could I just be heard on the issue of a mistrial? Frankly, we find ourselves in an untenable position here. On the one hand we've been grossly prejudiced by testimony that, as this Court has indicated, was

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clearly not to be offered during this trial.
On the other hand, a mistrial benefits these defendants --
THE COURT: Well, that's why I tried to -- by the award of costs, tried to avoid as much as I can with that and minimize that because I do think that's one of the terrible consequences.
MR. McKAY: I understand. And it benefits these lawyers and -- but there's other consequences besides just the costs.
THE COURT: I know, counsel, and I will tell you, that this is something I rarely do. And I don't want to do it, but I don't think there's any way around it.
This is a grossly prejudicial issue to raise particularly when the underlying data has not been disclosed to the other side. It's simply a bell that can't be unrung.
And I will consider any other additional requests you have, but I think that it's so tainting to a jury that it really can't -- this is the only sensible way to address it.
MR. McKAY: But Charles Ballard, he is active duty --
THE COURT: I know and I --

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MR. McKAY: If I could just be heard briefly, Your Honor --
THE COURT: Sure. I'm sorry. Go ahead.
MR. McKAY: He's active duty in the United States Air Force. He is stationed in Florida. You heard testimony about him being deployed overseas. He has no control over that. He is entitled to justice here. And delaying this -- delaying this, delays justice. And it's wrong what they did. It's a pattern that we've seen throughout this trial.
And giving him a new trial at some undetermined date in the future, which permits them to recalibrate, to have the advantage of having seen our case, to provide us, I assume, with the data that they wouldn't otherwise provide us, to having a do-over at a time when the evidence has come in, it's not fair.
And I think that there are -- I think there are other sanctions available to this Court. This Court can strike their defenses and order that this case go to the jury on damages. I think that would be an appropriate sanction given the conduct that occurred here and the conduct that has occurred throughout this trial.

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I heard counsel say he didn't mean for it to happen, but that witness was two sentences into describing what happened before we had to stand up and stop him.
THE COURT: Well, I agree with you, counsel. And it's -- I mean, I definitely agree with you that it's terribly unfair to be in this situation. And I -- that is one of the reasons why I think it's imperative that the plaintiff's costs for experts and attorney's fees and incidental costs be paid prior to the next proceeding.
But the reason I'm granting a mistrial is because I think it's so unfairly damaging to your case that it's just something that I can't remedy with an instruction. And I think it could potentially pollute your suggested remedy, which is not a remedy I considered, I admit.
I think there would be circumstances where maybe that would be reasonable. But I think there are things that can so pollute a case, and I think this is one of them. That's why I felt so strongly about it on the first day of trial. There are things that when they pollute a case, they pollute the entire part of the case.
So I won't bar you from addressing

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anything else additional that you want to consider by way of sanctions, but I am going to declare a mistrial. And I will -- your case will have the absolute priority on my calendar. You will have priority over any proceeding. I will do everything possible to minimize the harm to Sergeant Ballard.

MR. McKAY: Thank you, Your Honor, and I'll just make the Court aware that we will also be moving that these lawyers be disqualified from representing these defendants.

THE COURT: Okay. We'll address all of that.

MR. McKAY: They should not benefit from a new trial.

THE COURT: Well, I won't bar you from anywhere you want to take this discussion.

MR. McKAY: Thank you, Your Honor.

THE COURT: All right. Well, let's bring the jury back and we'll excuse them.

(Jury enters the courtroom.)

THE COURT: Well, ladies and gentlemen of the jury, I deeply regret informing you that I have declared a mistrial in this case. Prior to trial, a number of motions come before the court,

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and those motions address matters what either side feels would be so potentially problematic that they should not be brought up in a trial.

And a court makes certain rulings called orders in limine. And those orders in limine are designed to address major problem areas and major issues that should not be touched upon at all. For example -- well, I won't give you an example, but just to say, they are major and important and critical issues.

And the Court in this case -- I, in this case, issued a clear ruling with respect to the certain information. And that ruling was violated, and I am forced to declare a mistrial in this case.

So I want to thank you for your service. I want you to know it's very rare that this occurs. We don't bring you here to torment you, even though sometimes it might feel that way. We don't take you from your other jobs, we don't spend all this time, money, and effort to present a case to you to have it blow up.

So, in any event, I want to thank you all for your service. I really appreciate you being here and being available to serve. You, a

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hundred percent, came through on your duty. We really appreciate it. I know you've made sacrifices to be here. There were many other obligations that were calling out to you and you all put them aside to be what your community asked you to be, the judges of the facts.

And so on behalf of myself and the other judges, I want to thank you for your service in this case because we a hundred percent count on jurors making the sacrifice that you made and we deeply appreciate it. And I want to thank you for your service in this case. You may talk about the case if you choose to do so. I would recommend you might consider not talking about the case, but you may talk about it with friends and family if you choose to do so. You are released from your obligation not to discuss the case any further.

Now that -- you know, there were times in this trial where things didn't move very crisply. I'm sorry about that. It happens; trials vary. But I will say you all worked hard. You all paid attention. You all did a fine job. Thank you for your service. You are excused from service in this case.

(Proceedings concluded at 1:46 p.m.)

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REPORTER'S CERTIFICATE

I, Roxanne K. Patchell, Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand February 3, 2014

Roxanne K. Patchell, CSR, RPR
CSR No. 733

REPORTER'S CERTIFICATE

I, Roxanne K. Patchell, a Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced into typewriting under my direction, and that the foregoing transcript contains a full, true, and verbatim record of the said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 3rd day of February, 2014.

R Patchell

NOTARY PUBLIC in and for the State of Idaho, residing at Boise, Idaho.

My commission expires 9/08/2017
CSR No. 733

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS

ORIGINAL

> Mr. Quane's intentional, inflammatory, and unfair tactic to violate the statute and confuse and unfairly prejudice the jury should not be tolerated. It must be controlled by the swift and firm application of *Idaho Code* § 10–111, which requires a mistrial and leaves *no discretion* to the trial court judge. A new trial is required pursuant to Idaho Rules of Civil Procedure 59(a)(1) because this "irregularity in the preceedings" prevented the Robertsons "from having a fair trial."
>
> In addition, since the Plaintiffs have been required to try the case to completion and incur tremendous expenses and costs, the court should award costs and attorney's fees against defendant pursuant to *Idaho Code* § 12–121 and Idaho Rule of Civil Procedure 54(e). The intentional violation of *Idaho Code* § 10–111 was an unreasonable bad faith defense of this case and justifies an award of attorney's fees both at the trial level and on this appeal.

Robertson v. Richards, 115 Idaho 628, 643, 769 P.2d 505, 520 (1987) (Bistline, J., concurring specially) (emphasis in original).

Rarely is counsel mentioned by name by our appellate courts. In the above case, handling defense counsel is mentioned nearly 50 times, not counting references to the transcript, and his trial tactics resoundingly criticized. And yet in response to the instant Plaintiff's motion for sanctions which followed this Court's declaration of mistrial and misconduct by the Defendants, defense counsel has the audacity to claim the real motivation behind Plaintiff's motion is his effectiveness as a trial lawyer and that among the many trials he has handled, he has "never had any that ended or terminated by a mistrial." Defendants Second "Reformatted" Memorandum, p. 13.[1]

Plaintiff seeks the sanctions set forth in his motion for one simple reason: Defendants and their counsel caused a mistrial by violating the Court's rulings which significantly prejudices

[1] Plaintiff has contemporaneously filed a motion to strike this reformatted memorandum which is not in conformity with the pleading requirements set forth in the Idaho Rules of Civil Procedure and Local Rules and thus like Defendants' initial overlength memorandum, is similarly overlength.

SSgt. Charles Ballard. This mistrial generated tremendous expense and waste of the Court and Plaintiff's resources. The Defendants' actions delay SSgt. Ballard's ability to obtain justice for the death of his spouse, Krystal Ballard, and will require him to once again undergo the excruciating pain and sorrow associated with describing this loss – which the Court witnessed.

Plaintiff seeks monetary sanctions because Defendant's caused the mistrial. This Court has already stated that such monetary sanctions are appropriate:

> THE COURT: Well, I agree with you, counsel. And it's -- I mean, I definitely agree with you that it's terribly unfair to be in this situation. And I -- that is one of the reasons why I think it's imperative that the plaintiff's costs for experts and attorney's fees and incidental costs be paid prior to the next proceeding.

Transcript of Proceedings from November, 14, 2013, p. 112.[2]

Plaintiff also seeks through his sanction motion the removal of defense counsel from this case. In short, these lawyers have forfeited the right to appear before this Court on this case. Plaintiff's motion and supporting memorandum detail the factual and legal basis for all the relief sought by Plaintiff through his sanction motion including the removal of defense counsel.

In response to Plaintiff's motion, Defendants assign blame to everyone but themselves including this Court. They assert the case would have ended in mistrial anyway because of jury scheduling issues. Thus, they presumably believe the Court and Plaintiff conspired to use Dr. Stiller's testimony as subterfuge for the real reason for the mistrial. They incredulously deny that any prejudicial violation of this Court's pretrial rulings occurred and take no responsibility for their conduct and actions at trial. For the reasons stated herein and in Plaintiff's previously

[2] The transcript from the proceedings on November 14, 2013 is submitted herewith as Exhibit A to the contemporaneously filed Declaration of P. Gregory Haddad.

filed motion and supporting pleadings, all relief sought by Plaintiff through this motion should be granted.[3]

a. Defendants oppose sanctions through a distorted attempt at revisionist history and blame everyone but themselves for the mistrial in this case.

By their memorandum, Defendants blame the Jury Commissioner, Plaintiff, and this Court for the mistrial in this case. Defendants deny that a violation of the Court's *in limine* rulings occurred. Defendants deny any and all responsibility for the mistrial in this matter and quite incredibly, cast themselves as victims of the Court's ruling.

Defendants blame this Court for purportedly failing to allow argument prior to granting a mistrial, although Defendants had every opportunity to argue their position, but elected not to do so – and as pointed out in Plaintiff's opening memorandum, lead counsel even turned his back on this Court as the Court addressed the parties. Defendants blame the Court for failing to offer a curative instruction which they never requested (and, thus, for failing to bring more attention to their prejudicial testimony). They blame the Court for granting a mistrial arguing Dr. Stiller didn't really say what he said – or that the jury was not sophisticated enough to understand the import of what he said. They dismiss the significance of their own misconduct arguing a mistrial would have occurred anyway because of juror scheduling issues which they presumably don't believe the Court could have resolved.[4] They blame the Jury Commissioner for failing to ensure

---

[3] Defendants present no opposition to the additional relief requested by Plaintiff's motion -- full enforcement of sanctions previously imposed for their discovery violation and enforcement of existing discovery and disclosure deadlines, and accordingly, such relief also should be ordered.

[4] It is hard to know whether Defendants really believe that a couple jurors' expression of concerns over scheduling could not be overcome by this experienced Court after two weeks of trial other than by the grant of a mistrial. While this belief might explain their dilatory trial tactics, it seems incredible to think that these issues could not be resolved just at they are resolved in every other multi week trial.

a panel of sufficient number. They blame Plaintiff's counsel claiming they purportedly failed to consult with Mr. Ballard prior to seeking a mistrial. They blame SSgt. Ballard for having "three different law firms" represent him.[5] They even blame the process of aging claiming Mr. Quane had his back turned to the Court because of hearing loss and having the sniffles. These arguments are as irrelevant as they are inaccurate.

The only questions presented by Plaintiff's motion is whether a violation occurred, and who should bear the cost of the mistrial in this case. The answers to those questions are as abundantly clear today as they were the *moment* Dr. Stiller tendered the offending testimony – which this Court immediately recognized.

Defendants cannot now credibly claim that "[t]he [d]efense did not violate any of the Orders issued by the Court on the Motions in Limine." (Defs' Mem. at 8.[6]) The witness offered an apology to the Court in the wake of Mr. Haddad's objection. (**Exhibit A** to Declaration of Counsel, Partial Tr. Of Proceedings 104:18, Nov. 14, 2013.) And defense counsel, Mr. Jones, stated that, "to the extent it came out, I'll take responsibility for it; he's my witness" (*Id.* at 105:15-17.) Now Defendants incredibly argue Dr. Stiller presented no offending testimony – notwithstanding what everyone in Court including this Court, the parties, the lawyers and the jury otherwise understood.

Consider, for example, the linguistic gymnastics offered by Defendants in their transformative interpretation of Dr. Stiller's testimony. Defendants argue that when Dr. Stiller testified that he based his opinions on "the fact . . . that [there were] no pertinent or persistent

---

[5] Plaintiff has been represented throughout these proceedings by two law firms: Bailey & Glasser, LLP and local counsel, Nevin, Benjamin, McKay & Bartlett, LLP.

[6] Throughout this reply, Plaintiff cites to the "reformatted" version of Defendants' memorandum.

infections *in the office*[,]" Plaintiff employed "sheer speculation" in jumping to the conclusion that a violation of the Court's *in limine* ruling had occurred arguing that "an equally plausible interpretation . . . was the fact the patient herself had never presented with evidence of infection during her office visits and/or subsequent discussions with Dr. Kerr." (Defs.' Mem. at 7.)

Though this "equally plausible" interpretation is completely at odds with a plain-meaning interpretation of the testimony at issue, which contains no cognizable reference to Mrs. Ballard whatsoever, and though everyone in the courtroom with knowledge of the Court's pretrial ruling immediately recognized the impropriety of the testimony including Defendants, their lawyers and Dr. Stiller himself, Defendants' counsel accuses *Plaintiff's counsel* of "inflated and half-truth statements." (Defs.' Mem. at 8.)

This Court was repeatedly clear on this point, that the issue should not have been unilaterally raised without further discussion *outside the jury's presence*. Defendants violated this ruling as already found by the Court. Their "ordinary dictionary definitions [for] the words pertinent and persistent[,]" all the while ignoring the witness' reference to "*in the office*" and the lack of any such office history, is unpersuasive. The witness's apology to the Court's inquiry about the Order in Limine on this precise point, and everyone's immediate understanding of this testimony, leaves no room for the revisionist interpretation now argued by Defendants.

b. Sanctions are warranted under IRCP 37(e) as well as IRCP 47(u).

Defendants quite understandably given their conduct in this case wish to limit the analysis of this motion to a parsing of Dr. Stiller's testimony and to characterize the other improper pretrial and trial tactics cited in Plaintiff's initial memorandum as "collateral issues." (*See* Defs.' Mem. at 8.) According to the defense, "Plaintiff's counsel made it perfectly clear

that the only reason he was seeking a mistrial was based on one narrow issue of other patient infections, but yet now in support of sanctions Plaintiff is advancing the entire kitchen sink argument." (Defs.' Mem. at 13.)

Defendants' attempt to mischaracterize the instant analysis is unavailing. First, the Court on several prior occasions raised the specter of a mistrial should the Court's pretrial rulings be violated. Numerous objections were raised, and sustained, due to defense counsel's conduct including following violation of the Court's rulings. And while the Court finally declared a mistrial in response to Dr. Stiller's obvious violation of the Court's pretrial ruling related to other infections, the issue of sanctions need not be confined to the specific conduct triggering a mistrial. Defense counsel's repeated disregard for the rules and for this Court's rulings, both before and during trial, is absolutely relevant. Thus, sanctions are appropriate in this case under both IRCP 37(e) for failure to comply with the Court's order as well as IRCP 47(u) for deliberate misconduct by a party or attorney.

Under the analysis provided in the *Adams* and *Ashby* cases, an analysis acknowledged by the parties, "delay resulting from intentional conduct" is *one of three* aggravating factors, only one of which need be satisfied. *Adams v. Reed*, 138 Idaho 36, 39, 57 P.3d at 505, 508 (Ct. App. 2002) (*quoting Ashby v. W. Council, Lumber Prod. & Indus. Workers*, 117 Idaho 684, 686–87, 791 P.2d 434, 436–37 (1990)). Clearly, the conduct defense counsel characterizes as "collateral" is wholly relevant in this context. Moreover, Defendants' assertion that "there is no pattern of delay in this case" is erroneous. Plaintiff encourages the Court to refer to his initial memorandum of law, which sets forth numerous examples of defense counsel's intentional and improper tactics in the context of discovery, pretrial, and trial. Plaintiff's satisfaction of the

Ashby factors is clear.

And while Rule 47(u) appears to limit the Court's consideration of sanctions to "deliberate misconduct of a party or attorney," Defendants offer no reason to believe that this Court cannot consider trial conduct separate and apart from that which ultimately caused the mistrial in determining whether the offending conduct was, in fact, deliberate. Surely defense counsel's trial tactics throughout the trial proceedings is illuminative on this issue, and should be considered.

In any event, there can be no dispute that Defendants violated this Court's order in limine and thus all monetary sanctions sought by Plaintiff including attorney's fees, costs and expenses are recoverable under the clear language of IRCP 37(e).

c. The Court should exercise its discretion and remove defense counsel from this case.

With regard to Plaintiff's request for disqualification of defense counsel, Defendants' attempt to distinguish the cases cited by Plaintiff misses the mark for three reasons. First, the *Crown* and *Weaver* holdings both specifically acknowledge that "[t]he decision to grant or to deny a motion to disqualify counsel is within the discretion of the trial court." *Crown v. Hawkins Co., Ltd.*, 128 Idaho 114, 122, 910 P.2d 786, 794 (Ct. App. 1996) (*citing Weaver v. Millard*, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991)). Accordingly, such a ruling would be wholly appropriate so long as it is the product of the proper exercise of that discretion. Secondly, the Idaho Court of Appeals in *Crown* affirmed the trial court's denial of the Growers' motion to disqualify Nungester's counsel due to the prejudice that Nungester would have suffered upon the disqualification of his counsel in such close proximity to trial. *Crown*, 128 Idaho at 122, 910 P.2d at 794. Here, Defendants stand to suffer no such prejudice and have known since Plaintiff

raised this issue in Court on November 14, 2013 that Plaintiff would seek the removal of defense counsel. (Tr. 113, ll. 8-11) ("Thank you, Your Honor, and I'll just make the Court aware that we will also be moving that these lawyers be disqualified from representing these defendants."). Lastly, in *Weaver*, the trial court's order denying disqualification was based, in large part, on the fact that the moving party waited over a year to file the subject motion. *Weaver v. Millard*, 120 Idaho 692, 698, 819 P.2d 110, 116 (Ct. App. 1991). Again, that is simply not the case here. Plaintiff promptly filed his motion for sanctions and took the first hearing date offered by the Court when scheduling this motion for hearing.

d. Conclusion

For the reasons stated in Plaintiff's motion, his accompanying memorandum of law, and the instant reply, this Court should grant Plaintiff's motion and award Plaintiff all requested sanctions and other relief sought through his motion.

Dated this 10th day of February, 2014.

Respectfully Submitted,

BAILEY & GLASSER LLP

By_____
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James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2014, I served a true and correct copy of the foregoing by hand delivering the same to the following:

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

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CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

EXHIBIT "A" TO PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' SECOND OVERLENGTH MEMORANDUM

V

Attached as Exhibit "A" is a true and correct copy of a letter dated February 7, 2014, from Jeremiah A. Quane to this Court which was inadvertently not attached to Plaintiff's Motion to Strike Defendants' Second Overlength Memorandum filed yesterday, February 10, 2014.

Dated this 11th day of February, 2014.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2014, I served a true and correct copy of the foregoing by emailing the same to the following:

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Terrence Jones
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Scott McKay

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February 7, 2014

VIA EMAIL
Honorable Judge Deborah A. Bail
c/o Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

Re: ***Ballard v. Kerr, et al.***
Ada County Case No. CV OC 1204792
Our File No. 1107/25-938

Dear Judge Bail:

In view of having been informed today that the Court denied our Motion for Leave to File and Overlength Brief, we have reformatted our brief in conformance with Rule 10(a)(1). We also confirmed today with the Ada County Court Clerk's office that the use of Times New Roman 12 point font is acceptable and appropriate. With these formatting changes only, our Memorandum now falls within the 25 page limit of local Rule 8.1. Please note we could have submitted our brief originally in this format, but for the convenience and ease of reading for the Court and counsel we had used the expanded format and therefore sought the longer page limit.

Very truly yours,

Jeremiah A. Quane

JAQ/cf
Enclosure
Cc/encl: Scott McKay/David Nevin
P. Gregory Haddad
James B. Perrine

EXHIBIT A

Time	Speaker	Note
01:47:18 PM		CVOC12-4792 Ballard v Kerr Mo/Sanctions
02:08:12 PM	Judge	Calls case
02:08:25 PM	Greg Haddad and Scott McKay	on behalf of the Plaintiff
02:08:26 PM	Jeremiah Quane and Terry Jones	on behalf of the Defendant
02:08:28 PM	G. Haddad	Argues Motion for Sanctions
02:20:29 PM	T. Jones	Argues in opposition to Motion for Sanctions
02:57:57 PM	G. Haddad	Responds
03:01:26 PM	Judge	Grants the Motion for Sanctions: All witnesses costs - including expert witness. Travel costs for counsel during that time. Travel costs for the Plaintiff. Jury fees to be paid to Ada County. Denies the Request to dismiss all defenses. Denies the Motion for DQ of opposing counsel.
03:05:32 PM	Judge	will give counsel a couple of days to check on availability of jury trial in April.

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Attorneys for Plaintiff

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CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS

Plaintiff Charles Ballard, through his attorneys, hereby submits this Memorandum of Attorney Fees and Costs pursuant to the Court's order in open court on February 12, 2014, whereby the Court considered Plaintiff's Motion for Sanctions, For Full Enforcement of Sanctions Previously Imposed and for Enforcement of Existing Discovery and Disclosure Deadlines. The Court has awarded Plaintiff and ordered Defendants to pay Plaintiff his costs including expert witness costs and attorney fees associated with the jury trial in the above matter that ended in a mistrial declared by the Court on November 14, 2013.[1]

The foregoing monetary award is consistent with the Court's ruling at the time it declared this mistrial and as noted by the Court, these fees and costs must be paid by Defendants prior to the retrial of this case:

> THE COURT: Well, I agree with you, counsel. And it's -- I mean, I definitely agree with you that it's terribly unfair to be in this situation. And I -- that is one of the reasons why **I think it's imperative that the plaintiff's costs for experts and attorney's fees and incidental costs be paid prior to the next proceeding.**

Transcript of Proceedings from November, 14, 2013, p. 112, lines 5-11 (emphasis added).[2]

This Memorandum of Attorney Fees and Costs is supported by a contemporaneously filed Declaration of P. Gregory Haddad attesting to the amounts sought herein as well as the Declaration of J. Charles Hepworth attesting to the reasonableness of the professional rates underlying the attorney fee amounts. Based on the foregoing, the Court should order Defendants to pay Plaintiff prior to beginning the retrial in this matter the following:

---

[1] The Court also ordered that Defendants reimburse Ada County for the jury costs and fees paid by Ada County in connection with this trial.

[2] The transcript from the proceedings on November 14, 2013 was previously submitted as Exhibit "A" to the Declaration of P. Gregory Haddad filed February 10, 2014.

A. Attorney Fees Associated with Mistrial: $151,090.50

1. Attorney fees pretrial commencing on the date of counsel's arrival in Boise on October 30, 2013, to prepare for trial beginning on November 5, 2013: $48,373.00 (Bailey & Glasser, LLP - $30,467.00; Nevin, Benjamin, McKay & Bartlett, LLP -$17,906.00).

2. Attorney fees during trial, November 5, 2013 to November 14, 2013: $70,566.50 (Bailey & Glasser, LLP - $46,479.00; Nevin, Benjamin, McKay & Bartlett, LLP - $24,087.50).

3. Attorney fees following mistrial associated with mistrial and litigating motion for sanctions: $32,151.00 (Bailey & Glasser, LLP -$19,202.50; Nevin, Benjamin, McKay & Bartlett, LLP - $12,948.50).

B. Trial Costs and Expert Witness Fees Associated with Mistrial: $55,051.96

1. Costs for Plaintiff SSgt. Charles Ballard consisting of travel from Florida where he is stationed to Boise, lodging and meals associated with trial: $4,324.54.

2. Other trial costs incurred by Plaintiff including expert's travel to Boise, lodging and testimony at trial; travel from West Virginia to Boise, lodging and meals for Bailey & Glasser attorney Greg Haddad and trial paralegal Farrah Caruthers, trial technician for evidence and exhibit presentation software, costs for service of trial subpoenas, costs of trial witness fees and other itemized and reasonable trial costs: $50,727.42 (Bailey & Glasser, LLP - $48,673.41; Nevin, Benjamin, McKay & Bartlett, LLP - $2,054.01).

C. Total Attorney Fees and Costs Associated with Mistrial: $206,142.46

D. Attorney Fees Held in Abeyance for Earlier Discovery Sanctions Imposed by the Court: $5,651.36

The Court earlier imposed partial sanctions against Defendants' counsel as a result of Defendants' refusal to answer discovery and invited Plaintiff to seek full reimbursement for

attorney fees incurred as a result of this violation at a later time. (*See* Court's Order filed October 11, 2012 imposing sanctions against Defendants' counsel in the amount of $1,500 and permitting Plaintiff to later seek reimbursement for full fees incurred in bringing motion to compel). Plaintiff's motion for sanctions following the mistrial seeks reimbursement of the remaining attorney fees held in abeyance by this Court. The Court did not address this aspect of Plaintiff's motion at the hearing on February 12, 2014. Plaintiff now seeks imposition of full attorney fees for this discovery violation.

E. Total Attorney Fees and Costs Associated with Mistrial and Attorney Fees Held in Abeyance for Earlier Discovery Sanctions Imposed by Court: $211,793.82

The above attorney fees and costs are reasonable and the result of the mistrial declared in this case as well as the Defendants' earlier refusal to answer discovery as required. Accordingly, Plaintiff respectfully requests that attorney fees and costs totaling $ be awarded in full to him and against Defendants and Defendants be required to pay this amount prior to the retrial of the above matter.

Dated this 18th day of February, 2014.

Respectfully Submitted,

BAILEY & GLASSER LLP

By_____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2014, I served a true and correct copy of the foregoing by mailing the same to the following:

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Attorneys for Plaintiff

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Defendants.

Case No. CV OC 1204792

DECLARATION OF P. GREGORY HADDAD IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS

6

ORIGINAL

I, P. Gregory Haddad, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am duly licensed to practice law in the State of West Virginia, and I am a partner with the law firm of Bailey & Glasser LLP in Morgantown, West Virginia. I am admitted *pro hac vice* in this case, and I am lead counsel for Plaintiff, Charles Ballard. Together with the law firm of Nevin, Benjamin, McKay & Bartlett LLP, I have prosecuted this case, and I was present throughout the trial of this matter, which began on November 5, 2013, and which ended upon the declaration of mistrial on November 14, 2013. Bailey & Glasser, LLP, is based in Charleston, West Virginia, and now employs over forty lawyers practicing from nine offices, including offices in Birmingham, Alabama, Boston, Massachusetts, Washington, D.C., and Springfield, Illinois. Our lawyers practice in state and federal courts across the country and routinely represent clients in complex litigation and trial. I have tried over seventy cases, and I have represented plaintiffs and defendants in complex personal injury and professional liability matters, including medical malpractice and wrongful death cases, in state and federal courts, both in West Virginia and around the country.

2. Scott McKay and the law firm of Nevin Benjamin, McKay & Bartlett, LLP, have been instrumental and necessary to the preparation of this case, as well as its presentation at trial. Upon information and belief, Nevin Benjamin, McKay & Bartlett, LLP, was founded more than thirty years ago. Mr. McKay has handled cases throughout the country, and regularly appears in both state and federal court. Mr. McKay and his firm have an "AV" rating from Martindale-Hubbell, the highest rating available from this lawyer rating service. Mr. McKay graduated *magna cum laude* from the Gonzaga University School of Law in 1990 and, aside from clerking at the Idaho Supreme Court, he has been engaged continuously in the private

practice of law. Along with his "AV" rating from the Martindale-Hubbell lawyer rating service, Mr. McKay has been selected by his peers each year since 2003 for listing in "The Best Lawyers in America." He has been listed in Mountain States Super Lawyers Magazine, which describes itself as featuring the top five percent of lawyers in Nevada, Utah, Montana, Idaho, and Wyoming.

3. My senior paralegal, Farrah L. Caruthers, arrived in Boise, Idaho, to prepare for trial on October 30, 2013. I arrived in Boise, Idaho, to prepare for trial on October 31, 2013. For purposes of this Declaration, October 30, 2013, is considered the date counsel arrived in Boise, Idaho, to prepare for trial.

4. Bailey & Glasser, LLP's pretrial fees commencing on the date of lead counsel's arrival in Boise on October 30, 2013, to November 4, 2013, total **$30,467.00**.

5. Nevin, Benjamin, McKay & Bartlett, LLP's pretrial fees commencing on the date of lead counsel's arrival in Boise on October 30, 2013, to November 4, 2013, total **$17,906.00**.

6. Bailey & Glasser, LLP's fees during trial, from November 5, 2013, to November 14, 2013, total **$46,479.00**.

7. Nevin, Benjamin, McKay & Bartlett, LLP's fees during trial, from November 5, 2013, to November 14, 2013, total **$24,087.50**.

8. Bailey & Glasser, LLP's fees since the mistrial and associated with Plaintiff's motion for sanctions total **$19,202.50**.

9. Nevin, Benjamin, McKay & Bartlett, LLP's fees since the mistrial and associated with Plaintiff's motion for sanctions total **$12,948.50**.

10. Attached hereto at **Exhibit A** is Bailey & Glasser, LLP's fee and cost detail for the time period October 30, 2013, to February 17, 2014. As reflected in this fee and cost detail,

legal work and costs that need not be duplicated as a result of the mistrial have been stricken from the computations set forth herein. So, too, have non-trial related costs and expenses. The undersigned redacted time entry narratives to protect attorney-client confidentiality and attorney work product information.

11. Attached hereto at **Exhibit B** is Nevin, Benjamin, McKay & Bartlett, LLP's fee and cost detail for the time period October 30, 2013, to February 17, 2014, consistent with the above paragraph.

12. The hourly rates associated with the above stated fees are reasonable and consistent with that of other law firms and lawyers handling cases of this nature in this area. Attached hereto at **Exhibit C** is the Declaration J. Charles Hepworth, an attorney practicing in Boise, Idaho, who attests to the reasonableness of Plaintiff's counsel's hourly rates.

13. Bailey & Glasser, LLP has incurred **$48,673.41** in costs and expenses associated with the trial that ended in a mistrial in this case and pursuing a motion for sanctions. Included in this amount are the costs associated with the presentation of expert witness testimony at the trial in this case.

14. Nevin, Benjamin, McKay & Bartlett, LLP incurred **$2,054.01** in costs and expenses related to trial and in pursuit of an Order granting sanctions against Defendants.

15. Attached hereto at **Exhibit D** is an invoice from National Travel, which details airfare costs incurred by Bailey & Glasser, LLP for the undersigned's air travel to and from Boise, Idaho, in conjunction with the undersigned's appearance before this Court on Plaintiff's motion for sanctions. As this cost was paid with Bailey & Glasser, LLP's credit card, and as this cost will appear on Bailey & Glasser LLP's March 2014 credit card statement, same has not yet been posted to Mr. Ballard's file.

16. Plaintiff, Charles Ballard incurred $864.11 in rental car and gasoline costs, $1,130.90 in airfare and baggage costs, $1,598.95 for lodging, and $730.58 for meals in attending trial. Accordingly, Mr. Ballard incurred a total of **$4,324.54** in costs and expenses to participate in the trial of this matter.

17. By Order dated October 11, 2012, this Court granted sanctions to Plaintiff in the amount of $1,500.00 for Defendants' failure to comply with their discovery obligations. Furthermore, the Court permitted Plaintiff to later seek full reimbursement for the remaining fees and costs associated with Plaintiff's motion to compel. In accordance with this Court's Order of October 11, 2012, Plaintiff now requests that defense counsel be ordered to pay **$5,651.36**, which represents the difference between the sanctions imposed by the Court in October 2012, and the total fees and expenses associated with Plaintiff's pursuit of an order compelling Defendants to comply with well-established discovery obligations. (*See* Aff. of Counsel, Sept. 14, 2012 (setting forth $7,151.36 in reasonable fees and expenses).)

18. The fees and costs detailed above total **$211,793.82**. Plaintiff seeks full reimbursement of this total in conjunction with the mistrial caused by Defendants, as well as in relation to Defendants' discovery sanction.

19. Plaintiff provides the attached attorney fees and cost details without waiving his attorney-client privilege or the protections afforded pursuant to the work product doctrine.

20. Plaintiff, through his counsel, endeavored to keep the aforementioned fees and expenses reasonable by engaging paralegals to perform work; by engaging a paralegal, as opposed to an associate or another partner, to accompany lead counsel at trial; and by planning Plaintiff's order of proof at trial so as to minimize the unnecessary expenditure of resources, particularly as applied to expert witnesses.

This ends my declaration.

I declare under penalty of perjury, pursuant to the law of the State of Idaho, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated this 18th day of February, 2014.

P. Gregory Haddad

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2014, I served a true and correct copy of the foregoing ***Declaration of P. Gregory Haddad in Support of Plaintiff's Memorandum of Attorney Fees and Costs*** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

EXHIBIT A

Bailey & Glasser, LLP
209 Capitol Street
Charleston, West Virginia 25301
(304) 345 - 6555
February 18, 2014

Charles Ballard
1891 Myrick Road
Tallahassee, FL 32303

Invoice # 0
Client # BALL001
Matter # 1003362
Billing through 02/17/2014

In Reference To: Estate of Crystal Ballard

PROFESSIONAL SERVICES

10/30/2013	FLC	Travel to Boise, Idaho for trial prep with co-counsel and trial; continue trial prep, including numerous emails from/to attorneys, staff, co-counsel; review pleadings; continue working on Index for trial documents; prepare letter to court reporter; telephone call to court reporter; meetings with co-counsel.	12.40 hrs	1,550.00
	PGH	Prepare for trial.	8.70 hrs	2,827.50
	RDS	Continued Trial Preparation With Attention to Trial Boxes.	1.40 hrs	133.00
	RDS	Phone Call From [redacted] Regarding [redacted]	0.20 hrs	19.00
	BJM	[redacted]	[redacted]	[redacted]
10/31/2013	FLC	Continue preparing for trial, including numerous emails from/to attorneys, co-counsel, staff; meetings with attorney and co-counsel; continue preparing index for trial director documents; review and revise pleadings; review pleading filed by opposing counsel; telephone calls and emails to/from experts and fact witnesses.	11.60 hrs	1,450.00
	PGH	Prepare for trial; travel to Boise.	9.00 hrs	2,925.00

	PGH	Prepare for trial--outlines, literature to be used, exhibits.	9.60 hrs	3,120.00
	[redacted]	[redacted]	[redacted]	[redacted]
11/01/2013	[redacted]	[redacted]	[redacted]	[redacted]
	FLC	Continue trial prep, including numerous emails from/to attorney, co-counsel and staff; continue working on index for trial director, including begin preparing separate lists for our exhibits and defense exhibits; meet with IT personnel re: trial director; go to courthouse re: preparing for trial; telephone calls and emails to/from fact witnesses and experts.	10.00 hrs	1,250.00
	PGH	Prepare for trial--witness exams, meeting/discussions with [redacted]	10.40 hrs	3,380.00
	[redacted]	[redacted]	[redacted]	[redacted]

11/02/2013	FLC	Continue trial prep, including emails from/to attorney and co-counsel; continue working on exhibits and documents on trial director; prepare page-lines for Garrison Vol II and Lundeby; create video clips for Garrison Vol II on trial director and edit same; prepare file materials; discussions with attorney and co-counsel.	10.00 hrs	1,250.00
	PGH	Prepare for trial--witness examinations.	10.00 hrs	3,250.00
	[redacted]	[redacted]	[redacted]	[redacted]
11/03/2013	FLC	Continue trial prep, including emails from/to attorney and co-counsel; emails and telephone calls from/to Life Flight attorney; continue preparing exhibits and documents in trial director; meetings with attorney and co-counsel; prepare and revise deposition clips; meeting with counsel and client re: jury selection; prepare pl's exhibit notebooks.	11.90 hrs	1,487.50
	PGH	Prepare for trial--witness examinations.	9.70 hrs	3,152.50
	[redacted]	[redacted]	[redacted]	[redacted]
	[redacted]	[redacted]	[redacted]	[redacted]
11/04/2013	FLC	Continue trial prep, including final preparations with trial director, exhibits, documents; preparing for Kerr; meetings with attorneys; meet with Pat re: trial director; emails from/to attorney and co-counsel.	11.90 hrs	1,487.50
	PGH	Prepare for trial--jury selection, opening.	9.80 hrs	3,185.00

[redacted]		[redacted]	[redacted]	[redacted]
11/05/2013	FLC	Attend trial; meet with attorney and co-counsel; review defense exhibits; review file; additional preparations for trial.	10.40 hrs	1,300.00
	PGH	Prepare for trial day; attend trial day; prepare for tomorrow trial day.	11.50 hrs	3,737.50
	KWB	Research [redacted] with Trial.	1.00 hrs	300.00
	RDS	Receipt and Review of Affidavit of Service For Subpoena of Elmore Medical Center.	0.10 hrs	9.50
	RDS	Receipt and Review of Affidavit of Service For Subpoena To Life Flight.	0.10 hrs	9.50
11/06/2013	FLC	Attend trial; meet with [redacted] to prepare [redacted]; review and redact records to admit as an exhibit.	11.60 hrs	1,450.00
	PGH	Prepare for trial day; attend trial; prepare for tomorrow trial day.	12.20 hrs	3,965.00
[redacted]		[redacted]	[redacted]	[redacted]
11/07/2013	FLC	Attend trial; meet with attorney, co-counsel and [redacted] to prepare for Friday's testimonies.	10.10 hrs	1,262.50
	PGH	Prepare for trial day; attend trial; prepare for tomorrow trial day.	11.40 hrs	3,705.00
11/08/2013	FLC	Attend trial; meetings with attorney, co-counsel, witnesses; emails from/to co-counsel.	9.00 hrs	1,125.00
	PGH	Prepare for trial day; attend trial.	10.20 hrs	3,315.00
11/09/2013	FLC	Numerous emails from/to attorneys, co-counsel and staff; review [redacted] and other documents; review invoices from expert.	1.10 hrs	137.50

11/10/2013	FLC	Emails from/to attorney and co-counsel; prepare for this week's witnesses at trial; review [redacted]; prepare additional exhibits; additional preparation of witness files.	6.20 hrs	775.00
11/11/2013	FLC	Continue trial preparations, including meetings with attorney and co-counsel, prepare additional exhibits, review file for information, additional preparations for witness files.	9.10 hrs	1,137.50
	PGH	Prepare for trial day; attend trial; prepare for tomorrow trial day.	11.40 hrs	3,705.00
	PGH	Prepare for trial presentation for tomorrow.	9.00 hrs	2,925.00
11/12/2013	FLC	Preparations for trial; attend trial; meeting with attorneys to prepare for upcoming witnesses.	9.50 hrs	1,187.50
	PGH	Prepare for trial day ; attend trial; prepare for tomorrow trial day.	11.00 hrs	3,575.00
	PMK	Research [redacted]; call with G Haddad re same.	0.50 hrs	112.50
[redacted]		[redacted]	[redacted]	[redacted]
11/13/2013	FLC	Preparations for trial; attend trial; meetings with attorneys and preparations for witnesses tomorrow.	9.90 hrs	1,237.50
	PGH	Prepare for trial day; attend trial; prepare for tomorrow trial day.	12.00 hrs	3,900.00
[redacted]		[redacted]	[redacted]	[redacted]
[redacted]		[redacted]	[redacted]	[redacted]

11/14/2013	FLC	Preparations for trial; attend trial; meeting with attorney, co-counsel and client re: [redacted] prepare file to be stored and materials to be shipped to Charleston.	8.50 hrs	1,062.50
	PGH	Prepare for trial day: attend trial; mistrial granted.	8.50 hrs	2,762.50
	PMK	Research re waiver of mistrial.	0.70 hrs	157.50
	[redacted]	[redacted]	[redacted]	[redacted]
11/15/2013	FLC	Travel from Boise, Idaho to Winfield, WV.	8.20 hrs	1,025.00
	PGH	Return to Morgantown to Boise after mistrial.	8.00 hrs	2,600.00
	BJM	Conferred with Local Counsel Via Telephone Re: Motion for Sanctions and Admissibility of Evidence Pertaining to Income Taxes; Reviewed Invoices and Other File Materials for Documentary Support of Plaintiff's Motion for Sanctions; Emailed RS Re: Billing for Pretrial Preparation and Trial in Conjunction with Plaintiff's Motion for Sanctions.	2.00 hrs	450.00
11/18/2013	FLC	Numerous emails from/to attorneys, co-counsel, staff, client; telephone calls from/to attorney; review file and prepare documents re: expenses for defendants to reimburse; telephone calls re: charges made.	2.00 hrs	250.00
	BJM	Conferred with PGH Re: Mistrial and Motion for Sanctions; Researched Idaho Code, Rules, and Case Law in Conjunction with Plaintiff's Motion for Sanctions; Reviewed Invoices and Researched B&G's Trial Related Fees and Costs in Conjunction with Plaintiff's Motion for Sanctions; Conferred with FC and Rebekah Parsons Via Email and Telephone Re: Trial Related Fees and Costs, All in Conjunction with Plaintiff's Motion for Sanctions; Drafted Plaintiff's Motion for Sanctions; Drafted Affidavit of Counsel in Support of Plaintiff's Motion for Sanctions.	6.60 hrs	1,485.00

11/19/2013	FLC	Emails from/to co-counsel, attorney and staff; review motion for sanctions and email attorney and accounting re: same; meet with accounting re: motion for sanctions; email and telephone call to client re: same.	1.80 hrs	225.00
	BJM	Conferred with PGH Re: Motion for Sanctions; Conferred with Rebekah Parsons Re: Compilation of Trial Related Fees and Cost Information; Drafted Plaintiff's Motion for Sanctions; Emailed PGH and Local Counsel Re: Plaintiff's Motion for Sanctions.	4.00 hrs	900.00
12/02/2013	BJM	Reviewed PGH Revisions for Plaintiff's Motion for Sanctions; Conferred with Local Counsel Re: Plaintiff's Motion for Sanctions.	0.30 hrs	67.50
12/03/2013	FLC	Emails from/to attorney; review revised motion for sanctions.	0.20 hrs	25.00
	BJM	Revised Plaintiff's Motion for Sanctions Pursuant to PGH Revisions; Reviewed Trial Related Cost Spreadsheet Provided by Rebekah Parsons; Conferred with Local Counsel Via Email Re: Revised Motion for Sanctions.	4.20 hrs	945.00
12/04/2013	FLC	Emails from/to attorney and staff; review numerous documents from trial.	0.50 hrs	62.50
12/05/2013	FLC	Several emails from attorneys and co-counsel; review motion for sanctions, memorandum and declaration in support.	0.30 hrs	37.50
	BJM	Reviewed and Revised Plaintiff's Motion for Sanctions; Revised Memorandum of Law and Affidavit in Support of Plaintiff's Motion for Sanctions; Conferred with PGH and Local Counsel Via Motion for Sanctions, Memorandum and Affidavit in Support Thereof; Reviewed Draft Motion for Sanctions, Draft Memorandum of Law, and Draft Declaration of Counsel Submitted by Local Counsel for Review.	1.50 hrs	337.50
12/06/2013	FLC	Emails from/to staff, attorney and co-counsel; review memorandum in support of motion for sanctions.	0.30 hrs	37.50

	BJM	Conferred with PGH and Local Counsel Re: Draft Motion for Sanctions and Accompanying Memorandum of Law and Declaration of Counsel Submitted by Local Counsel; Reviewed and Revised Draft Motion for Sanctions and Supporting Memorandum of Law and Declaration of Counsel; Reviewed Invoice for Service of Trial Subpoenas; Conferred with FC Via Email Re: Invoice and Timing of Detailed Fees and Costs Related to Plaintiff's Motion for Sanctions.	4.00 hrs	900.00
[redacted]				
12/17/2013	FLC	Email to expert.	0.10 hrs	12.50
12/20/2013	FLC	Emails from/to attorneys; emails to all experts re: mistrial/retaining their file; emails from/to expert and accounting; emails re: defense experts that need paid; review file for invoices.	0.70 hrs	87.50
12/23/2013	FLC	Emails from/to attorney and co-counsel; calendar hearing on motion for sanctions and holds for travel to and from Idaho; review response to motion for sanctions.	0.30 hrs	37.50
12/26/2013	FLC	Email from co-counsel; review notice of hearing; revise calendar entry.	0.10 hrs	12.50
12/30/2013	FLC	Emails from/to client and attorneys/co-counsel.	0.20 hrs	25.00
12/31/2013	FLC	Emails from/to co-counsel and attorney.	0.10 hrs	12.50
01/02/2014	FLC	Emails from attorney; review invoices from expert.	0.10 hrs	12.50
01/08/2014	[redacted]			
01/14/2014	FLC	Prepare letter to [redacted] enclosing [redacted]; prepare Fed Ex to be sent.	0.60 hrs	75.00
01/15/2014	FLC	Emails to/from [redacted] and his office re: [redacted]	0.10 hrs	12.50

01/17/2014	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
01/22/2014	FLC	Emails from/to co-counsel and attorney.	0.10 hrs	12.50
01/23/2014	PGH	Call with co counsel re resetting trial and work that needs done in advance.	1.00 hrs	325.00
01/28/2014	FLC	Emails from/to staff and attorney.	0.10 hrs	12.50
	[redacted]	[redacted]	[redacted]	[redacted]
01/29/2014	FLC	Several emails from/to attorney, co-counsel and accounting; telephone calls to/from Dr. Nichols' office re: available trial dates.	0.50 hrs	62.50
01/31/2014	FLC	Telephone call to Dr. Nichols' office; email to attorney and co-counsel re: same.	0.10 hrs	12.50
02/03/2014	FLC	Emails from/to co-counsel and attorney; telephone call to Dr. Nichols' office.	0.20 hrs	25.00
02/04/2014	FLC	Emails from/to co-counsel and attorney; review trial transcript from 11/14/13.	0.50 hrs	62.50
02/05/2014	FLC	Emails from/to co-counsel and attorneys; review opposition to motion for sanctions; calendar reply.	0.70 hrs	87.50
	BJM	Conferred with Local Counsel Re: Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Sanctions; Reviewed Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Sanctions; Reviewed Case of Robertson v. Richards in Conjunction with Plaintiff's Reply to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Sanctions.	1.00 hrs	225.00
02/06/2014	FLC	Emails from/to attorneys and co-counsel.	0.20 hrs	25.00
02/07/2014	FLC	Several emails from attorneys and co-counsel; review email to client.	0.10 hrs	12.50
	BJM	Reviewed Defendants' Response in Opposition to Plaintiff's Motion for Sanctions; Outlined Reply to Defendants' Response in Opposition to Plaintiff's Motion for Sanctions.	1.00 hrs	225.00

02/09/2014	BJM	Researched and Drafted Plaintiff's Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Sanctions.	5.00 hrs	1,125.00
02/10/2014	FLC	Several emails from/to co-counsel, staff and attorneys; review letter and revised memo in opposition to motion for sanctions; [redacted]	0.20 hrs	25.00
	BJM	Researched, Drafted, and Revised Plaintiff's Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Sanctions; Conferred with PGH Re: Same; Conferred with Local Counsel Via Telephone and Email Re: Same; Assembled Filings Related to Plaintiff's Motion for Sanctions for PGH; Drafted Declaration of PGH in Support of Plaintiff's Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Sanctions.	7.00 hrs	1,575.00
02/11/2014	FLC	Several emails from/to co-counsel; several attempts [redacted] including [redacted]; research re: [redacted] review briefs filed yesterday re: motion for sanctions; return call from client; review letter from opposing counsel; [redacted]	~~1.20~~ .8 hrs	~~150.00~~ 100.00
	PGH	Travel to Boise for hearing on motion for sanctions.	8.00 hrs	2,600.00
02/12/2014	[redacted]	[redacted]	[redacted]	[redacted]
	PGH	Prepare for hearing on motion for sanctions.	6.50 hrs	2,112.50
	PGH	Attend hearing on motion for sanctions.	1.20 hrs	390.00
02/13/2014	FLC	Numerous emails from/to staff, attorneys and co-counsel (discussions re: submitting fees and expenses to Court); review bill for costs and expenses.	0.40 hrs	50.00
	PGH	Return to Morgantown from hearing on motion for sanctions.	8.80 hrs	2,860.00

	BJM	Reviewed Pre-Bill for Trial Related Fees and Expenses to be Paid by Defense as Sanction; Conferred with PGH, FC, and Local Counsel Via Email Re: Fees and Expenses to be Detailed in Submission to Court and Affidavit to be Prepared for Submission to Court.	1.00 hrs	225.00
02/14/2014	FLC	Several emails from/to accounting, staff, attorneys and co-counsel; telephone call to client.	0.30 hrs	37.50
	BJM	Conferred with Local Counsel and PGH Re: Compilation of Fees and Costs for Submission to Court; Conferred with Sheryl Tucker Re: Fees and Costs Detail; Reviewed Fees and Costs Detail for Trial Related Fees and Costs to be Submitted to Court.	1.50 hrs	337.50
02/17/2014	FLC	Emails from/to attorneys and co-counsel; telephone calls and email to client.	0.30 hrs	37.50
	BJM	Conferred with Rebekah Parsons and Sheryl Tucker Re: Pre-Bill for Sanctions Submission; Reviewed Fees and Costs Details; Reviewed Draft Memorandum in Support of Attorney Fees and Costs; Conferred with PGH, FC, and Local Counsel Via Email Re: Fees and Costs and Declaration of PGH in Support of Memorandum of Attorney Fees and Costs; Conferred with Rebekah Parsons Via Telephone and PGH in Person Re: Voiding Uncashed / Undeposited Witness Appearance Fee Checks.	2.80 hrs	630.00
		Professional Services Rendered	458.00 hrs	$105,155.50

ADDITIONAL CHARGES

10/30/2013	[redacted]	[redacted]
11/02/2013	[redacted]	[redacted]
11/04/2013	Dr. Keith B. Armitage; Expert Services.	780.00
11/05/2013	FedEx; Shipment to Tri County Process Serving on 10/24/13.	27.17
11/05/2013	Tri-County Process Serving; Service of Subpoena.	125.00
11/05/2013	Tri-County Process Serving; Service of Subpoena.	58.00
11/05/2013	Tri-County Process Serving; Service of Subpoena.	58.00
11/05/2013	[redacted]	[redacted]
11/05/2013	The GEC Group; Economic Consulting Services through 10/31/13.	849.50

11/06/2013	[redacted]	[redacted]
11/06/2013	Tri-County Process Serving; Service of Process.	103.00
11/08/2013	Airfare for Farrah Caruthers on 10/30/13.	505.89
11/08/2013	Airfare for Greg Haddad on 10/31/13.	590.83
11/08/2013	Lodging for Farrah Caruthers on 10/20/13.	137.34
11/08/2013	Lodging for 10/30/13.	2,958.34
11/10/2013	[redacted]	[redacted]
11/12/2013	[redacted]	[redacted]
11/13/2013	[redacted]	[redacted]
11/13/2013	[redacted]	[redacted]
11/13/2013	FedEx; Shipment to Scott McKay on 10/30/13.	178.18
11/13/2013	FedEx; Shipment to Scott McKay on 10/30/13.	65.94
11/13/2013	FedEx; Shipment to Scott McKay on 10/30/13.	55.33
11/13/2013	[redacted]	[redacted]
11/13/2013	FedEx; Shipment to Farrah Caruthers on 10/31/13.	13.43
11/13/2013	FedEx; Shipment to Farrah Caruthers on 10/31/13.	26.60
11/13/2013	FedEx; Shipments to D. Presher on 10/29/13.	553.86
11/13/2013	Katz Consulting Group; Professional Services for October 2013.	2,217.52
11/14/2013	American Medical Forensic Specialists; Trial Services.	9,000.00
11/14/2013	Dr. Keith B. Armitage; Professional Services.	540.00
11/14/2013	Commonwealth Medical Legal Services, Inc; Professional Services during Trial.	12,012.26
11/14/2013	[redacted]	[redacted]
11/14/2013	[redacted]	[redacted]
11/15/2013	[redacted]	[redacted]
11/18/2013	[redacted]	[redacted]
11/19/2013	P. Gregory Haddad; Meals and Travel Fees for 10/31/13-11/8/13.	583.28
11/19/2013	P. Gregory Haddad; Meals for 11/12/13-11/15/13.	315.59
11/19/2013	P. Gregory Haddad; Travel, Lodging, and Meals for 10/24/13-10/25/13.	685.75
11/19/2013	P. Gregory Haddad; Meals for 10/31/13-11/10/13.	387.69
11/19/2013	M & M Court Reporting Service, Inc.; Trial Presentation Support.	3,541.25
11/19/2013	[redacted]	[redacted]
11/20/2013	Farrah Caruthers; Meals and Baggage Fees for 10/30/13-11/2/13.	176.02
11/20/2013	Farrah Caruthers; Meals and Postage for 11/12/13-11/15/13.	121.08
11/20/2013	Farrah Caruthers; Meals for 10/31/13-11/5/13.	304.04
11/20/2013	Farrah Caruthers; Meals for 11/7/13-11/12/13.	89.57
11/20/2013	P. Gregory Haddad; Copies.	1,314.00
12/03/2013	[redacted]	[redacted]
12/04/2013	P. Gregory Haddad; Travel for 10/21/13-10/26/13.	547.48
12/05/2013	Legal Research for November 2013.	466.76

12/05/2013	FedEx; Shipment to Greg Haddad on 11/15/13.	91.58
12/06/2013	Airfare for Farrah Caruthers on 11/15/13.	531.80
12/06/2013	Airfare for Greg Haddad on 11/15/13.	489.09
12/06/2013	Lodging.	1,210.23
12/06/2013	Rental Car for Greg Haddad and Farrah Caruthers in Boise.	832.06
12/06/2013	Rental Car for Greg Haddad on 11/15/13.	116.16
12/06/2013	Photocopies (61 x.15)	9.15
12/09/2013	Tri-County Process Serving; Service of Process.	207.90
01/08/2014	The GEC Group; Professional Services for November 2013.	6,296.50
01/27/2014	[redacted]	[redacted]
01/30/2014	FedEx; Shipment to George Nichols on 1/14/14.	14.58
01/30/2014	[redacted]	[redacted]
02/05/2014	[redacted]	[redacted]
02/10/2014	[redacted]	[redacted]
02/12/2014	[redacted]	[redacted]
02/12/2014	[redacted]	[redacted]
02/12/2014	[redacted]	[redacted]
02/13/2014	[redacted]	[redacted]
02/17/2014	P. Gregory Haddad; Travel, Meals, and Lodging for 2/11/14-2/13/14.	749.91
02/17/2014	Tucker & Associates; Transcripts.	274.00
02/17/2014	Photocopies (65 x.15)	9.75
	Total Additional Charges	[redacted]

BILLING SUMMARY

Total This Bill	[redacted]
Total balance now due	[redacted]

TIMEKEEPER SUMMARY

		Hours	Rate	Amount
Brian J. McAllister	Associate	77.60	225.00	$17,460.00
Cris I. Bombard	Associate	0.30	225.00	$67.50
Farrah L. Caruthers	Paralegal	174.60	125.00	$21,825.00
Kerrie W. Boyle	Partner	1.00	300.00	$300.00
Patrick D. Clark	Legal Assistant	0.30	50.00	$15.00
Philip Greg Haddad	Partner	197.90	325.00	$64,317.50
Patricia M. Kipnis	Associate	4.40	225.00	$990.00

Rebecca D. Shelton	Paralegal	1.90	95.00	$180.50
	Total	[redacted]		[redacted]

EXHIBIT B

Nickname	Ballard, Charles | 1126		
Full Name	Mr. Charles Ballard		
Address			
Phone 1		Phone 2	
Phone 3		Phone 4	
In Ref To			
Fees Arrg.	By billing value on each slip		
Expense Arrg.	By billing value on each slip		
Tax Profile	Exempt		
Last bill			
Last charge	2/17/2014		
Last payment	11/19/2012	Amount	$375.00

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
10/30/2013 64485	SM preparation Trial preparation; various telephone conversations and office conferences regarding trial preparation; telephone conversation and communications with client; review email (various); prepare email (various); telephone conversation with co-counsel; evening trial preparation	275.00	6.70	1,842.50	Billable
10/30/2013 64490	DP legal assist. Various trial tasks including research regarding jury selection, witness and exhibit lists, proofread and finalize response to defendants' misrepresentation, trial director	95.00	3.50	332.50	Billable
10/31/2013 64497	SM preparation Trial preparation; work on witness and exhibit lists; telephone conversation with expert; telephone conversation with witness; telephone conversation with client; conference with co-counsel and team; trial preparation	275.00	6.50	1,787.50	Billable
10/31/2013 64499	DP legal assist. Various trial tasks including witnesses, exhibits, depositions; office conference with team	95.00	6.20	589.00	Billable
11/1/2013 64544	SM preparation Early morning travel to Mountain Home for witness meeting; return travel to Boise; trial preparation - day and evening; conferences with co-counsel and staff; review courtroom arrangement and technology; review and prepare email (various); review briefing; legal research regarding trial issues	275.00	12.40	3,410.00	Billable
11/1/2013 64550	DP legal assist. Various trial related tasks including jury research, exhibits, meeting at courtroom	95.00	6.80	646.00	Billable
11/2/2013 64549	SM preparation Trial preparation including various conferences with co-counsel, staff,	275.00	7.50	2,062.50	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
	case expert; review and prepare various email; legal research regarding evidentiary issues and instruction; tasks regarding jury (Saturday)				
11/2/2013 64551	DP legal assist. Various trial related tasks including jury research, jury list and exhibits	95.00	7.70	731.50	Billable
11/3/2013 64558	DP legal assist. Various trial related tasks including jury research, jury list and exhibits; office conference regarding jurors	95.00	6.20	589.00	Billable
11/3/2013 64859	SM preparation Trial preparation; conferences with co-counsel and staff regarding same; work on jury selection issues; prepare for limine argument; drafting of outline for use at trial; evening trial preparation (Sunday)	275.00	8.60	2,365.00	Billable
11/4/2013 64575	DP legal assist. Various trial related tasks including jury, exhibits and witnesses	95.00	6.40	608.00	Billable
11/4/2013 64624	SM preparation Trial Preparation; prepare for day 1 of trial including jury selection, argument of limine issues and potential witness examination; work on exhibits; conferences with co-counsel and staff; visit courtroom and address logistical issues; evening trial preparation	275.00	10.70	2,942.50	Billable
11/5/2013 64625	SM preparation Morning trial preparation; attend trial Day 1; evening trial preparation for Day 2	275.00	9.70	2,667.50	Billable
11/6/2013 64589	DP legal assist. Trial support including exhibit organization and witness contact	95.00	1.60	152.00	Billable
11/6/2013 64592	DP legal assist. Trial support including exhibit organization, witness contact; assist in jury selection	95.00	5.90	560.50	Billable
11/6/2013 64626	SM preparation Morning trial preparation; attend trial Day 2; evening nighttime trial preparation for Day 3	275.00	11.40	3,135.00	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
11/7/2013 64627	SM preparation Morning trial preparation; attend trial Day 3; evening-night trial preparation for Day 4	275.00	10.80	2,970.00	Billable
11/8/2013 64628	SM preparation Morning trial preparation; attend trial Day 4- tasks following day's trial to prepare for following week	275.00	8.10	2,227.50	Billable
11/10/2013 64629	SM preparation Trial Preparation (Sunday)	275.00	9.30	2,557.50	Billable
11/11/2013 64630	SM preparation Trial Preparation for Day 5 and week 2 of trial; conferences with co-counsel to prepare for same; evening trial preparation	275.00	8.30	2,282.50	Billable
11/12/2013 64663	SM preparation Morning trial preparation; attend trial Day 5; prepare comments to draft jury instructions; evening trial preparation	275.00	10.70	2,942.50	Billable
11/13/2013 64664	SM preparation Trial preparation; attend Day 6 of trial;; trial preparation (evening)	275.00	11.40	3,135.00	Billable
11/14/2013 64860	SM preparation Morning trial preparation; attend trial - Day 7, mistrial declared; various post trial tasks and conferences following mistrial	275.00	5.30	1,457.50	Billable
11/15/2013 64861	SM preparation Tasks to address mistrial and prepare for post trial briefing on sanctions - retrial; telephone conversations (various) with case witnesses and contacts regarding mistrial	275.00	2.30	632.50	Billable
12/4/2013 64899	RF research Telephone conversation with Scott McKay regarding sanctions research; legal research regarding disqualification of counsel as sanction; drafting regarding same	185.00	2.20	407.00	Billable
12/4/2013 64942	SM preparation Research and drafting of sanctions motion; review and prepare case email regarding same	275.00	2.60	715.00	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
12/5/2013 64943	SM preparation Research and drafting of sanctions motion, memorandum and supporting pleadings; review and preparation of case email (various) regarding same	275.00	5.50	1,512.50	Billable
12/6/2013 64946	SM preparation Further review and drafting of memorandum in support of motion for sanctions and supporting pleadings; telephone conversations with co-counsel regarding same; conferences with staff to coordinate same; tasks regarding same	275.00	2.70	742.50	Billable
12/23/2013 65045	DP legal assist. Draft notice of hearing	95.00	0.10	9.50	Billable
12/23/2013 65667	SM preparation Review objection to sanction motion; revise notice regarding sanction motion and trial setting	275.00	0.30	82.50	Billable
2/5/2014 65600	SM preparation Review of defendants' opposition to motion for sanctions and related materials; legal research and tasks regarding same; prepare and review email (various) regarding same	275.00	3.50	962.50	Billable
2/6/2014 65647	SM preparation Further review of defendants' opposition to sanction motion and research regarding same; research and inquiry regarding defense representations opposing sanctions; tasks regarding same; various email regarding sanction motion and response	275.00	2.90	797.50	Billable
2/7/2014 65654	SM preparation Prepare and review email regarding pending sanction motion and trial reset; tasks regarding same; telephone conversation with co-counsel regarding same; conference with assistant regarding defendants' overlength brief and court's denial of same; prepare email regarding same; review defendants' letter and "reformatted brief"; legal research regarding same; further case email regarding briefing; tasks regarding same	275.00	2.40	660.00	Billable
2/9/2014 65656	SM preparation Research and draft motion to strike overlength brief filed in support of sanction motion	275.00	1.30	357.50	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	T
2/10/2014 65623	DP legal assist. Proofread and finalize motion to strike, reply memo in support of sanction motion and declaration; filing and service	95.00	2.30	218.50	Billable
2/10/2014 65657	SM preparation Legal research and drafting of reply memorandum in support of motion for sanctions; telephone conversations with co-counsel (various) regarding same; conferences with legal assistant regarding sanction reply and related tasks; finalize brief and supporting pleadings; coordinate filing and service	275.00	5.70	1,567.50	Billable
2/11/2014 65658	SM preparation Conference with assistant regarding task to address filling and pending motions regarding sanctions; review and revise pleading regarding same; conferences with co-counsel to prepare regarding sanction hearing; review of pleadings and research regarding same	275.00	4.30	1,182.50	Billable
2/12/2014 65659	SM preparation Morning conference with co-counsel to prepare for hearing on sanction motion; review of pleadings and prepare for hearing; attend hearing on sanction motion; post hearing conferences with co-counsel and tasks	275.00	3.80	1,045.00	Billable
2/13/2014 65642	DP legal assist. Format affidavit of counsel regarding sanction motion; prepare documents regarding sanctions	95.00	0.80	76.00	Billable
2/13/2014 65660	SM preparation Research and outline of issues regarding court's ruling on sanction motion and fee petition; review and prepare email regarding same; drafting of pleadings to support same	275.00	3.10	852.50	Billable
2/14/2014 65661	SM preparation Revise pleadings in support of fee petition; prepare email regarding same; review and reply to case email; review correspondence regarding new trial dates; email and tasks to address new trial date	275.00	1.60	440.00	Billable
2/17/2014 65662	SM preparation Research and drafting of memorandum of fees and costs; review and prepare email regarding same; outline declaration and submission regarding fees and costs submission; tasks to coordinate fee petition on sanctions	275.00	2.50	687.50	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

		Amount	Total
TOTAL	Billable Fees	231.60	$54,942.00

Date / ID	Professional / Expense	Price / Markup %	Quantity	Amount	T
10/31/2013 64383	SM $copy charges In-house copies (limine motion, affidavit, exhibits and JIs)	0.15	1293.000	193.95	Billable
10/31/2013 64407	SM $misc costs Mileage Boise to Mountain Home	0.565	86.799	49.04	Billable
10/31/2013 64465	SM $copy charges In-house copies (Trial)	0.15	1354.000	203.10	Billable
10/31/2013 64498	SM $misc costs Witness fee for trial witness	35.90	1.000	35.90	Billable
10/31/2013 64554	SM $copy charges In-house copies (trial)	0.15	130.000	19.50	Billable
11/1/2013 64556	SM $copy charges In-house copies (trial)	0.15	95.000	14.25	Billable
11/2/2013 64557	SM $copy charges In-house copies (Trial)	0.15	54.000	8.10	Billable
11/3/2013 64552	SM $meals Lunch for trial counsel/client	31.27	1.000	31.27	Billable
11/3/2013 64555	SM $copy charges In house copies (Trial)	0.15	1650.000	247.50	Billable
11/3/2013 65641	SM $copy charges In house copies (Trial)	0.15	1350.000	202.50	Billable
11/4/2013 64574	SM $copy charges In-house copies (Trial)	0.15	997.000	149.55	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Expense	Price / Markup %	Quantity		Amount	T
11/4/2013 64576	SM $copy costs In house copies (Trial)		0.15	2488.000	373.20	Billable
11/5/2013 64587	SM $meals Lunch (Trial)		25.42	1.000	25.42	Billable
11/6/2013 64586	SM $copy costs In house copies (Trial)		0.15	196.000	29.40	Billable
11/6/2013 64588	SM $meals Lunch (Trial)		32.22	1.000	32.22	Billable
11/7/2013 64612	SM $meals Lunch (Trial)		61.13	1.000	61.13	Billable
11/8/2013 64613	SM $meals Lunch (Trial)		85.99	1.000	85.99	Billable
11/10/2013 64614	SM $meals Meal (Trial)		31.00	1.000	31.00	Billable
11/10/2013 64652	SM $copy charges In house copies (Trial)		0.15	328.000	49.20	Billable
11/11/2013 64620	SM $copy charges In-house copies (Trial)		0.15	492.000	73.80	Billable
11/11/2013 64653	SM $copy charges In house copies (Trial)		0.15	546.000	81.90	Billable
11/13/2013 64661	SM $meals Lunch (Trial)		19.71	1.000	19.71	Billable
11/13/2013 64683	SM $copy charges In-house copies (Trial)		0.15	104.000	15.60	Billable
11/13/2013 65091	SM $meals Meal (Trial)		8.48	1.000	8.48	Billable

Ballard, Charles:Mr. Charles Ballard (continued)

Date / ID	Professional / Expense	Price / Markup %	Quantity		Amount	T
1/14/2014	SM		12.30	1.000	12.30	Billable
65281	$misc costs PACER (Trial)					
TOTAL	Billable Costs					$2,054.01

Calculation of Fees and Costs

	Amount	Total
Fees Bill Arrangement: Slips By billing value on each slip.		
Total of billable time slips	$54,942.00	
Total of Fees (Time Charges)		$54,942.00
Costs Bill Arrangement: Slips By billing value on each slip.		
Total of billable expense slips	$2,054.01	
Total of Costs (Expense Charges)		$2,054.01
Total new charges		$56,996.01

EXHIBIT C

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DECLARATION OF J. CHARLES HEPWORTH

1. I am an attorney, duly licensed to practice law in the State of Idaho and the senior partner with the law firm of Hepworth, Janis & Kluksdal, Chtd., in Boise. I make the statements contained in this declaration based on my own personal observations and knowledge.

2. I graduated from Stanford University with a degree in English in 1978 and obtained my law degree from the University of California, Hastings College of Law in 1981. Since that time, I have actively been engaged in the private practice of law and for over thirty years, have been practicing in Idaho.

3. My law firm and my practice are devoted to representing individuals and surviving family members in claims for personal injury and wrongful death including medical malpractice. I have tried to verdict many such cases including a $6.15 million verdict that I helped obtain in 2006 for the family of a 28-year-old woman who died as a result of a medical error, and a $7.55 million verdict that I helped obtain against St. Luke's Hospital in a wrongful death case in 2001.

4. I am listed in The Best Lawyers in America and was rated one of the top 75 lawyers in all fields by the Mountain States Super Lawyers for 2009. I have an "AV" rating from the Martindale Hubbell lawyer rating service. I am a member of the American Association for Justice, a fellow with the American College of Trial Lawyers and a long standing member of the Idaho Trial Lawyers Association.

5. I am familiar with hourly rates charged by the lawyers and legal professionals at my law firm as well as other law firms in this area. It is my opinion that a billing rate for attorney P. Gregory Haddad of $325/hr. and for attorney Scott McKay of $275/hr., the attorneys who handled the first trial in the above matter, is eminently reasonable and consistent with billing rates in the Boise area for attorneys of similar experience, skill and reputation. I further believe that billing rates for experienced paralegal support of up to $125/hr. and for experienced

associate attorneys of up to $225/hr. is likewise reasonable for experienced paralegals and associates assisting on cases of this nature in the Boise area.

This ends my declaration.

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED This Dated this 14th day of February, 2014.

J. Charles Hepworth

J. Charles Hepworth

EXHIBIT D

National Travel

information » technology » service

HADDAD/PHILIP GREGORY | BALLARD | 24-Jan-2014 11:12 am

Booking locator: TML0PY | Page 1 of 2

Fare: $452.00

THANK YOU. TRACI W

11-Feb-2014 08:55am Tuesday

Air Delta Air Lines | Flight# 974 | Class: U

From: Pittsburgh PA, USA | To: Minneapolis St Pl MN, USA

Meal: REFRESH AT COST | Seats: Seat:08C

Equip: Airbus Jet | Status: Confirmed

Depart: 11-Feb-2014 Tuesday 08:55am | Stops: 0

Arrival: 11-Feb-2014 Tuesday 10:23am

Depart -
Arrive - MSP TERMINAL 1
Delta Air Lines locator: HQ2YYN
Flight Duration: 2 hour(s) and 28 minutes

11-Feb-2014 11:35am Tuesday

Air Delta Air Lines | Flight# 869 | Class: U

From: Minneapolis St Pl MN, USA | To: Boise ID, USA

Meal: REFRESH AT COST | Seats: Seat:15F

Equip: Airbus Jet | Status: Confirmed

Depart: 11-Feb-2014 Tuesday 11:35am | Stops: 0

Arrival: 11-Feb-2014 Tuesday 01:41pm

Depart - MSP TERMINAL 1
Arrive -
Delta Air Lines locator: HQ2YYN
Flight Duration: 3 hour(s) and 6 minutes

11-Feb-2014 Tuesday

Hotel Interstate Hotels And Resorts Hotel 43

981 Grove Street , Boise ID US 83702 ,

Phone: 1-208-3424622 | Fax: 1-208-3445751

Number of Rooms: 1 | Rate: 190.00USD

Confirmation: 14937SB011149 | Room Guaranteed

Check Out: 13-Feb-2014 Thursday

BK59591ARR11FEB CXL:CXL BY 1600 HOTEL TIME ON 11FEB14-FEE 1 NIGHT-
RESERVATION IS GUARANTEED FOR LATE ARRIVAL.
PLEASE CANCEL BY 4PM DAY OF ARRIVAL TO AVOID BILLING.

DIRECTIONS TO HOTEL
BOI- Boise Airport- 3 mi NE

13-Feb-2014 07:10am Thursday

Air United Airlines | Flight# 1412 | Class: T

From: Boise ID, USA | To: Denver CO, USA

Meal: None | Seats: Seat:34F

Equip: Boeing 737-800 Jet | Status: Confirmed

Depart: 13-Feb-2014 Thursday 07:10am | Stops: 0

Arrival: 13-Feb-2014 Thursday 08:59am

United Airlines locator: CMY1SM
Flight Duration: 1 hour(s) and 49 minutes

13-Feb-2014 09:56am Thursday

Air United Airlines | Flight# 648 | Class: T

From: Denver CO, USA | To: Pittsburgh PA, USA

Meal: FOOD TO PURCHASE | Seats: Seat:25A

Equip: Airbus Jet | Status: Confirmed

Depart: 13-Feb-2014 Thursday 09:56am | Stops: 0

Arrival: 13-Feb-2014 Thursday 02:53pm

United Airlines locator: CMY1SM
Flight Duration: 2 hour(s) and 57 minutes

Other

15-Mar-2014 Saturday

Pittsburgh PA, USA
ELECTRONIC TICKET REQUESTED/I

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA AND LASER CENTER and/or SILK TOUCH MED SPA LASER and LIPO OF BOISE,

Defendants.

Case No. CV-OC-2012-04792

AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS

This case is set for Jury Trial to commence on **Tuesday, April 8, 2014 at 09:30 A.M.**, and continue for three (3) weeks. ***No trial proceedings will be held on Mondays because it is the Court's criminal calendar day.***

IT IS HEREBY FURTHER ORDERED:

1. All pretrial motions, with the exception of Motions in Limine, shall be heard and completed at least twenty-eight (28) days before the trial date. ***A Judge's copy of all motions and memoranda in support thereof should be filed directly with chambers. *Motions in Limine must be filed not later than two (2) weeks prior to trial. No Motions filed after that time will be considered. Motions in Limine shall be heard on the morning of trial, unless otherwise scheduled by the Court.***

2. Not later than fourteen (14) days before the trial date, counsel for all parties to the action shall hold a conference for exchange of information and discussion of matters specified by I.R.C.P. 16(a) and 16(b).

3. Not later than seven (7) days before trial: (a) each attorney shall certify to the Court, in writing, that such Exchange of Information Conference has taken place and furnish with such certification a list of the names of persons disclosed as possible witnesses pursuant to Rule 16(a)(4), and a descriptive list of all exhibits proposed to be offered in evidence, reciting which exhibits counsel have agreed may be received in evidence without objection and those to which no objection will be made on grounds other than irrelevancy or immateriality; or (b) in lieu thereof, all counsel may join in submitting a written stipulation in conformance with Rule 16(b).

4. Any objection to the date of this trial must be made by any party within fifteen (15) days from the date of this notice.

5. All exhibit lists must be submitted to the Court five (5) days prior to trial.

6. All requested jury instructions must be submitted to the Court, *BOTH hard copy AND emailed to* lsimsdouglas@adaweb.net (in Word format) fourteen (14) days prior to trial.

7. This Order shall control the subsequent course of the action unless modified for good cause shown to prevent manifest injustice.

8. The Court may impose appropriate sanctions for violation of this Order, which may include assignment of the trial date to another case.

9. Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case if the assigned judge is unavailable. The following is a list of potential alternate judges:

Hon. G. D. Carey	Hon. James C. Morfitt
Hon. Gregory M. Culet	Justice Gerald Schroeder

Hon. Dennis Goff	Hon. Kathryn A. Sticklen
Hon. Renae Hoff	Hon. Darla Williamson
Hon. Daniel C. Hurlbutt, Jr.	Hon. Ronald Wilpur
Hon. James Judd	Hon. W.H. Woodland
Hon. Duff McKee	**All Sitting Fourth District Judges**

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this notice.

DATED the 21st day of February, 2014.

Deborah A. Bail

DEBORAH A. BAIL
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of February, 2014, I mailed (served) a true and correct copy of the within instrument to:

DAVID NEVIN
SCOTT S MCKAY
ATTORNEYS AT LAW
POST OFFICE BOX 2772
BOISE ID 83701-2772

JEREMIAH A QUANE
TERRENCE S. JONES
ATTORNEYS AT LAW
POST OFFICE BOX 1576
BOISE ID 83701-1576

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 OBJECTIONS TO PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS

The following constitute the objections of the Defendants to the Plaintiff's Memorandum of attorney fees and costs. The Plaintiff's Memorandum cites five categories of fees and costs, labeled A through E, each of which is objected to by the

Defendants, in their totality and in certain portions and aspects.

It is the position of the Defendants that an award is confined to the Plaintiff's costs for his experts who testified at trial, 3 in number, attorney fees for the trial itself and incidental costs for the trial. Attorney time spent preparing for trial is not included and time spent in addition to the time in Court for trial is not included, nor is the payment to Ada County for Jury costs and fees for the trial authorized by rule 47(u), I.R.C.P. It is prohibited by Rule 48(a), I.R.C.P. In the opinion of undersigned, the services of paralegals and legal assist for trial are not recoverable, not reasonably required or necessary and not within the scope of the award to be entered by the Court. The fees and costs for services rendered after November 14, 2013 are not recoverable and not within the scope of the award to be entered by the Court.

At trial, the Plaintiff called 5 live witnesses and one witness by her deposition and its video. The medical records were admitted by agreement of counsel. The Plaintiff called 3 expert witnesses, Dr. Kerr and the Plaintiff. The Plaintiff rested his case-in-chief on November 12, 2013. The Defendants called Dr. Kerr and Dr. Stiller in their case-in-chief and neither were cross-examined by Plaintiff's counsel. The trial also included jury selection, opening statements, Court hearings on several Motions and matters, and the matter of one juror not returning for trial. The Defendants did not have a paralegal or legal assistant at trial or technician for operating equipment showing exhibits, none of which was reasonably necessary or required.

Defendants object as follows to the categories specified in the Plaintiff's Memorandum of Attorney Fees and Costs.

Category A.1. Not recoverable.

Category A.2. Excessive time, attorney duplication, improper attorney hourly rates, lack of proof that the time of all persons was necessary, reasonable and required.

Category A.3. Not recoverable.

Category B.1. Not recoverable.

Category B.2. Other than the expert witness fees of Drs. Sorensen and Nichols and Economist Hoffman, there is only travel expense of Dr. Nichols. Travel expense of Mr. Haddad and paralegal Farrah Caruthers and costs of trial technician not recoverable. Costs of trial subpoenas, trial witness fees and other itemized trial costs not recoverable. The Declaration of Mr. Haddad under the heading Additional Charges does not describe or identify the need or reasons for the items listed and Dr. Armitage did not testify at the trial.

Category D. Not recoverable. Has nothing to do with the mistrial. Defense counsel did not violate any discovery order or refusal to answer discovery, once the Court overruled objections to Plaintiff's interrogatories. Answers to the interrogatories were promptly filed and served and payment made to Plaintiff's attorney as ordered by the District Judge.

Category E. Objections noted above are applicable.

The Affidavit of Jeremiah A. Quane is filed and served with these objections. It is relied upon in the instances where applicable to these objections.

The Defendants and their counsel urge the Court to consider the following factors in determining the amount of attorney fees:

1. The time and labor reasonably required and necessary as opposed

to time entries simply made in time records.

2. The novelty and difficulty of the issues, legal and factual, of the case.

3. The skill requisite to perform the legal services properly and the experience and ability of the Plaintiff's attorneys in the field of law for medical malpractice.

4. The prevailing changes in the Boise area for like work.

5. Whether the fees of Plaintiff's counsel are fixed or contingent.

6. The time limitations imposed under the circumstances of the case.

DATED this 24th day of February, 2014.

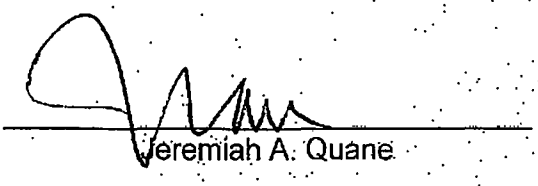
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2014, I served a true and correct copy of the foregoing OBJECTIONS TO PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

ORIGINAL

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Terrence S. Jones, ISB No. 5811
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Telephone (208) 780-3939
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF JEREMIAH A. QUANE FOR OBJECTIONS TO PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS

STATE OF IDAHO)
: ss.
County of Ada)

Jeremiah A. Quane, having been first duly sworn upon oath, deposes and says:

AFFIDAVIT OF JEREMIAH A. QUANE FOR OBJECTIONS TO PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS - 1

1. I am the attorney of record for Defendants in the above captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. I have handled numerous civil tort cases that involved varying legal issues. Of these civil tort cases, many were medical malpractice cases. I have handled and/or tried civil tort and medical malpractice cases in all but 8 of the 44 counties in the State of Idaho and the Federal District Courts of Idaho and Montana. Of these cases, a great number of them were in the District Court of Ada County.

3. Based on my experience, I am familiar with and have knowledge of the attorney fee hourly rates customarily and usually charged by attorneys in civil tort and medical malpractice cases that include cases in the District Court of Ada County and its surrounding counties. I have acquired this knowledge by means of discussing hourly rates with attorneys, reviewing billing statements of attorneys and claims asserted by attorneys in connection with litigated cases and decisions of courts for the assessment of attorney fees. I have testified as an expert witness in the District Court of Ada County on the subject of reasonable and customary attorney fee hourly rates and observed other attorneys doing the same. In these cases, the presiding judge accepted me as a qualified expert witness.

4. I am qualified to render the opinions stated in this Affidavit.

5. The customary, usual and accepted hourly rates for attorneys in the Fourth and other Judicial Districts of the State of Idaho in civil tort and malpractice cases is in the range of $150 to $190, and $190 is the outer or highest rate.

6. In my opinion, these are the ranges for the assessment of attorney

fees in connection with the Plaintiff's pending motion.

7. My experience and acquired knowledge set forth above, covers, applies and relates to the attorney time necessary and reasonably required to perform the legal services for the issues involved in this case and I believe that I am qualified to render an opinion on the time that is customarily and reasonably necessary and required of Plaintiff's attorney to conduct the trial of this case.

8. The trial of this case started November 5, 2013 and ended November 14, 2013, a total of slightly over 6 ½ days. The actual time spent in trial is as follows for the trial days:

November 5, 2013	8.2 hours
November 6, 2013	6.1 hours
November 7, 2013	6.6 hours
November 8, 2013	6.8 hours
November 12, 2013	6.4 hours
November 13, 2013	6.5 hours
November 14, 2013	4.9 hours
Total	45.4 hours

9. According to the declaration of Mr. Haddad, the following time is stated to be as follows for himself and Mr. McKay for the trial dates:

Mr. Haddad

November 5, 2013	11.5 hours
November 6, 2013	12.2 hours
November 7, 2013	11.4 hours
November 8, 2013	10.2 hours
November 12, 2013	11.0 hours
November 13, 2013	12.0 hours
November 14, 2013	8.5 hours
Total	76.8 hours

Mr. McKay

November 5, 2013	9.7 hours
November 6, 2013	11.4 hours
November 7, 2013	10.8 hours
November 8, 2013	8.1 hours
November 12, 2013	10.7 hours
November 13, 2013	11.4 hours
November 14, 2013	6.3 hours
Total	68.4 hours

10. According to the time records of Nevin, Benjamin, McKay and Bartlett, Exhibit B to the Declaration of Mr. Haddad and the time records of Bailey and Glasser, Exhibit A to the Declaration of Mr. Haddad, the description of services for each trial day for both Mr. McKay and Mr. Haddad are very similar and constitute in the opinion of undersigned, the unnecessary duplication of services of one to the other.

11. The Declaration of Mr. Haddad, page 2, states that he has tried over seventy cases, but his declaration does not state the numbers of cases tried. Assuming the number of cases tried is about 70 or close to 70, undersigned has tried 175 civil cases in Idaho compared to the alleged 70 or so cases tried by Mr. Haddad, none in Idaho except this case.

12. The Declaration of Mr. Haddad does not describe or mention the trial experience of Mr. McKay in medical malpractice cases.

13. The Declaration of Mr. Haddad, page 4, paragraph 12, states "the hourly rates associated with the above stated fees are reasonable and consistent with that of other law firms and lawyers handling cases of this nature in this area." The Declaration then refers to the Declaration of attorney Charles Hepworth. The above quoted statement of Mr. Haddad lacks foundation and the factual basis for it, and is

tantamount to pure speculation and conjecture.

14. In the opinion of undersigned, he has handled and tried many more medical malpractice cases than attorney Charles Hepworth and he disagrees with the attorney fee rates specified in the Declaration of Mr. Hepworth and he disagrees with the attorney fee rates specified in the Declaration of Mr. Haddad.

15. The Complaint in this case was filed March 16, 2012. The Declaration of Mr. Haddad contains the time records of Bailey and Glasser and Nevin, Benjamin, McKay and Bartlett that reflect the attorney time registered for both Mr. Haddad and Mr. McKay for the following dates:

Mr. Haddad

October 30, 2013	8.7 hours
October 31, 2013	18.6 hours
November 1, 2013	10.4 hours
November 2, 2013	10.0 hours
November 3, 2013	9.7 hours
November 4, 2013	9.8 hours

Mr. McKay

October 30, 2013	6.7 hours
October 31, 2013	6.5 hours
November 1, 2013	12.4 hours
November 2, 2013	7.5 hours
November 3, 2013	8.6 hours
November 4, 2013	10.7 hours

The same time records reflect the time registered for others on the following dates:

Bailey and Glasser

October 30, 2013	(FLC (paralegal))	12.4 hours
	(RDS (paralegal))	1.6 hours
October 31, 2013	(FLC)	11.6 hours

November 1, 2013	(FLC)	10.0 hours
November 2, 2013	(FLC)	10.0 hours
November 3, 2013	(FLC)	11.0 hours
November 4, 2013	(FLC)	11.9 hours

Nevin, Benjamin, McKay and Bartlett

October 30, 2013	(DP (legal assist))	3.5 hours
October 31, 2013	(DP)	6.2 hours
November 1, 2013	(DP)	6.8 hours
November 2, 2013	(DP)	7.7 hours
November 3, 2013	(DP)	8.6 hours
November 4, 2013	(DP)	6.4 hours

The time entries themselves noted above, do not in the opinion of undersigned establish that the services were reasonably necessary and required and customary nor do they show that the services of each person are not the duplication of the services of others.

Taking into account the fact that both law firms for the Plaintiff have been working on this case since the Complaint was filed March 16, 2012 and before, it is the opinion of undersigned that the time reflected in the time records is excessive, not required, not customary and not reasonably necessary, notwithstanding, the position taken by the Defendants that services performed before the trial started on November 5, 2013 are not recoverable or the subject of the Court Order for fees and costs based on the mistrial.

16. The time records for both Mr. Haddad and Mr. McKay for the trial dates do not describe or identify the type and nature of the services rendered. They are both similar in descriptions that basically say prepare for trial, attend trial and prepare for trial the next day. It is the opinion of undersigned that there is no showing by the Plaintiff or

documentation that the services for Mr. Haddad and Mr. McKay are reasonably necessary, required and customary, which is the standard the Court should apply. Examples of two random time entries for Mr. Haddad and Mr. McKay are:

Mr. Haddad:

11/6/13 Trial time 6.1 hours. Recorded time is 12.2 hours, leaving 6.1 hours.

Mr. McKay

11/6/13 Trial time 6.1 hours. Recorded time is 11.4 hours, leaving 5.3 hours.

Mr. Haddad:

11/13/13 Trial time is 6.5 hours. Recorded time is 12.0 hours, leaving 5.5 hours.

Mr. McKay:

11/13/13 Trial time is 6.5 hours. Recorded time is 11.4 hours, leaving 4.9 hours.

17. The Declaration of Charles Hepworth states in part "billing rate for attorney P. Gregory Haddad of $325/hour and for attorney Scott McKay of $275/hour,... is consistent with billing rates in the Boise area for attorneys of similar experience, skill and reputation." The Declaration of Mr. Haddad does not identify or describe the experience, skill and reputation of Mr. McKay on the handling and trial of medical malpractice cases. The Declaration of Mr. Haddad does not identify or describe his experience, skill and reputation in the handling and trial of medical malpractice cases, although it states generally that he has represented Plaintiffs and Defendants in complex personal injury and professional liability matters, including medical malpractice and wrongful death cases, in state and federal courts, both in West Virginia and around the country. These

matters stated for Mr. McKay and Mr. Haddad are vague, non-specific and lacking in particulars that bear upon their experience with and knowledge of the medical and legal issues involved in medical malpractice cases so as to allow the Court to determine and gauge their experience, skill and reputation as stated in the Declaration of Mr. Hepworth.

It is the opinion of undersigned that the attorney rates for Mr. Haddad and Mr. McKay as stated by Mr. Hepworth are not consistent with the billing rates in the Boise area for attorneys of similar experience, skill and reputation.

FURTHER your Affiant saith not.

Jeremiah A. Quane

SUBSCRIBED AND SWORN to before me this 24th day of February, 2014.

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris
Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF JEREMIAH A. QUANE FOR OBJECTIONS TO PLAINTIFF'S MEMORANDUM OF ATTORNEY FEES AND COSTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709 [ ] Email
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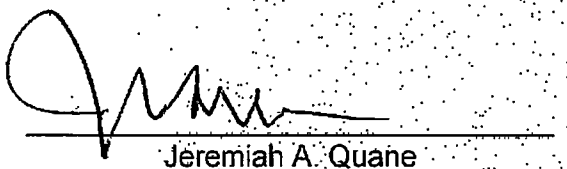

Jeremiah A. Quane

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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF HEARING

TO: THE ABOVE ENTITLED PARTIES/PLAINTIFFS and their attorneys of record:

YOU WILL PLEASE TAKE NOTICE that on Wednesday, the 12th day of March, 2013, at 2:00 p.m. of said day, or as soon thereafter as counsel can be heard,

before the Honorable Deborah A. Bail, at the Ada County Courthouse, Boise, Idaho, the undersigned will call up for hearing before the Court Defendants' Objections to Plaintiff's Memorandum of Attorney Fees and Costs.

DATED this 24th day of February, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2014, I served a true and correct copy of the foregoing NOTICE OF HEARING by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
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Jeremiah A. Quane

NO. Motion
A.M. FILED P.M. 1:17

FEB 27 2014

CHRISTOPHER D. RICH, Clerk
By ELYSHIA HOLMES
DEPUTY

NO. Order
A.M. FILED P.M. 1:55

FEB 28 2014

CHRISTOPHER D. RICH, Clerk
By TARA VILLEREAL
DEPUTY

ORIGINAL

Jeremiah A. Quane, ISB No. 977
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MOTION FOR FIRST DISQUALIFICATION OF THE HONORABLE DEBORAH BAIL

DENIED 2/28/14
Deborah A. Bail

COME NOW the Defendants, pursuant to Idaho Rules of Civil Procedure 40(d)(1), 40(d)(1)(A), 40(d)(1)(B) and 40(d)(1)(F) and respectfully move this Court for its order, without cause, for the disqualification of the Honorable Deborah Bail. This is the

first and only Motion for Disqualification without cause of the Honorable Deborah Bail by the Defendants and is not made to hinder, delay or obstruct the Administration of Justice. On February 21, 2014, Judge Bail signed and entered her Amended Notice of Trial Setting and Order Governing Further Proceedings that was served by mail on the attorneys for the Plaintiff and Defendants February 21, 2014 as certified by Deputy Court Clerk Linda Sims-Douglas and received by counsel for the Defendants February 25, 2014. A trial of this case has been held starting November 5, 2013 in which the Plaintiff completed his case-in-chief and rested on November 12, 2013 and the Defendants then proceeded with their case-in-chief that ended November 14, 2013 when the Court granted the Plaintiff's Motion for a mistrial. The Amended Notice of Trial Setting and Order Governing Further Proceedings of Judge Deborah Bail setting this case for jury trial to commence April 8, 2014 is a complete new trial from the previous trial that was held. This Motion is timely filed after service of the written Notice or Order of Judge Deborah Bail setting the action for trial and is filed before the commencement of the new trial before the Honorable Deborah Bail.

The trial scheduled April 8, 2014 per the written Amended Notice of Trial Setting dated February 21, 2014 will be a complete trial, irrespective of the events of the trial held previously and the provisions of Rules 40(d)(1), 40(d)(1)(A) and 40(d)(1)(B) are applicable. Per Rule 40(d)(1)(A), the Motion for Disqualification, if timely, shall be granted. As respects the trial scheduled April 8, 2014, there has been no status conference, pre-trial conference, contested proceeding before Judge Deborah Bail. The Amended Notice of Trial Setting and Order Governing Further Proceedings dated February 21, 2014 specifies and denotes the issues, matters and events to be undertaken and

completed before the trial is scheduled to start April 8, 2014. This Order has no bearing on or relationship to anything that transpired in the trial previously conducted and the consequences of the Order of the Judge granting a mistrial. The trial scheduled April 8, 2014 is a totally new and different trial than the trial previously conducted.

This matter is not made on the basis of cause for the disqualification of the Honorable Deborah Bail.

DATED this 27th day of February, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February, 2014, I served a true and correct copy of the foregoing MOTION FOR FIRST DISQUALIFICATION OF THE HONORABLE DEBORAH BAIL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
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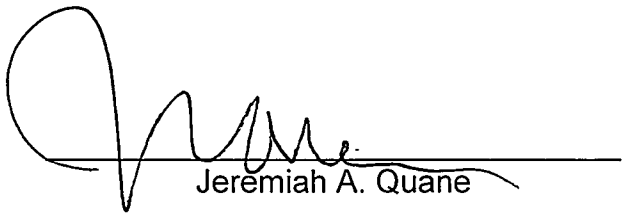

Jeremiah A. Quane

Time	Speaker	Note
01:51:39 PM		CVOC12-4792 Ballard v Kerr Objection to Fees and Costs
02:05:54 PM	Judge	Calls case
02:05:58 PM	Jeremiah Quane	on behalf of the Plaintiff
02:06:00 PM	Scott McKay	on behalf of the Defendant
02:06:03 PM	J. Quane	Argues Objection to Fees and Costs
02:22:43 PM	S. McKay	Argues in opposition to Objection to Fees and Costs
02:22:45 PM	Judge	Orders $64,324.54 with respects to travel costs and other costs to be paid by March 21 @ noon. Will address attorney fees at a later date.
02:26:03 PM	S. McKay	Requests sanctions from the first hearing
02:26:20 PM	Judge	will look into those sanctions

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jaq@quanelaw.com
tsj@quanelaw.com

Attorneys for Defendants/Appellants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff/Respondent,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants/Appellants.

Case No. CV OC 1204792

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, CHARLES BALLARD, AND THE PARTY'S ATTORNEYS, DAVID Z. NEVIN, SCOTT MCKAY, NEVIN, BENJAMIN, MCKAY & BARTLETT LLP, P.O. BOX 2772, BOISE, IDAHO 83701, P. GREGORY

HADDAD, BAILEY & GLASSER LLP, 2855 CRANBERRY SQUARE, MORGANTOWN, WEST VIRGINIA 26508, JAMES B. PERRINE, BAILEY & GLASSER LLP, 3000 RIVERCHASE GALLERIA, SUITE 905, BIRMINGHAM, ALABAMA 35244, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, Brian Calder Kerr, M.D., Silk Touch Laser, LLP, an Idaho limited liability partnership; and Silk Touch Laser, LLP, an Idaho limited liability partnership, dba Silk Touch Med Spa and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser and Lipo of Boise, appeal against the above named Respondent to the Idaho Supreme Court from the following orders of the District Court, both of which were verbally rendered from the bench by the District Judge without written orders:

a. Order of the District Court for the award of witness costs, expert witness fees, travel expenses and costs of the Plaintiff, travel expenses and attorney fees of Plaintiffs' attorney and jury fees of Ada County against Appellants as a result of the mistrial ordered by the District Court on November 14, 2013, entered in the above-entitled action on February 12, 2014, honorable Judge Deborah A. Bail presiding.

b. Order of the District Court for the award of expenses and costs against Appellants in the sum of $64,324.54 that must be paid by noon, March 21, 2014, Mountain Daylight Time as a result of the mistrial ordered by the District Court on November 14, 2013, entered

in the above entitled action on March 12, 2014, Honorable Judge Deborah A. Bail presiding.

2. That the party has a right to appeal to the Idaho Supreme Court and the Orders described in paragraph 1 above are appealable Orders under and pursuant to Rule 11, (a)(1), I.A.R. and the following:

a. The Orders appealed from are final Orders and enforceable and not dependent on or subject to the District Court Order scheduling the case for trial April 8, 2014 for three weeks, excluding each Monday, entered February 21, 2014 and the results or outcome of the scheduled trial. The appealed orders are in effect despite anything to do with the trial or court ordered preparations for the trial and the time period to appeal the Orders is not extended by reason of the scheduled trial.

b. By virtue of the Order of the District Court of March 12, 2014 for the award of expenses and costs against Appellants in the sum of $64,324.54 that must be paid by March 21, 2014 constitutes significant detriment to Appellants and the only viable remedy for relief from the Order is this Appeal.

c. The trial is scheduled April 8, 2014 through April 25, 2014 (3 weeks) and appeals from the Court Orders of February 12, 2014 and March 12, 2014 will be untimely if the appeal is taken after April 25, 2014 or the conclusion of the trial.

d. The Orders appealed from involve legal issues and questions

of first impression in this state in regard to the application, effect and interpretation of Rule 47(u), I.R.C.P.

3. A preliminary statement of the issues on appeal which the Appellants then intend to assert in the appeal are as follows:

a. Did the District Court error in its Order of March 12, 2014 awarding costs and expenses for Respondent against Appellants that must be paid by March 21, 2014 in the sum of $64,324.54.

b. Whether the provisions of Rule 37(e), I.R.C.P., for the assessment of attorney fees, costs or expenses against a party or the party's attorney control, or apply to the violation of a Court Order on a Motion in Limine entered during trial.

c. Whether the provisions of Rule 47(u) for the payment of expenses and attorney fees is the controlling basis and authority for an Order of the District Court for payment of expenses and attorney fees.

d. Whether the District Court erred by failing to make a determination that an occurrence at trial prevented a fair trial for the Respondent in ordering a mistrial on November 14, 2013 that resulted in the Orders of the District Court of February 12, 2014 and March 12, 2014 for the award of costs, expenses and attorney fees against the Appellants.

e. Whether the District Court erred by failing to make a determination that the mistrial was caused by the deliberate

misconduct of the Appellants and their attorneys that resulted in the orders of the District Court of February 12, 2014 and March 12, 2014 for the award of costs, expenses and attorney fees against Appellants.

f. After the jury was impaneled on November 5, 2013, the District Court granted Respondent's Motion in Limine to exclude evidence pertaining to the lack of post-surgical infections of other patients of Appellants. Whether the testimony of Dr. Geoffrey Stiller on November 14, 2013 constituted a violation of this Order of the District Court on the Respondent's Motion in Limine that justified a mistrial that resulted in the Orders of the District Court of February 12, 2014 and March 12, 2014 for awards of costs, expenses and attorney fees.

g. Whether the District Court erred in its Order of February 12, 2014 for payment of jury fees of Ada County by Appellants.

4. No order has been entered sealing all or any portion of the record.

5. (a) Reporter's transcripts have been requested.

(b) The appellants request the preparation of the following reporter's transcripts in hard copy format for:

(1) Portions of the November 5, 2013 trial transcript;

(2) Entire November 14, 2013 trial transcript;

(3) Entire February 12, 2014 hearing transcript; and

(4) Entire March 12, 2014 hearing transcript.

6. The Clerk's standard record is limited to the following as authorized by Rule 28, I.A.R.

a. 3/16/12, Complaint filed;

b. 4/16/12, Answer of Defendants;

c. Notice of Appeal;

d. Table of Contents and Index;

The Appellants request the following documents to be included in the Clerk's records in addition to those specified above for the standard Clerk's record:

a. 10/22/13, Plaintiff's Consolidated Motions in Limine;

b. 10/29/13, Memorandum in Opposition to Plaintiff's Motions in Limine;

c. 10/29/13, Affidavit of Counsel in Support of Memorandum in Opposition to Plaintiff's Motions in Limine;

d. 2/5/14, Affidavit of Terrence S Jones;

e. 2/5/14, Affidavit of Dr. Geoffrey D Stiller;

f. 2/18/14, Declaration of P. Gregory Haddad In Support Of Plaintiff's Memorandum of Attorney Fees and Costs; and

g. 2/21/14, Notice of Trial Setting and Order Governing Further Proceedings.

7. The Appellants request the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court – None.

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

(1) Tiffany Fisher, Boise, Idaho;

(2) Roxanne Patchell, Boise, Idaho; and

(3) Susan Gambee, Boise, Idaho.

(b) The clerk of the district court has been paid the estimated fees for preparation of the reporter's transcripts.

(c) The estimated fee for preparation of the clerk's record has been paid.

(d) The appellate filing fee has been paid.

(e) Service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 20th day of March, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2014, I served a true and correct copy of the foregoing NOTICE OF APPEAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

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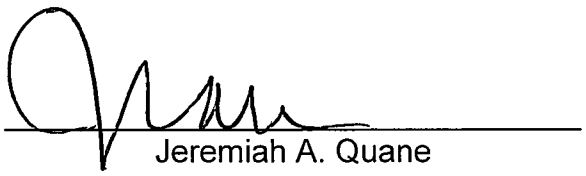

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S NOTICE OF RELIANCE ON PREVIOUSLY FILED CONSOLIDATED MOTIONS *IN LIMINE* AND SUPPLEMENTAL MOTIONS *IN LIMINE*

ORIGINAL

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Idaho Code § 9-102, Idaho Rule of Evidence 103(c), and the Court's Amended Notice of Trial Setting and Order Governing Further Proceedings of February 21, 2014, and hereby gives notice of his reliance on Plaintiff's Consolidated Motions *in Limine*, which Plaintiff filed on October 22, 2013. Plaintiff incorporates by reference this prior filing as if it was fully set forth herein. For the Court's convenience, the matters previously addressed by Plaintiff's Consolidated Motions *in Limine*, and ruled upon by the Court, include the following:

I. The Possibility that Charles Ballard Might Remarry or Enter Into Another Relationship;

II. Krystal Ballard's Purported Noncompliance;

III. The Absence of Infection in Other Silk Touch Patients to Prove Compliance with the Standard of Care as to Krystal Ballard;

IV. Life Insurance and Other Collateral Sources;

V. Dr. Charles Garrison's Untimely Opinion Regarding Fat Embolism and All Undisclosed Expert Opinions;

VI. Defense Experts Who Failed to Properly Familiarize Themselves as to the Applicable Standard of Practice;

VII. Dr. Kerr's Communication with Krystal Ballard's Aunt;

VIII. Dr. Lundeby's Testimony as to Krystal Ballard's Cause of Death;

IX. Evidence, Argument, and Special Verdict Pertaining to Third Party Liability;

X. Testimony of Dr. Kerr Regarding a Medical Malpractice Action Involving Plaintiff's Expert, Dr. Sorenson;

XI. Speaking Objections, Unsworn Testimony of Counsel, and References to the

Parties' Motion Practice While in the Jury's Presence;

XII. *Ad Hominem* Arguments and Remarks;

XIII. Settlement Negotiations;

XIV. Expert Testimony That Invades the Province of the Jury; and

XV. Cumulative Expert Testimony.

Additionally, Plaintiff moves for a further order *in limine* regarding the following matters:

XVI. Dr. Gregory Laurence's Recent Guilty Plea to a Federal Felony Offense is Admissible, as are the Underlying Facts Contained Within His Plea Agreement, Which Dr. Laurence Now Admits Are True; and

XVII. Defendants Should be Precluded from Eliciting Responses From Witnesses or Jurors That Vouch for the Credibility of One of Their Retained Experts.

As for the evidence Plaintiff seeks to preclude, the order(s) *in limine* should forbid Defendants, Defendants' counsel, and Defendants' witnesses at trial from causing or permitting the jury to hear, read, or otherwise become aware of the foregoing matters in any way, whether through the testimony of its witnesses, in cross-examination of Plaintiff's witnesses, in colloquy or argument, or in any other manner, and whether in the case-in-chief, rebuttal, or surrebuttal.

A memorandum in support of these motions follows. An Affidavit of Counsel, to which all exhibits referenced herein are attached, is filed contemporaneously herewith.

MEMORANDUM

XVI. DR. GREGORY LAURENCE'S RECENT GUILTY PLEA TO A FEDERAL FELONY OFFENSE IS ADMISSIBLE, AS ARE THE UNDERLYING FACTS CONTAINED WITHIN HIS PLEA AGREEMENT, WHICH DR. LAURENCE NOW ADMITS ARE TRUE.

Defendants retained Dr. Gregory Laurence and intend to call him as an expert witness on the standard of care. To buttress his testimony and credibility, Defendants are likely to elicit testimony highlighting Dr. Laurence's "various publications, honors and university appointments as set forth in his curriculum vitae," among other qualifications. (*See* Exhibit N to Aff. of Counsel in Support of Pl.'s Resp. to Defs.'s Mots. *in Limine*, Oct. 29, 2013 (Defs.' Ans. to Pl.'s Third Set of Discovery 42).)

In light of such a jury presentation, and by operation of Idaho Rules of Evidence 608 and 609, Plaintiff should be allowed to demonstrate that Dr. Laurence pleaded guilty to a federal felony offense, one which originates from his medical practice, and one which certainly calls into question his character for truthfulness, his fitness to practice medicine, and his qualifications to render standard of care opinions in this case. Moreover, because Dr. Laurence now faces the very real possibility of prolonged imprisonment, substantial fines, restitution, and the loss of his license to practice medicine, Plaintiff should be free to inquire as to whether these significant financial consequences bear on the issue of Dr. Laurence's motives and/or biases in this case.

a. On February 6, 2014, Dr. Laurence Pleaded Guilty to a Federal Felony Offense Arising Out of His Medical Practice.

On May 8, 2013, a federal grand jury in the United States District Court for the District of Colorado returned a six count indictment charging Dr. Laurence and two co-defendants with various felony offenses ranging from Conspiracy to Defraud the United States to Corruptly Endeavoring to Obstruct or Impede the Due Administration of the Internal Revenue Laws. (*See*

Exhibit A, Indictment, *United States v. Eva Melissa Sugar, Jerry Lynn Roberts and Gregory Nathan Laurence*, U.S. District Court, District of Colorado, Criminal Case No. 13-cr-00-193 JLK.) The government charged Dr. Laurence with this latter crime, as well as Obstruction of Justice. (*Id.* at Counts 5 and 6.) Recently, Dr. Laurence "[entered a plea of] guilty to the violation of 26 U.S.C. § 7212(a), Corruptly Endeavoring to Impede the Due Administration of the Internal Revenue Laws, [as] charged in Count 5 of the Indictment." (**Exhibit B**, Plea Agreement 1, Feb. 6, 2014; **Exhibit C**, Change in Plea Minutes 1, Feb. 6, 2014.) By the agreement, the parties stipulate that, under 26 U.S.C. § 7212(a), the government has the burden of proving beyond a reasonable doubt that 1) "the defendant acted with the purpose to obstruct or impede the due administration of the Internal Revenue Laws;" 2) "the defendant's acts had a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws;" 3) "the defendant acted knowingly;" and 4) "the defendant acted corruptly, that is, with the purpose to obtain an unlawful benefit for himself or someone else." (Plea Agreement at 5-6 (*citing* Fed. Crim. Jury Instr., 7th Cir 7212[1]).)

By his signed, sworn guilty plea, Dr. Laurence admits to the following conduct:

- "[Dr. Laurence] practiced medicine through two entities in which he was the sole physician, Germantown Family Care and Obstetrics, LP and Germantown Aesthetics, LP." (Plea Agreement at 7.)
- "Beginning in approximately June, 2002, and continuing through at least the end of 2007, Dr. Laurence used the services of . . . an attorney . . . as well as others associated with a group known as Financial Fortress Associates . . . to take steps to disguise his true income from the IRS and to support the false business and personal tax returns he filed during the relevant period." (*Id.*)
- "Dr. Laurence paid [the attorney] for the use of various unincorporated business organizations ("UBOs") . . . ." (*Id.*)
- "Dr. Laurence also paid [the attorney] to set up bank accounts for the UBOs at two different banks and to list sham trusts as depositors for the bank accounts." (*Id.* at 8.)
- "Dr. Laurence and [the attorney] opened the bank accounts for the UBOs using the UBO EINs in part so that Dr. Laurence's social security number would not be associated with the bank accounts." (*Id.*)

- "Dr. Laurence paid [the attorney] to conduct bank transactions for the UBOs on his behalf." (*Id.*)
- "Dr. Laurence took steps which purported to transfer ownership of the sham trusts of assets that he or his medical practices owned, such as his personal residence, his cars, the buildings where he conducted his practices, and the equipment used in those practices." (*Id.*)
- "[Dr. Laurence] issued checks from his professional corporation to the fictitious trust entities for expenses such as rents and equipment leases. These checks were deposited into various UBO accounts. Dr. Laurence then treated these payments as legitimate deductions for business expenses to reduce the apparent profit generated by Germantown Family, thereby reducing its taxable income." (*Id.* at 8-9.)
- "Dr. Laurence also avoided payroll taxes for Germantown Family and Germantown Aesthetics by stopping his previous practices of withholding and paying over payroll taxes and issuing his employees Forms W-2 each year. Instead, Dr. Laurence caused his employees to be paid their wages and other incentives, without any withholdings and as purported independent contractors, through [a UBO.]" (*Id.* at 9.)
- "Between January 1, 2003, and April, 2007, Dr. Laurence deposited over $1.7 million into [a UBO account] from his practices. He did not report the employees' receipt of those wages to the IRS in any form, but he did claim his payments as deductions for labor on Germantown Family's returns." (*Id.*)
- "Dr. Laurence caused the preparation and filing of federal tax returns for Germantown Family for tax years 2002 through 2007, which reported these false deductions and substantially under-reported the total compensation he received. During the same period, Dr. Laurence did not file any returns or other documents which would have allowed the IRS to determine that Germantown Aesthetics even existed." (*Id.*)
- "Dr. Laurence also caused the preparation and filing of false individual federal income tax returns for tax years 2002 through 2007, which tracked the corporate returns by substantially under-reporting the total compensation he received from his medical practices." (*Id.*)
- "Dr. Laurence used the funds in the UBO account to pay personal expenses, such as vehicles, his home mortgage, and tuition for his children's schools." (*Id.*)
- "During the time period at issue . . . neither [the attorney] nor Dr. Laurence filed Forms 1065 for the UBOs or federal tax returns for any of the fictitious entities. Dr. Laurence was aware that he had a duty to file tax returns which contained accurate information and that the IRS was relying on the information in his corporate and personal returns when computing taxes due and owing. The total tax loss from Dr. Laurence's conduct was between approximately $195,000 and approximately $300,000." (*Id.* at 10.)

The Plea Agreement continues to describe how Dr. Laurence "took a number of steps to obstruct [the ensuing grand jury] investigation," and furthermore, how Dr. Laurence defied a

court order compelling the production of materials requested in grand jury subpoenas. (*Id.* at 10-11.) In fact, "[o]n January 23, 2009, the Court issued an order finding Dr. Laurence in contempt of its . . . order to compel." (*Id.* at 11.) The Court imposed fines upon Dr. Laurence for his contemptuous behavior. (*Id.*)

Pursuant to the Plea Agreement, "[Dr. Laurence] agrees to pay restitution . . . in the amount of all taxes, interest, and penalties due and owing since 2003 . . . ." (*Id.* at 1.) In addition to restitution, Dr. Laurence faces an estimated eighteen (18) to thirty-six (36) months in prison, fines estimated between four thousand dollars ($4,000.00) and six hundred thousand dollars ($600,000.00), and one year of supervised release. (*Id.* at 12-13.) The parties, including Dr. Laurence, signed and filed the Plea Agreement on February 6, 2014. (*Id.* at 1, 14.) That same day, Senior District Judge John L. Kane accepted Dr. Laurence's plea and set sentencing for September 4, 2014. (Change in Plea Minutes at 1-2.)

Germantown Aesthetics, as identified in the Plea Agreement, is the entity used by Dr. Laurence to practice cosmetic medicine. Defendants note as much in their expert disclosure, by which they list: "Gregory Laurence, M.D., Germantown Aesthetics." (*See* Defs.' Ans. to Pl.'s Third Set of Discovery 37, July 22, 2013.) Dr. Laurence describes himself in his *curriculum vitae* as the Medical Director of Germantown Aesthetics. Similarly, Defendants' disclosure touts Dr. Laurence's obstetrical experience, and his *curriculum vitae* likewise lists a long association with Germantown Family Care and Obstetrics, the other medical practice described within the Plea Agreement.

There is no indication, based upon a review of readily and publicly-available licensure information from the Idaho or Tennessee Boards of Medicine, that Dr. Laurence reported any information pertaining to his plea in Colorado. (**Exhibit D**, Tennessee Department of Health

Practitioner Profile Data; State of Idaho Board of Medicine Public Record Information Detail; Utah Division of Occupational and Professional Licensing Information.)

b. Evidence of Dr. Laurence's Plea, the Criminal Conduct Serving as the Basis for That Plea, and the Consequences of that Plea, is Admissible Under Idaho Rules of Evidence 608 and 609.

By their previous motion *in limine* on this topic, Defendants sought to preclude evidence of the government's *charges* against Dr. Laurence, arguing that because "[n]o trial date, plea or conviction of any kind has been entered against Dr. Laurence . . . any reference to Dr. Laurence's indictment at the trial would be unfairly prejudicial, irrelevant and arguably raise an appeal issue." (Defs.'s Mem. in Support of Mots. *in Limine* 8, Oct. 21, 2013.) Defendants also argued that evidence of Dr. Laurence's indictment is inadmissible under IRE 609 as "Dr. Laurence's indictment . . . is not a conviction of any kind." (*Id.* at 8-9.) This Court ultimately agreed.

Circumstances today, however, are vastly different. When the United States District Court for the District of Colorado accepted Dr. Laurence's guilty plea on February 6, 2014, any potential prejudice previously existing evaporated, and evidence pertaining to the guilty plea became admissible. Idaho Rule of Evidence 609 provides as follows:

> For the purposes of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for the purpose of impeachment of a party to the action or proceeding, the party shall have the option to present evidence of the nature of the conviction, but evidence of the circumstances of the conviction shall not be admissible.

In this case, there is no question that Dr. Laurence pleaded guilty to a federal felony offense directly implicating his credibility. Dr. Laurence, by his own admission, *knowingly*

participated in a sophisticated, corrupt, criminal scheme designed to mislead the Internal Revenue Service, and consequently, to avoid paying personal and corporate taxes owed. This conduct, which took place over the course of *years*, stems directly from the very same medical practices Dr. Laurence operated in gathering the experience Defendants tout in attempting to qualify Dr. Laurence as an expert in this case.

Moreover, there is no question that the probative value of this evidence greatly outweighs any prejudicial effect that might befall Defendants. As mentioned below, Dr. Laurence serves in this case as a repetitive standard of care expert. Defendants have the option of calling Dr. Laurence, or not calling Dr. Laurence. Because Defendants enjoy such a choice, cries of weighty prejudice should be disregarded. If Defendants choose to put Dr. Laurence on the stand, Defendants will have, by necessity, decided that any purported prejudice is outweighed by other factors. In that case, Defendants will have, in essence, performed the Rule 609 balancing test for the Court, and Plaintiff must be allowed to confront Dr. Laurence in accordance with Rule 609's full operation.

The Rules of Evidence also provide that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." I.R.E. 608(b). "They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning . . . the character of the witness for truthfulness or untruthfulness . . . ." *Id.*

And "[a]lthough the Idaho Rules of Evidence do not specifically address impeachment of witnesses by evidence of bias, the right to do so is unquestionable." D. Craig Lewis, *Idaho Trial Handbook* 342 (2d ed. 2005). The reason for this is simple: "Proof of bias is almost always

relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all* evidence which might bear on the accuracy and truth of a witness' testimony." *State v. Thumm*, 153 Idaho 533, 540, 285 P.3d 348, 355 (Ct. App. 2012) (*quoting U.S. v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 469 (1984)) (emphasis added). For this reason, because "[i]t would not be unusual for a medical expert to have a bias in favor of the party who is paying his expert witness fee . . . cross-examination as to who is paying for the expert is almost always allowed when the expert is testifying." *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 925, 712 P.2d 621, 626 (1985).

Ultimately, the scope of cross-examination rests in the Court's discretion. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct.App.1985). That being said, "[o]ur system of dispute resolution permits and encourages challenges to the credentials and opinions of an opponent's experts." *Harmston v. Agro-W., Inc.*, 111 Idaho 814, 820, 727 P.2d 1242, 1248 (Ct. App. 1986) (*citing State v. Cypher*, 92 Idaho 159, 438 P.2d 904 (1968) and *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951)).

A recent Idaho Court of Appeals opinion discusses the distinction between IRE 609 and 608(b) and the broad discretion of a trial judge to permit evidence of a witness's character for truthfulness under I.R.E. 608(b) -- which discretion should be exercised in this case to permit evidence of Dr. Laurence's untruthful character. In *State v. Bergerud*, the trial court precluded the defendant from impeaching a witness on cross-examination based upon that witness's conviction of a misdemeanor for lying to police. 155 Idaho 705, 316 P.3d 117 (Ct. App. 2013). The trial court held that such impeachment was not permissible under IRE 608 and 609, which the trial court held applies only to felonies. 155 Idaho at ---, 316 P.3d at 122. On appeal, the Idaho Court of Appeals held that the trial court erred in not separately considering the

admissibility of such evidence under IRE 608(b) and acknowledged the discretion of a trial judge to permit such evidence. *Id.*

As noted by the Court in *Bergerud,* "although Rule 608(b) prohibits extrinsic evidence of a witness's past conduct to attack credibility, it expressly allows cross-examination of the witness concerning instances of the witness's conduct if it is probative of the witness's truthfulness." *Id.* (italics and footnote omitted) (*citing State v. Araiza,* 124 Idaho 82, 90, 856 P.2d 872, 880 (1993); *State v. Guinn,* 114 Idaho 30, 38, 752 P.2d 632, 640 (Ct.App.1988)). With respect to whether the misdemeanor conduct was relevant, the Court further held that "[m]aking a false statement to a law enforcement officer, like perjury, is an act that is intimately connected to credibility. In fact, it is itself a crime." 155 Idaho at ---, 316 P.3d at 124 (*citing* I.C. § 18–705). "It not only indicates a willingness to be dishonest when it serves one's own interest, but a willingness to defy authority and break the law when doing so." *Id.*

The conduct admitted by Dr. Laurence in the subject Plea Agreement is far more egregious than the conduct at issue in *Bergerud.* That conduct certainly reveals Dr. Laurence's willingness to be dishonest when it serves his interests, as it demonstrates Dr. Laurence's willingness to defy authority and break the law. After all, Dr. Laurence pleaded guilty to 1) acting with the purpose to obstruct or impede the due administration of the Internal Revenue Laws; 2) performing acts that had a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws; 3) doing so knowingly; and 4) acting corruptly, that is, with the purpose to obtain an unlawful benefit for himself or someone else. Of additional, and considerable, significance is the fact that Dr. Laurence's criminal conduct stems directly from the medical practices upon which he relies in providing qualified expert testimony in this case.

Furthermore, the conduct described in Dr. Laurence's Plea Agreement demonstrates his

contempt and disdain for the legal process in refusing to comply with the District Court's order that he produce grand jury materials directed at his medical and cosmetic medicine practice. If Dr. Laurence refused to honor subpoenas and court orders specifically directed at him and his medical practices, how can it be assumed that he complied with the legal requirements associated with rendering testimony in this case, including the requirement that he adequately familiarize himself with the local standard of care? Again, Dr. Laurence's admitted conduct demonstrates a willingness to defy authority and break the law, particularly when it serves his own self-interest. Accordingly, Plaintiff should be permitted to inquire of Dr. Laurence regarding this contempt of the legal process, which is probative of his character for truthfulness under IRE 608(b).

Additionally, Dr. Laurence's character for untruthfulness exists through his medical licensure, including in Idaho, where he is now licensed. Dr. Laurence testified at his deposition that he had not informed any of the three states where he is licensed, including Idaho, of his pending felony charges. (Laurence Dep. 168:17 – 169:9, Oct. 2, 2013.) In Idaho, a physician is required to report not only a felony conviction but the "commission of any act constituting a felony." Idaho Code § 54-1814(1) (licensed physician required to report conviction of a felony); Idaho Code § 54-1814(21) (licensed physician required to report commission of an act constituting a felony or crime of moral turpitude). In addition, a physician in Idaho, upon renewal of his medical license, is required to report, among other matters, whether they have been "charged with or convicted of a felony...." (*See* Exhibit O to Aff. of Counsel in Support of Pl.'s Resp. to Defs.' Mots. *in Limine*, Oct. 29, 2013 (State of Idaho, Board of Medicine, Physician and Surgeon License Renewal Application Form).)

Notwithstanding the foregoing, it appears Dr. Laurence never reported his Indictment to the appropriate regulatory boards. It also appears that, to date, Dr. Laurence has likewise failed

to advise these boards of his guilty plea. This information is probative of his character for truthfulness, and thus, it is admissible. Independent of this analysis, however, once Dr. Laurence entered his guilty plea, application of Rules 608 and 609 renders the subject evidence admissible in any event.

Dr. Laurence is a redundant defense expert on the issue of standard of care. Defendants have identified two other physicians they intend to call to address the standard of care, one from Idaho, and another from Spokane who also maintains a practice in Coeur d'Alene. The notion that Defendants will suffer prejudice by Plaintiff's cross-examination of Dr. Laurence is unavailing. It is Defendants who failed to adequately vet this expert, and who were surprised when they learned for the first time of Dr. Laurence's indictment at deposition. Plaintiff should neither be faulted, nor disadvantaged, simply because Defendants were unaware of Dr. Laurence's criminal issues, or because Dr. Laurence chose to conceal the subject information from defense counsel. In fact, it is Mr. Ballard who will be unfairly prejudiced unless he is allowed a full and fair opportunity to cross-examine this expert -- a process our system of justice both permits and encourages.

c. The Significant Consequences and Penalties Facing Dr. Laurence Are Admissible.

With his guilty plea, Dr. Laurence faces the very real potential of years of imprisonment, significant fines, and a weighty restitution obligation. Dr. Laurence also faces dramatic penalties with regard to his medical licensures in Tennessee, Idaho, and Utah. *See* Tennessee Code § 63-6-214(a)(10) (grounds for medical license revocation include conviction of a felony); Idaho Code § 54-1814(1) (same). Committing acts constituting a felony is likewise grounds for discipline and a physician is required to report such conduct. Idaho Code § 54-1814(21).

The foregoing, looming consequences and termination of his income stream provide Dr.

Laurence with a strong motive to work with Defendants and express a favorable opinion that will result in additional, lucrative expert witness work. As such, these charges and myriad of consequences are probative and admissible to show motive. IRE 404(b) (evidence of other crimes, wrongs or acts may be admissible to show motive). In addition, such evidence is admissible to show bias on the part of Dr. Laurence. *State v. Araiza*, 124 Idaho 82, 91, 856 P.2d 872, 881 (1993) ("[T]he bias, prejudice, or motive of a witness to lie concerning issues presented in a trial is always material and relevant to effective cross-examination."); *see also Cosgrove By and Through Winfree v. Merrell Dow Pharmaceuticals, Inc.,* 117 Idaho 470, 476-77, 788 P.2d 1293, 1299-1300 (1989) (discussing impeachment of expert by evidence of amount earned testifying in court).

d. Conclusion

For the foregoing reasons, evidence of Dr. Laurence's federal felony guilty plea, the potential consequences of that plea, and the admitted facts underlying that plea, should be admitted.

XVII. DEFENDANTS SHOULD BE PRECLUDED FROM ELICITING RESPONSES FROM WITNESSES OR JURORS THAT VOUCH FOR THE CREDIBILITY OF ONE OF THEIR RETAINED EXPERTS.

During the first trial of this matter, Defendants' counsel inquired of a prospective juror and Plaintiff's expert, Dr. Sorenson, about Defendant's retained expert, Dr. Thomas Coffman.[1] Defendants asked questions of this juror and of Dr. Sorenson, with the intention of bolstering the credibility of Dr. Coffman. Such questioning, and such testimony, must be precluded moving forward, as any such testimony invades the province of the jury.

"[A]n expert witness may provide an opinion '[i]f scientific, technical, or other

[1] Defendants retained Dr. Coffman, an infectious disease specialist, who presently charges $1,500.00 per hour for testimony in this case.

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Hansen v. Roberts*, 154 Idaho 469, 299 P.3d 781, 786 (2013) (*quoting* Idaho R. Evid. 702). "Therefore, after the court qualifies a witness as an expert, it "must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence." *Id.* (*citing State v. Pearce,* 146 Idaho 241, 246, 192 P.3d 1065, 1070 (2008)). "Pursuant to I.R.E. 704, an expert's testimony is not inadmissible merely because it embraces an ultimate issue to be decided in the case; however, '[e]xpert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible.'" *Id.* (*quoting State v. Ellington,* 151 Idaho 53, 66, 253 P.3d 727, 740 (2011)). "[E]vidence is generally inadmissible under I.R.E. 702 if it vouches for the credibility of another witness." *Id.* (*citing State v. Perry,* 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003)).

None of the jurors, lay witnesses, or experts in this case should be offering testimony designed to bolster an expert witness's credibility in the eyes of the jury. Members of the jury will be well-qualified, based upon common sense and normal experience, to make determinations of expert witness credibility. Accordingly, counsel should be precluded from eliciting, and experts should be precluded from offering, testimony that vouches for, or otherwise bolsters, the credibility of any other witness.

Dated this 25th day of March, 2014.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____ for

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2014, I served a true and correct copy of the foregoing **Plaintiff's Notice of Reliance on Previously Filed Consolidated Motions *in Limine* and Supplemental Motions *in Limine*** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

for
Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL

ORIGINAL

AFFIDAVIT OF P. GREGORY HADDAD

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, TO WIT:

I, P. Gregory Haddad, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am one of the attorneys representing Plaintiff in this litigation.

2. On this date, Plaintiff filed his Notice of Reliance on Previously Filed Consolidated Motions *in Limine* and Supplemental Motions *in Limine*.

3. True and accurate copies of the exhibits referenced within Plaintiff's Notice of Reliance on Previously Filed Consolidated Motions *in Limine* and Supplemental Motions *in Limine* are attached hereto as follows.

4. A true and accurate copy of Dr. Gregory Laurence's Indictment in the United States District Court for the District of Colorado, dated May 8, 2013, is attached hereto at **Exhibit A**.

5. A true and accurate copy of Dr. Gregory Laurence's Plea Agreement in the United States District Court for the District of Colorado, dated February 6, 2014, is attached hereto at **Exhibit B**.

6. A true and accurate copy of the Change in Plea Minutes in the United States District Court for the District of Colorado, dated Feb. 6, 2014, is attached hereto at **Exhibit C**.

7. True and accurate copies of the Tennessee Department of Health Practitioner Profile Data, State of Idaho Board of Medicine Public Record Information Detail, and Utah Division of Occupational and Professional Licensing Information are attached hereto at **Exhibit D.**

8. Neither Plaintiff, nor Plaintiff's counsel, possess a transcript of the pertinent, previous trial proceedings in this matter. Nevertheless, I have reviewed the factual assertions stated in the contemporaneously filed motion and memorandum of law, and I believe the descriptions of such factual matters to be true, accurate and consistent with my memory of such matters during trial.

And further affiant saith not.

P. Gregory Haddad

STATE OF WEST VIRGINIA;
COUNTY OF MONONGALIA, to-wit:

Taken, subscribed and sworn to before me this 21st day of March, 2014.

My Commission expires: Dec. 16, 2021

Notary

OFFICIAL SEAL
DOROTHY A. SOMMERS
NOTARY PUBLIC
STATE OF WEST VIRGINIA
526 Tyrone Road
Morgantown, WV 26505
My Commission Expires Dec. 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2014, I served a true and correct copy of the foregoing ***Affidavit of Counsel*** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

for
Scott McKay

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 13-cr-00-193 JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. **EVA MELISSA SUGAR,**
2. **JERRY LYNN ROBERTS, and**
3. **GREGORY NATHAN LAURENCE**

Defendants.

INDICTMENT
18 U.S.C. § 371
26 U.S.C. § 7212(a)
18 U.S.C. § 2
26 U.S.C. § 7203
18 U.S.C. § 1503

The Grand Jury charges:

COUNT 1
EVA MELISSSA SUGAR
(18 U.S.C. § 371 - Conspiracy to Defraud the United States)

THE CONSPIRACY

1. From on or about sometime in 1999, the exact date being unknown to the Grand Jury, and continuing through on or about April 2008, in the State and District of Colorado, defendant SUGAR did unlawfully, voluntarily, intentionally, and knowingly conspire, combine, confederate, and agree together and with J.L., M.D.B., J.D., and

other individuals both known and unknown to the Grand Jury to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service ("IRS") of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue, namely income, employment, and other federal taxes.

THE PERSONS

At various times relevant to this Indictment:

2. J.L. was a resident of Georgia who operated Financial Fortress Associates, or a variation of that name (hereinafter "FFA"), an organization that promoted and advised its clients on schemes to avoid the payment of income and other federal taxes.

3. Defendant EVA MELISSA SUGAR, also known as Melissa Sugar, was a resident of Aurora, Colorado, and was self-employed as an attorney specializing in tax and other legal matters in Denver, Colorado. SUGAR worked with FFA clients to execute the schemes FFA promoted.

4. M.D.B. was a resident of Florida and worked as a promoter for FFA.

5. J.D. was a resident of Georgia and worked with FFA to execute the FFA schemes.

MANNER AND MEANS OF THE CONSPIRACY

6. The conspiracy was carried out using the following manner and means, which created interdependency among the conspirators:

a. J.L. and M.D.B, with others, operated FFA. FFA promoted Pure Trust Organizations ("PTO") and "private banking" using so-called Banking Unincorporated Business Organizations ("BUBO") as vehicles to conceal business and personal income and asset ownership and, thereby, to avoid paying income, employment, and other federal taxes to the IRS. FFA held seminars and workshops around the country to promote its schemes, which individuals paid to attend. SUGAR occasionally attended and spoke at FFA seminars. At those seminars, FFA's promoters explained the schemes and provided referrals to their co-conspirators, including SUGAR, who charged fees to execute the schemes for FFA clients.

b. As part of the FFA schemes, SUGAR or others established one or more Unincorporated Business Organization(s) ("UBO") for each client and applied for an IRS-issued Employee Identification Number ("EIN") for those UBOs. Each UBO was named as a "management" company, i.e. "X Management." For each UBO, SUGAR opened a corresponding bank account for a "BUBO" with the same name as the UBO. The bank account for each BUBO was set up to accept deposits by at least one named fictitious entity, which the co-conspirators generally described as a "trust" or PTO. FFA conspirators, including J.D., set up these trusts for the FFA clients.

c. FFA clients used the fictitious trust entities as companies "doing business as" the management company for which the BUBO bank account was established. The entities, however, existed in name only. Generally, the FFA client either (1) caused receipts from a legitimate business to be paid to one of the fictitious

entities, diverting the income to the BUBO bank account and thereby understating the business's gross receipts, or (2) made payments to one of the fictitious entities and deducted the payments as expenses for the FFA client's legitimate business, thereby decreasing the business's income.

d. SUGAR and the FFA client then caused funds from the BUBO account to be (1) paid directly back to the FFA client, (2) used to pay the FFA clients' personal expenses, (3) used for personal purchases, such as for cars or vacation homes, or (4) transferred offshore or to a warehouse bank set up to disguise the ownership and source of the funds.

e. Another variation of FFA's program involved placing assets into the names of the fictitious entities that used the bank account to conceal the proceeds of the sale of those assets. As noted, conspirators frequently established the entities as "trusts," with one of the promoters, such as J.L. or M.D.B., named as trustee. When the FFA client sold the assets, the buyer would issue a check to the trust, which then deposited the check into the BUBO bank account. The FFA client would then use the funds as discussed in subparagraph 6(d) above.

f. SUGAR provided various services to her clients, which as described, included establishing UBOs, applying for EINs for the UBOs, and opening associated BUBO bank accounts that her clients used to conceal assets and income and to avoid paying taxes to the IRS. SUGAR generally was the trustee for the UBOs and had signatory authority for the bank accounts. If her client also wanted signatory

authority for the BUBO bank accounts, SUGAR would list the client as an "administrative assistant," "Managing Director," or some other officer or employee of the fictitious trust entity or UBO/BUBO.

g. Often, however, to prevent the client's name from association with the BUBO account, SUGAR and the client would identify a third party, such as a family member, as the administrative assistant or other position for the fictitious trust entity or UBO/BUBO. That person would be given signatory authority for the BUBO bank account. These individuals exercised no authority or control over the UBO/BUBO, the fictitious trust entity, or the assets thereof. So that they could use the BUBO bank account without involvement by the third party, SUGAR and her clients had signature stamps created for these individuals.

h. With the BUBO bank accounts established, SUGAR then conducted transactions for her clients using those accounts, including for example, signing blank checks or authorizing wire transactions for her clients' use as described in subparagraph 6(d), endorsing checks for deposit, and withdrawing cash.

i. SUGAR charged her clients fees for her services, including annual maintenance fees and fees on a per-service basis, such as for signing checks or authorizing a wire transfer.

j. The FFA client and owner of the UBO/BUBO would not file federal tax returns for the UBO/BUBO or the fictitious entities, despite legal filing requirements. Indeed, because the UBOs did not file federal income tax returns and all of the bank

accounts established for the BUBOs were non-interest-bearing accounts; the IRS was unaware of the use and operation of the BUBO accounts and entities. Only the request and receipt of the EIN would indicate to the Government that the UBO/BUBO ever existed.

OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY

7. In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed in the District of Colorado and elsewhere:

a. On or about November 23, 1999, SUGAR applied to the IRS for EINs in the names of Streamside Management, Northside Management, Maple Leaf Management, Oxford Management, Cascade Management, Management Unlimited, Eastside Management, and Avon Management.

b. On or about on February 9, 2001, SUGAR opened a bank account at Compass Bank, formerly known as FirsTier Bank, in the name of Streamside Management, with SUGAR and ROBERTS'S then minor son as signatories.

c. On or about August 15, 2002, at the request of her client, L.S., SUGAR wrote out and signed a check from a Bank of Denver account for Garnet Management to Bexar Technologies in the amount of $21,000.

d. On or about September 23, 2002, SUGAR sent an e-mail to her client, Gregory Laurence, instructing him that SUGAR alone must sign all endorsements on checks deposited into and all checks written from Laurence's BUBO bank accounts, unless Laurence or his wife were willing to provide their identification and social security

numbers to the bank.

e. On or about March 26, 2004, SUGAR transferred the bank account for Triumph Management from Liberty Savings Bank to Compass Bank.

f. On or about between June 16, 2006, and June 23, 2006, SUGAR signed 504 blank checks for Best for Hearing Limited Partnership, an UBO she established for client E.B.

g. On or about May 14, 2007, SUGAR authorized the wire transfer of $213,500 from the Compass Bank account for Aquarius Management for her client J.K.

h. On or about May 25, 2007, SUGAR caused $1,091,348.48 to be wired from Northside Management's Compass Bank account to Surety Title Agency for her client J.S.'s purchase of a vacation home.

i. On or about July 5, 2007, SUGAR transferred $200 from Best for Hearing Limited's Compass Bank account to her own bank account as payment for services rendered in relation to that entity for her client E.B.

j. On or about January 15, 2008, SUGAR deposited or caused to be deposited into her personal account a Postal Money Order for $457 from Reef Management.

k. On or about November 7, 2007, SUGAR wrote and cashed seven checks from the BUBO accounts at Compass Bank for her client Gregory Laurence.

l. On or about April 24, 2008, SUGAR cashed a negotiable instrument for $13,776 from the Compass Bank account for Palm Tree Management.

The foregoing was in violation of Title 18, United State Code, Section 371.

COUNT 2
EVA MELISSA SUGAR AND JERRY ROBERTS
(26 U.S.C. § 7212(a) and 18 U.S.C. § 2 – Corrupt Endeavor to Obstruct or Impede Due Administration of the Internal Revenue Laws and Aiding and Abetting)

8. The Grand Jury realleges and incorporates paragraph three herein.

9. At all times relevant to the indictment, ROBERTS was a resident of Florida. ROBERTS worked for Roberts Enterprises, a family-owned fundraising business.

10. Beginning on or about November 23, 1999, and continuing through on or about April 2008, in the State and District of Colorado and elsewhere, the defendants SUGAR and ROBERTS, aiding and abetting each other, did corruptly endeavor to obstruct and impede the due administration of the Internal Revenue laws by the following means, among others:

a. ROBERTS paid SUGAR to set up UBOs, associated BUBO bank accounts, and nominee fictitious trust accounts as depositors for the bank accounts. Specifically, SUGAR established Streamside Management, Triumph Management, and Universal Management, each with an associated bank account and several associated fictitious trust entities.

b. SUGAR and ROBERTS identified other individuals, including ROBERTS'S family members, as "managers," "administrative assistants," or other positions for the various management companies and trust entities. These individuals exercised no control over the entities or the assets held in the associated bank

accounts. For example, when SUGAR and ROBERTS first opened the BUBO bank accounts, ROBERTS caused his then minor son to be identified as the Administrative Assistant for the fictitious trust entities associated with each management company. ROBERTS'S son also had signatory authority at various times for each of the three management companies. ROBERTS used his son to cash checks drawn from the BUBO bank accounts.

c. SUGAR and ROBERTS caused signature stamps to be created for the third-party signatories on the BUBO bank accounts and authorized facsimile signatures for those individuals.

d. SUGAR also identified herself as the "Managing Director" for the fictitious trust entities with signatory authority for each of the BUBO bank accounts. SUGAR and the third parties were the only individuals with signatory authority for the bank accounts ROBERTS ultimately controlled.

e. ROBERTS used the fictitious trust entities and management companies, along with SUGAR's services, to disguise income paid to him by Roberts Enterprises.

f. ROBERTS used the funds in the BUBO bank accounts to pay for personal expenses, such as credit card payments, mortgage payments, utility and telephone bills, and for cash.

g. During the time period at issue, from November 1999 through April 2008: (i) ROBERTS did not file individual federal income tax returns for calendar years

2000 through 2007; (ii) neither ROBERTS nor SUGAR filed Forms 1065 for Streamside Management, Triumph Management, or Universal Management; and (iii) ROBERTS and SUGAR did not file federal tax returns for any of the fictitious entities.

The foregoing was in violation of Title 26, United State Code, Section 7212(a).

COUNT 3
EVA MELISSA SUGAR
(26 U.S.C. § 7203 – Failure to File Tax Return)

11. During the calendar year 2007, defendant SUGAR, who was a resident of Aurora, Colorado, was self-employed as an attorney in Denver, Colorado. During that year, SUGAR earned income in excess of $8,750, which income required that SUGAR file a federal income tax return on or before April 15, 2008, to any proper officer of the Internal Revenue Service. Defendant SUGAR, well knowing and believing all of the foregoing, knowingly failed to file any return on that income.

The foregoing was in violation of 26, United States Code, Section 7203.

COUNT 4
JERRY ROBERTS
(18 U.S.C. § 1503 – Obstruction of Justice)

12. Beginning on or about May 2, 2008, and continuing thereafter up to and including on or about July 22, 2008, in the State and District of Colorado and elsewhere, ROBERTS corruptly endeavored to influence, obstruct, and impede the due administration of justice, in that, after contact by Internal Revenue Service criminal investigators and the service of Grand Jury subpoenas relating to Streamside Management, Triumph Management, Universal Management, and Roberts Enterprises,

ROBERTS committed the following acts:

a. ROBERTS signed and sent or caused to be sent to one or more Special Agents of the IRS a letter that stated "COMPLIANCE HEREWITH IS MANDATORY." The letter enclosed a "Public Service Questionnaire," which demanded the Special Agent's personal information. The questionnaire stated that failure to advise ROBERTS before releasing information regarding him to any person may subject the Special Agents to civil or criminal action.

b. ROBERTS signed and sent or caused to be sent to one or more IRS Special Agents a "Notice of Default" claiming the Special Agent had failed to complete the "Public Service Questionnaire" and asserting, among other things, that that failure to respond will result in the Special Agent's agreement to "Commercial Dishonor," that "a Default" be entered against the Special Agent, and to "being a participant in Fraud." The letter also asserted that failure of a foreign agent to mail a certified copy of a "Foreign Agents Registration Statement" with photo identification to ROBERTS "may result in a claim not to exceed One Million Dollars."

c. ROBERTS signed an "Affidavit of Public Notice" and recorded or caused to be recorded with the Polk County Clerk of the Court documents including (i) copies of the "Public Service Questionnaire" and "Notice of Default" mentioned in subparagraphs 12(a) and (b), and (ii) "Disclosure Statements" for IRS Special Agents stating that failure to complete a "Public Servant's Questionnaire" and provide "verified Proof of Claim" would be accepted as the Special Agents' "agreement that a Default be

entered against you for Two Hundred Thousands [sic] Dollar and no cent[USD]."

d. ROBERTS mailed or caused to be mailed to one or more IRS Special Agents the recorded documents identified in subparagraph 12(c).

The foregoing was in violation of Title 18, United States Code, Section 1503.

COUNT 5
EVA MELISSA SUGAR AND GREGORY LAURENCE
(26 U.S.C. § 7212(a) and 18 U.S.C. § 2 – Corrupt Endeavor to Obstruct or Impede Due Administration of the Internal Revenue Laws and Aiding and Abetting)

13. The Grand Jury realleges and incorporates paragraph three herein.

14. At all times relevant to the indictment, Gregory LAURENCE was a resident of Tennessee. LAURENCE was a doctor who operated two businesses, Germantown Aesthetics, LP ("GA") and Germantown Family Care & Obstetrics, LP ("GFCO").

15. Beginning on or about January 4, 2002, and continuing through on or about October 2008, in the State and District of Colorado and elsewhere, the defendants SUGAR and LAURENCE, aiding and abetting each other, did corruptly endeavor to obstruct and impede the due administration of the Internal Revenue laws by the following means, among others:

a. LAURENCE paid SUGAR to set up UBOs, associated BUBO bank accounts, and nominee fictitious trust accounts as depositors for the bank accounts. Specifically, SUGAR established Jasper Management, Amethyst Management, Capricorn Management, Diamond Management, Emerald Management, Moonstone Management, Pearl Management, Sagittarius Management, and Sapphire Management, each associated with its own fictitious trust entity.

b. LAURENCE caused his wife to be identified as "Assistant Administrator" with signatory authority for the Jasper Management, Emerald Management, Moonstone Management, and Pearl Management bank accounts with authority to use a facsimile signature. SUGAR identified herself as the "Managing Director" for the fictitious trust entities with signatory authority for each of the BUBO bank accounts.

c. SUGAR and LAURENCE'S wife were the only individuals with signatory authority for the bank accounts LAURENCE ultimately controlled. LAURENCE himself was not named in any position for the numerous entities SUGAR and LAURENCE established.

d. SUGAR and LAURENCE caused signature stamps to be created for LAURENCE'S wife and authorized facsimile signatures for the BUBO bank accounts for which she had signatory authority.

e. LAURENCE caused GFCO to issue checks payable to the fictitious trust entities associated with his BUBO bank accounts to make a portion of GFCO's business income appear as legitimate deductions and costs of goods sold, thereby reducing GFCO's taxable income. LAURENCE also caused the GFCO partnership federal income tax returns prepared for calendar years 2002 through 2007 to report those sums as deductions.

f. LAURENCE used the management companies, fictitious trust entities, and SUGAR's services to disguise the existence of GA. LAURENCE did not

file federal income tax returns for GA for calendar years 2002 through 2007.

g. LAURENCE used fictitious trust entity Dynamic Health Care Staffing and Jasper Management, along with SUGAR's services, to pay himself and employees of GA and GFCO as "independent contractors" and to avoid paying federal employment taxes. LAURENCE did not issue those employees IRS Forms 1099.

h. Laurence used the funds in the BUBO bank accounts to pay for items including expenses associated with his businesses, school tuition for his children, cars, and credit card payments.

i. During the time period at issue, from January 2002 through April 2008, neither SUGAR nor LAURENCE filed Forms 1065 for the UBO management companies or federal tax returns for any of the fictitious entities.

The foregoing was in violation of Title 26, United State Code, Section 7212(a).

COUNT 6
GREGORY LAURENCE
(18 U.S.C. § 1503 – Obstruction of Justice)

16. Beginning on or about March 5, 2008, and continuing thereafter up to and including on or about January 22, 2009, in the State and District of Colorado and elsewhere, LAURENCE corruptly endeavored to influence, obstruct, and impede the due administration of justice, in that, after contact by Internal Revenue Service criminal investigators and the service of Grand Jury subpoenas relating to GA and GFCO, LAURENCE committed the following acts.

a. LAURENCE signed and sent or caused to be sent to one or more

IRS Special Agents, through the United States Attorney's Office, documents including: (1) "Public Servant's Questionnaires" requesting the Special Agents to provide personal information, and (2) "Disclosure Statements" asserting that failure to respond to the questionnaire and failure to answer questions in the statement will result in the Special Agents' agreement to "Commercial Dishonor," that "a Default be entered against you for Two Hundred Thousands [sic] Dollar [USD]," and to "being a participant in Fraud."

b. LAURENCE signed and sent or caused to be sent to one or more IRS Special Agents a "Notice of Default and Dishonor of a Lawful Public Servant Questionnaire."

c. LAURENCE failed to comply with Orders to Compel production of the subpoenaed records issued by the United States District Court for the District of Colorado on November 17 and December 8, 2008.

The foregoing was in violation of Title 18, United States Code, Section 1503.

A TRUE BILL

Ink signature on file in the Clerk's Office
FOREPERSON

JOHN WALSH
United States Attorney

By: *s/ Anna K. Edgar*
Matthew Kirsch
Anna K. Edgar
Assistant United States Attorneys
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Attorneys for the United States

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 13-cr-00193-JLK-03

UNITED STATES OF AMERICA,

Plaintiff,

v.

3. GREGORY NATHAN LAURENCE,

Defendant.

PLEA AGREEMENT

The United States of America, by and through Matthew T. Kirsch and Anna K. Edgar, Assistant United States Attorneys for the District of Colorado, and the Defendant, Gregory Nathan Laurence, personally and by counsel, W. Hickman Ewing, Jr., hereby submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1.

I. PLEA AGREEMENT

The defendant agrees to plead guilty to the violation of 26 U.S.C. § 7212(a), Corruptly Endeavoring to Impede the Due Administration of the Internal Revenue Laws, charged in Count 5 of the Indictment.

The defendant agrees to pay restitution to the Internal Revenue Service ("IRS") in the amount of all taxes, interest, and penalties due and owing since 2003, including all taxes, penalties, and interest on the tax due and owing in an amount to be

COURT EXHIBIT
1

determined by the Court at sentencing. The defendant agrees this restitution amount results from his conduct as described in Count 5, as well as any relevant conduct as determined by the Court at the time of sentencing. The defendant agrees that he will sign any IRS forms deemed necessary by the IRS to enable the IRS to make an immediate assessment of the tax and interest that he agrees to pay as restitution. The defendant agrees not to file any claim for refund of taxes or interest represented by any amount of restitution paid pursuant to this agreement.

The government agrees that the defendant's restitution amount should be reduced by the amount of any payments already made by the defendant on his outstanding tax obligations from conduct relevant to this plea before the time of sentencing.

The defendant agrees that nothing in this agreement shall limit the IRS in its lawful examination, determination, assessment, or collection of any taxes, penalties or interest due from the defendant for the time period covered by this agreement or any other time period, and he agrees that this agreement, or any judgment, order, release, or satisfaction issued in connection with this agreement, will not satisfy, settle, or compromise the defendant's obligation to pay the balance of any remaining civil liabilities, including tax, additional tax, additions to tax, interest, and penalties, owed to the IRS for the time period covered by this agreement or any other time period. The defendant also agrees to file complete and accurate tax returns for any outstanding tax years.

Provided the defendant does nothing inconsistent with accepting responsibility between the date of his plea and the date of sentencing, the government will recommend that the defendant receive the maximum reduction for acceptance of responsibility.

The defendant agrees to cooperate fully, honestly, without reservation, and affirmatively with the United States Attorney's Office for the District of Colorado (the "government") and with any other federal, state, or local governmental department or agency designated by the Government ("designated agency") relating to any matter being investigated by the government or a designated agency about which the defendant may possess knowledge, information, or materials.

The defendant agrees that his continuing cooperation with the government described above includes, but is not limited to, the following:

a. Completely and truthfully disclosing all information and materials in his possession to the government that the government or its designated agency may request;

b. Affirmatively and immediately providing to the government any information and materials that comes to the defendant's attention that may be relevant to any governmental investigation;

c. Assembling, organizing, and providing, in a responsive and prompt fashion, all information and materials in his possession, custody, or control as may be requested by the government; and

d. Providing information and materials and testifying as requested by the government, including sworn testimony before a grand jury or in any judicial proceeding and interviews with the government and designated agencies.

The government agrees that any information and testimony given by the defendant pursuant to this agreement will not be used against him, either directly or indirectly, in any criminal case except for prosecutions for perjury, making a false statement, or obstruction of justice, or for impeachment. Information and testimony will not be used against the defendant pursuant to Section 1B1.8 of the Sentencing Guidelines. Any information and testimony relating to the defendant's involvement in crimes of violence, as defined in 18 U.S.C. § 16, is excluded from this agreement.

The defendant agrees that if the government can show that he lied or attempted to mislead the government or law enforcement authorities, or if he does not fulfill the terms of or does not complete his cooperation under this agreement, then any information or testimony which he has given in connection with this case can be used in any prosecution against him, notwithstanding the provisions above. If the government alleges such conduct, it will have the burden of establishing the alleged conduct at a separate hearing by a preponderance of the evidence.

Provided that the defendant continues to fully and truthfully cooperate with the government as described above, as determined in the government's sole discretion, the government agrees that it will consider filing, before or at the time of the defendant's sentencing, a motion for downward departure, pursuant to Section 5K1.1 of the Sentencing Guidelines and Title 18, United States Code, Section 3553(e). The parties

agree and understand that the government is not yet in a position to determine whether such a motion would be appropriate. Regardless of whether the government files a Section 5K1.1 motion, it agrees to make known to the Court the nature and extent of the defendant's cooperation.

The government further agrees to consider whether a sentence below the statutory maximum would be reasonable under applicable law and whether to recommend such a sentence, including a variant sentence to account for the defendant's civil contempt penalties imposed during the investigation of this matter. The defendant is free to recommend to the sentencing court whatever he believes is the appropriate sentence.

Additionally, the government agrees to move to dismiss Count 6 of the Indictment at the time of sentencing.

This agreement is submitted to the Court for its consideration pursuant to Rule 11(c)(1)(A) and (B) of the Federal Rules of Criminal Procedure.

I. ELEMENTS OF THE OFFENSE(S)

In order to be convicted of a violation of 26 U.S.C. § 7212(a), the following elements would have to be proven by the government beyond a reasonable doubt:

First: the defendant acted with the purpose to obstruct or impede the due administration of the Internal Revenue laws, which includes the Internal Revenue Service's lawful functions to ascertain income, and to compute, assess, and collect income taxes;

Second: the defendant's acts had a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws;

Third: the defendant acted knowingly; and

Fourth: the defendant acted corruptly, that is, with the purpose to obtain an unlawful benefit for himself or someone else.

Fed. Crim. Jury Instr. 7th Cir. 7212[1].

II. STATUTORY PENALTIES

The maximum statutory penalty for a violation of 26 U.S.C. § 7212(a) is as follows: not more than 36 months of imprisonment, a fine of not more than the greater of $250,000.00 or twice the gain or loss from the offense, or both; not more than 1 year of supervised release; a $100.00 special assessment fee; costs of prosecution; plus restitution as be determined by the Court. If probation or supervised release is imposed, a violation of any condition of probation or supervised release may result in a separate prison sentence and additional supervision.

III. COLLATERAL CONSEQUENCES

The conviction may further cause the loss of certain civil rights, including, but not limited to, the right to possess a firearm, vote, hold elected office, and sit on a jury.

IV. STIPULATION OF FACTS

The parties agree that there is a factual basis for the guilty plea that the defendant will tender pursuant to this plea agreement. That basis is set forth below. Because the Court must, as part of its sentencing methodology, compute the advisory guideline range for the offense of conviction, consider relevant conduct, and consider

the other factors set forth in 18 U.S.C. § 3553, additional facts may be included below which are pertinent to those considerations and computations. To the extent the parties disagree about the facts set forth below, the stipulation of facts identifies which facts are known to be in dispute at the time of the execution of the plea agreement.

This stipulation of facts does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have stipulated and which are relevant to the Court's guideline computations, to other 18 U.S.C. § 3553 factors, or to the Court's overall sentencing decision.

The parties agree that the date on which relevant conduct began was in June, 2002.

The parties agree that the government's evidence would be as follows:

At all relevant times, Defendant Gregory Nathan Laurence was a resident of Germantown, Tennessee. He practiced medicine through two entities in which he was the sole physician, Germantown Family Care and Obstetrics, LP and Germantown Aesthetics, LP. Beginning in approximately June, 2002, and continuing through at least the end of 2007, Dr. Laurence used the services of Melissa Sugar, an attorney in Denver, Colorado, as well as others associated with a group known as Financial Fortress Associates, among other things, to take steps to disguise his true income from the IRS and to support the false business and personal tax returns he filed during the relevant period.

Dr. Laurence paid Sugar for the use of various unincorporated business organizations ("UBOs"), including Jasper Management, Capricorn Management,

Amethyst Management, Moonstone Management, Pearl Management, Diamond Management, Emerald Management, Sapphire Management, and Sagittarius Management. Sugar had previously created these UBOs and had applied to the IRS for Employee Identification Numbers ("EINs") for the UBOs. Dr. Laurence also paid Sugar to set up bank accounts for the UBOs at two different banks and to list sham trusts as depositors for the bank accounts. These trusts included Dynamic Health Care Staffing, Reliant Property Management Services, Professional Property Management Services, Superior Consulting Services, Physician Marketing Services, First Quality Medical Equipment and Supply, Midsouth Auto Leasing, Midsouth Home Solutions, and Asset Management Services. Dr. Laurence and Sugar opened the bank accounts for the UBOs using the UBO EINs in part so that Dr. Laurence's social security number would not be associated with the bank accounts.

Sugar had sole signatory authority over many of the UBO bank accounts established for Dr. Laurence. On other accounts, Dr. Laurence's wife was identified to the bank as an "Assistant Administrator" for the UBO and granted signatory authority, although she rarely if ever exercised that authority. Instead, Dr. Laurence paid Sugar to conduct bank transactions for the UBOs on his behalf.

Dr. Laurence took steps which purported to transfer ownership to the sham trusts of assets that he or his medical practices owned, such as his personal residence, his cars, the buildings where he conducted his practices, and the equipment used in those practices. He issued checks from his professional corporation to the fictitious trust entities for expenses such as rents and equipment leases. These checks were

deposited into various UBO accounts. Dr. Laurence then treated these payments as legitimate deductions for business expenses to reduce the apparent profit generated by Germantown Family, thereby reducing its taxable income.

At FFA's suggestion, Dr. Laurence also avoided payroll taxes for Germantown Family and Germantown Aesthetics by stopping his previous practices of withholding and paying over payroll taxes and issuing his employees Forms W-2 each year. Instead, Dr. Laurence caused his employees to be paid their wages and other incentives, without any withholdings and as purported independent contractors, through Jasper Management. Between January 1, 2003, and April, 2007, Dr. Laurence deposited over $1.7 million into the Jasper account from his practices. He did not report the employees' receipt of those wages to the IRS in any form, but he did claim his payments as deductions for labor on Germantown Family's returns.

Dr. Laurence caused the preparation and filing of federal tax returns for Germantown Family for tax years 2002 through 2007, which reported these false deductions and substantially under-reported the total compensation he received. During the same period, Dr. Laurence did not file any returns or other documents which would have allowed the IRS to determine that Germantown Aesthetics even existed.

Dr. Laurence also caused the preparation and filing of false individual federal income tax returns for tax years 2002 through 2007, which tracked the corporate returns by substantially under-reporting the total compensation he received from his medical practices. Dr. Laurence used the funds in the UBO account to pay for personal expenses, such as vehicles, his home mortgage, and tuition for his children's schools.

During the time period at issue, from June, 2002, through April, 2008, neither Sugar nor Dr. Laurence filed Forms 1065 for the UBOs or federal tax returns for any of the fictitious entities. Dr. Laurence was aware that he had a duty to file tax returns which contained accurate information and that the IRS was relying on the information in his corporate and personal returns when computing taxes due and owing. The total tax loss from Dr. Laurence's conduct was between approximately $195,000 and approximately $300,000.

Dr. Laurence learned of the government's investigation of the activity described above in February, 2008, when IRS agents served him with grand jury subpoenas for records related to Germantown Family and Germantown Aesthetics. Dr. Laurence then took a number of steps to obstruct that investigation.

For example, on March 5, 2008, Dr. Laurence signed and sent a document to the Grand Jury enclosing "Public Servant Questionnaires," which demanded the personal information of IRS Special Agents. The questionnaire stated that failure to advise Dr. Laurence before releasing information regarding him to any person may subject the Special Agents to civil or criminal action. Dr. Laurence also enclosed "Disclosure Statements" directed to IRS Special Agents, which stated that the agents' failure to respond to the Public Servant Questionnaires would result in a $400,000 default judgment being entered against the agents.

Dr. Laurence was subsequently served with orders to compel the production of the material requested in the grand jury subpoenas. He responded to those orders by, among other things, sending correspondence to the U.S. Attorney's Office indicating

that the Deputy United States Marshals who had served the orders were guilty of criminal trespass.

On January 23, 2009, this Court issued an order finding Dr. Laurence in contempt of its previous order to compel. On March 13, 2009, the Court found that Dr. Laurence had previously purged his contempt and imposed fines of $45,000 each on Germantown Family, Germantown Aesthetics, and Dr. Laurence, but suspended $40,000 of each of those fines.

V. SENTENCING COMPUTATION AND 3553 ADVISEMENT

The parties understand that the imposition of a sentence in this matter is governed by 18 U.S.C. § 3553. In determining the particular sentence to be imposed, the Court is required to consider seven factors. One of those factors is the sentencing range computed by the Court under advisory guidelines issued by the United States Sentencing Commission. In order to aid the Court in this regard, the parties set forth below their estimate of the advisory guideline range called for by the United States Sentencing Guidelines. To the extent that the parties disagree about the guideline computations, the recitation below identifies the matters which are in dispute.

A. The appropriate Guideline is §2T1.1. The base offense level is the level from §2T4.1 (Tax Table), either 16, corresponding to a tax loss of approximately $195,000, or 18, corresponding to a tax loss greater than $200,000. The defendant reserves the right to argue that the applicable guideline is §2T1.9, with a base offense level of either 16 or 18.

B. There is a 2-level increase because the offense involved sophisticated means. *Id.* §2T1.1(b)(2). The defendant reserves the right to challenge the applicability of this enhancement.

C. There are no victim-related or role-in-offense adjustments. There is a 2-level increase for obstruction of justice. *Id.* §3C1.1.

D. The adjusted offense level is between 18 and 22.

E. Pursuant to §3E1.1(a) and (b), the defendant should receive the full three-level reduction for acceptance of responsibility. The resulting offense level would be between 15 and 19.

F. The parties understand that the defendant's criminal history computation is tentative. The criminal history category is ultimately determined by the Court. The information known to the parties, however, shows that the defendant does not appear to have any prior criminal history. Accordingly, the defendant's criminal history category is estimated to be Category I.

G. Assuming the tentative criminal history facts above are accurate, the career offender/criminal livelihood/armed career criminal adjustments do not apply.

H. The guideline range resulting from the estimated offense levels above, and the tentative criminal history category above, is 18 to 24 months at a level 15 and 30-36 months at a level 19. However, in order to be as accurate as possible, with the criminal history category undetermined at this time, the estimated offense level could conceivably result in a range from 18 months (bottom of Category I, offense level 15) to 36 months (the statutory maximum). *See id.* §5G1.1(a).

I. Pursuant to guideline §5E1.2, assuming the estimated offense level above is accurate, the fine range for this offense would be between $4,000 to as much as approximately $400,000 at a level 15, or $6,000 to as much as approximately $600,000 at a level 19, plus applicable interest and penalties.

J. Pursuant to §5D1.2, if the Court imposes a term of supervised release, that term shall be 1 year.

K. Restitution will be determined by the Court at the time of sentencing.

The parties understand that although the Court will consider the parties' estimate, the Court must make its own determination of the guideline range. In doing so, the Court is not bound by the position of any party.

No estimate by the parties regarding the guideline range precludes either party from asking the Court, within the overall context of the guidelines, to depart from that range at sentencing if that party believes that a departure is specifically authorized by the guidelines or that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the advisory guidelines. Similarly, no estimate by the parties regarding the guideline range precludes either party from asking the Court to vary entirely from the advisory guidelines and to impose a non-guideline sentence based on other 18 U.S.C. § 3553 factors.

VI. ENTIRE AGREEMENT

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances,

express or implied. In entering this agreement, neither the government nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement.

Date: 2/6/14

Gregory Nathan Laurence
Defendant

Date: 2/6/2014

W. Hickman Ewing, Jr.
Attorney for Defendant

Date: 2/6/2014

Matthew T. Kirsch
Assistant U.S. Attorney

Date: 2/6/14

Anna K. Edgar
Assistant U.S. Attorney

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge John L. Kane

Date: February 6, 2014

Courtroom Deputy: Bernique Abiakam
Court Reporter: Mary George

Criminal Action No.: 13-cr-00193-JLK-3

Parties:	*Counsel:*
UNITED STATES OF AMERICA,	Anna K. Edgar
Plaintiff,	
v.	
GREGORY NATHAN LAWRENCE,	William H. Ewing, Jr.
Defendant.	

CHANGE OF PLEA MINUTES

4:02 p.m. Court in session.

Court calls case. Counsel present. Defendant present on bond.

Defendant sworn and answers questions asked by the Court.

EXHIBITS: Court Exhibit 1 - Plea Agreement; Court Exhibit 2 - Statement by Defendant in Advance of Plea of Guilty.

Defendant advised of the maximum penalties.

Defendant's right to trial to jury and other constitutional rights are explained.

Defendant is re-arraigned.

Defendant pleads guilty to Count Five of the Indictment.

The Court **accepts** the plea of guilty.

ORDERED: Probation department shall conduct a presentence investigation and submit a presentence report as required by Fed.R.Crim.P.32.

13-cr-00193-JLK-3
Change of Plea
February 6, 2014

ORDERED: Sentencing is set for September 4, 2014 at 10:00 a.m.

ORDERED: Bond is CONTINUED.

4:24 p.m. Court in recess.
Hearing concluded
Total in-court time: 22 minutes.

EXHIBIT D

Practitioner Profile Data

This information is provided by the licensee as required by law.
Print Date.3/24/2014

While searching for information on a particular health care professional, consumers should be aware that there are several locations available to aid them with their research. (Licensure Verification (index.htm), Abuse Registry (/AbuseRegistry/index.html), Monthly Disciplinary Actions, (/Boards/disciplinary.htm) and Recently Suspended Licenses Due to Failure to Pay Child Support (/Downloads/SuspendedLicenses.pdf)). Links to various Internet sites are available from the Department of Health Website home page (http://state.tn.us/health/) and from the Health Related Boards Website (/Boards/index.htm).

LAURENCE, GREGORY NATHAN

PRACTICE ADDRESS: GERMANTOWN SURGICAL SERVICES, PA
7475 POPLAR PIKE
GERMANTOWN, TN 38138

LANGUAGES: (Other than English) None Reported

SUPERVISING PHYSICIAN: None Reported

GRADUATE/POSTGRADUATE MEDICAL/PROFESSIONAL EDUCATION AND TRAINING

PROGRAM/ INSTITUTION	CITY STATE/ COUNTRY	DATE OF GRADUATION	TYPE OF DEGREE
UNIV OF TEXAS	DALLAS TX	05/01/1992	MD

OTHER EDUCATION AND TRAINING

PROGRAM/ INSTITUTION	CITY STATE/ COUNTRY	FROM	TO
UNIV OF TN	MEMPHIS TN	06/01/1992	05/01/1993
UNIV OF TN	MEMPHIS TN	06/01/1993	06/01/1995
UNIV OF TN	MEMPHIS TN	07/01/1995	06/01/1996

SPECIALTY BOARD CERTIFICATIONS

CERTIFYING BODY/ BOARD/ INSTITUTION	CERTIFICATION/ SPECIALTY/ SUBSPECIALTY
AMERICAN BOARD OF FAMILY PRACTICE	FAMILY PRACTICE
AMERICAN BOARD OF FAMILY PRACTICE	LASER SURGERY

FACULTY APPOINTMENTS

TITLE	INSTITUTION	CITY/STATE
ASSOCIATE PROFESSOR	UNIV OF TN	MEMPHIS TN

STAFF PRIVILEGES

This practitioner currently holds staff privileges at the following hospitals

BAPTIST HOSP	MEMPHIS TN
METHODIST HOSP	MEMPHIS TN
ST FRANCIS HOSP	MEMPHIS TN

This practitioner currently participates in the following *TennCare* plans

ACCESS MED PLUS
BLUE CARE
OMNI CARE

FINAL DISCIPLINARY ACTION

ACTIONS BY STATE REGULATORY BOARD

AGENCY	VIOLATION	ACTION
None Reported	None Reported	None Reported

RESIGNATIONS IN LIEU OF TERMINATION

HOSPITAL	ACTION
None Reported	None Reported

ACTIONS BY HOSPITAL

HOSPITAL	VIOLATION	ACTION
None Reported	None Reported	None Reported

CRIMINAL OFFENSES

OFFENSE	JURISDICTION
None Reported	None Reported

LIABBILITY CLAIMS

Some studies have shown that there is no significant correlation between malpractice history and a doctor's competence. At the same time, the Legislature believes that consumers should have access to malpractice information. In these profiles, the Department has given you information about both the malpractice history of the physician's specialty and the physician's history of payments. The Legislature has placed payment amounts into three statistical categories: below average, average, and above average. To make the best health care decisions, you should view this information in perspective.You could miss an opportunity for high quality care by selecting a doctor based solely on malpractice history.

When considering malpractice data, please keep in mind:

- **Malpractice histories tend to vary by specialty. Some specialties are more likely than others to be the subject of litigation. This report compares doctors only to the members of their specialty, not to all doctors, in order to make individual doctor's history more meaningful.**
- **The incident causing the malpractice claim may have happened years before a payment is finally made. Sometimes, it takes a long time for a malpractice lawsuit to move through the legal system.**
- **Some doctors work primarily with high risk patients. These doctors may have malpractice histories that are higher than average because they specialize in cases or patients who are at very high risk for problems.**
- **Settlement of a claim may occur for a variety of reasons which do not necessarily reflect negatively on the professional competence or conduct of the provider. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred.**

You may wish to discuss information provided in this report, and malpractice generally, with your doctor. The Department can refer you to other articles on this subject.

The Health Department started getting reports for claims paid after May, 1998.

Settlements valued below $75,000 are not included here.

DATE	Settlement amount was:
None Reported	None Reported

OPTIONAL INFORMATION

COMMUNITY SERVICE / AWARD / HONOR

DESCRIPTION	ORGANIZATION

TITLE	PUBLICATION	DATE
COLORECTAL CANCER	MANUAL OF FAMILY PRACTICE PUBLISHER LITTLE BROWN	01/01/1996

State of Idaho

Board Of Medicine

Public Record Information - Detail

Public Record Information - Subscriber Services

Dr. GREGORY Nathan LAURENCE Click here to RENEW this License.

Close this License/Registration.

Business Phone:	(901) 752 - 4999	License Status:	New License
Address Of Record:	7459 STONEGATE CV		
City/State/Zip:	GERMANTOWN TN 38138	Method:	Endorse
Country:	USA	Practice:	
Board:	BOARD OF MEDICINE	Locumtenens:	No
Type:	PHYSICIAN AND SURGEON	Inside State:	No
Number:	M-11871	Outside State:	No
Profession:	Medicine		
Date of Issue:	12/24/2012		
Expiration Date:	6/30/2014		

Specialties

Code	Primary	Specialty	Year	Status
FM	Yes	Family Medicine	2009	Active

Disciplinary History - No Board Actions :

License Verification and Disclaimer

This verification service provides current data extracted by the Idaho Board Of Medicine (IBOM) from its own database. The data in this web site is provided by and controlled entirely by the IBOM and therefore constitutes a primary source verification of licensure status as authentic as a direct inquiry to the IBOM. The information provided through the verification service is all of the information pertinent and available in that field of information in the IBOM database. The data is updated daily. No responsibility is assured or implied for errors or omissions created by technical difficulties. No one shall be entitled to claim detrimental reliance thereon. For information regarding those categories not included in the database and/or concerns about transmissions errors, inconsistencies, or other data issues that may be identified from time to time, contact the IBOM.

Utah Division of Occupational and Professional Licensing

Details for GREGORY NATHAN LAURENCE

License Information

Name:	GREGORY NATHAN LAURENCE
City, State, Zip, Country:	GERMANTOWN, TN 38138, UNITED STATES
Profession:	PHYSICIAN
License Type:	PHYSICIAN & SURGEON
License Number:	8459489-1205
Obtained By:	ENDORSEMENT
License Status:	ACTIVE
Original Issue Date:	10/10/2012
Expiration Date:	06/01/2014
Agency and Disciplinary Action:	NONE
Docket Number:	N/A

Education

School Name	Major	Graduation Date	Degree
UNIVERSITY OF TEXAS MEDICAL SCHOOL AT HOUSTON		1992-06-05	DOCTORATE OF MEDICINE

This information is accurate as far as is contained in the Division's official records. It does not reflect whether an entity required to maintain a current registration with the Division of Corporations is current in that registration. You can verify such status at https://secure.utah.gov/bes/bes. Additionally, this verification does not show a complete license history or interruptions of licensure. Original issue dates listed as 01/01/1910 and 01/01/1911 were unknown at the time the Division implemented its first electronic licensing database.

Austin

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S NOTICE OF RELIANCE ON PREVIOUSLY FILED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM

ORIGINAL

00220B

Pursuant to the Court's Amended Notice of Trial Setting and Order Governing Further Proceedings filed February 21, 2014, Plaintiff Charles Ballard, through his attorneys, hereby gives notice of his reliance on Plaintiff's Proposed Jury Instructions and Special Verdict Form filed October 22, 2013. Plaintiff incorporates by reference this prior filing, as if it was fully set forth herein, and requests that the Court instruct the jury and utilize the special verdict form as set forth in his previous filing

Dated this 25th day of March, 2014.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

for

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

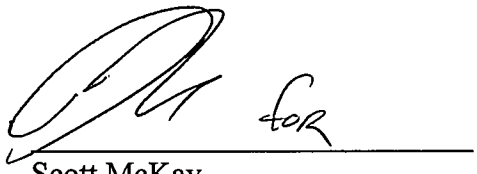
P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2014, I served a true and correct copy of the foregoing ***Plaintiff's Notice of Reliance on Previously Filed Jury Instructions and Special Verdict Form*** by delivering the same by United States Mail, postage prepaid, to the following:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL, PLLC
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519



Scott McKay

ORIGINAL

Jeremiah A. Quane, ISB No. 977
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Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 DEFENDANTS' MOTIONS IN LIMINE

COMES NOW, Defendants, by and through their counsel of record, Quane Jones McColl, PLLC, and move this Court, pursuant to Rules 103, 104, 401, 402, 403, 701 and 803 of the Idaho Rules of Evidence and Rules 16 and 47(i) of the Idaho Rules of Civil Procedure for Orders in Limine as to the following issues:

1) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, that Defendant Dr. Kerr or any of the defense witnesses, including Dr. Kelly O'Neil, have ever had any complaints filed against them or proceedings or orders of any kind before any state licensing entity in any jurisdiction that they have ever been licensed in.

2) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the fact that Dr. Kerr or any of the defense witnesses, including Kelly O'Neil have ever been previously sued for malpractice or settled a malpractice claim in any jurisdiction.

3) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, that Dr. Laurence has been the subject of any criminal indictments or grand jury proceedings in any jurisdiction.

4) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the fact that any of the Defendants have liability insurance, the availability of insurance or the issue of insurance

in any way at all.

5) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the fact that any of the Defendants or any of the defense witnesses have ever been previously represented by Jeremiah Quane or any of the attorneys with the firm Quane Jones McColl, PLLC.

6) For an Order in limine prohibiting Plaintiffs, their counsel or any of the Plaintiffs' witnesses from in any way, directly or indirectly, mentioning to the jury, during either voir dire, Plaintiffs' case-in-chief, cross-examination or rebuttal, or opening or closing statements or by way of offering any evidence at trial, the effect of this or any medical malpractice case on the cost of health care or the implementation of the affordable care act also known as "Obamacare."

This Motion in Limine is based upon the Memorandum in Support of Defendants' Motions in Limine filed contemporaneously herewith, in addition to the court record, files, and pleadings otherwise on file in this action.

DATED this 25th day of March, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2014, I served a true and correct copy of the foregoing DEFENDANTS' MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
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Attorneys for Plaintiff

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[ ] Overnight Mail
[X] Facsimile (205) 733-4896

Jeremiah A. Quane

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE

This is a medical malpractice case set for trial before this court on November 5, 2013. Pending before the court are the defense motions in limine. While most of the six defense motions in limine are self-explanatory, below is additional authority for consideration by the court in support of the defense motions.

1. Plaintiff Should Be Prohibited From Any Mention Of Liability Insurance.

Defendants move to prohibit Plaintiff Charles Ballard, his counsel, or any of his witnesses from in any way, directly or indirectly, mentioning to the jury, during either *voir dire*, Plaintiff's case in chief, cross-examination or rebuttal, or opening or closing statements, introducing evidence, submitting jury instructions, mentioning, or offering testimony or reports relating to the issue of Defendants' liability insurance.

Rule 402 of the Idaho Rules of Evidence (I.R.E.) prohibits a party from introducing any evidence that is not relevant. According to I.R.E. 401, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." The disputed facts and issues in this matter relate to Plaintiff's allegations of medical malpractice. The Defendants' possession of liability insurance is not likely to make the existence of any fact needed for the determination of this claim more or less probable. Therefore, evidence of Defendants' insurance is not relevant to this case and Plaintiff should be barred from introducing it at trial.

In the alternative, if this Court finds that information regarding liability insurance is relevant, under I.R.E. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, any potential probative value of evidence regarding the Defendants' insurance coverage is substantially outweighed by the risk of unfair prejudice. Plaintiff can prove his claim for malpractice without a necessary reference to the Defendants' liability insurance. The prejudicial effect of an unnecessary reference to liability insurance, however, is substantial. Evidence of a party's insurance coverage is likely to be misused by the jury.

Under I.R.E. 411, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." The Advisory Committee on the Federal Rules of Evidence explained that Rule 411 is based on "the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds." **Fed. R. Evid. 411** advisory committee's note (1972). Although evidence of liability insurance may be admissible for a limited purpose, none of the limited applications are appropriate for the case at bar. ***See*** I.R.E. 411. The mention of liability insurance will only put in the minds of the jury that Defendants are insured. ***See Lehmkuhl v. Bowland***, 114 Idaho 503, 508; 757 P.2d 1222, 1227 (Ct. App. 1998) (review denied) (Idaho Rule of Evidence 411 may be utilized to assure that issues of liability based upon insurance are not introduced). Such an inference will unfairly and unnecessarily prejudice the jury to conclude that it will not be the Defendants' own personal money that would pay any potential verdict.

The decision whether to allow inquiries relating to insurance during *voir dire* is a matter within the trial court's discretion. ***See Harris v. Alessi***, 141 Idaho 901, 907, 120 P.3d 289, 295 (Ct. App. 2005). However, "[t]he fact that this practice is not forbidden by Idaho law does not mean that a trial court must allow it. " ***Id***. (citing ***Kozlowski v. Rush***, 121 Idaho 825, 831, 828 P.2d 854, 860 (1992)). Here, there is no indication that allowing Plaintiff's counsel to make statements regarding liability insurance during *voir dire* will contribute to a purported aim of ferreting out juror bias. Any reference to liability insurance during *voir dire* will be highly prejudicial in that it will signal to the jury that the Defendants are insured.

For the foregoing reasons, the Court should enter an order prohibiting Plaintiff from discussing, in any way, the issue of Defendants' liability insurance.

2. Plaintiff Should Be Prohibited From Discussing The Issue Of Whether Any Defendant or Defense Expert Has Been Sued For Malpractice Or Has Any Prior Board Or Licensing Matters.

Defendants move to prohibit Plaintiff Charles Ballard, his counsel, or any of his witnesses from in any way, directly or indirectly, mentioning to the jury, during either *voir dire*, Plaintiff's case in chief, cross-examination or rebuttal, or opening or closing statements, introducing evidence, submitting jury instructions, mentioning, or offering testimony or reports relating to whether any Defendant or defense expert has been sued for malpractice or has been the subject of any prior administrative licensing matter. Information regarding any such issue is irrelevant and would be unfairly prejudicial to the Defendants.

Per I.R.E. 401, information regarding an expert's previous lawsuit history would be irrelevant and therefore under I.R.E. 402, inadmissible. The disputed facts and issues in this matter relate to Plaintiff's allegations of medical malpractice. Whether any of the defendants or defense experts have ever been sued for medical malpractice or have been involved in any board proceeding has no tendency to make the existence of facts related to Plaintiff's allegations of malpractice more or less probable. Therefore, information regarding previous lawsuits of any defense expert is irrelevant and is not admissible.

Even if this Court were to find information regarding any of the defense expert's medical malpractice lawsuits or prior board proceedings to somehow be relevant, its probative value is grossly outweighed by the risk of unfair prejudice to the

Defendants and should be excluded under I.R.E 403. "It is well established that a trial court has considerable discretion to exclude evidence for reasons ... that the evidence is confusing, and could [be] interpreted in many different ways." ***Burgess v. Salmon River Canal Co., Ltd.***, 127 Idaho 565 574, 903 P.3d 730, 739 (1994). Any mention that a Defendant or defense expert has been sued or has been the subject of a prior board matter is unfairly prejudicial because such information could be interpreted by the jury in myriad ways which are not applicable to the case at bar. The raising of such a collateral issue by Plaintiffs' counsel will result in a protracted mini-trial on such issues which will only serve to confuse and distract the jury from the actual limited malpractice issues before them.

Attached to the affidavit of counsel in support of the Defendants' motions in Limine are the reported decisions from a number of other jurisdictions wherein the issue of using prior disciplinary matters and/or prior malpractice claims for impeachment purposes was held improper, see ***Noble v. Lansche***, 735 S.W. 2d (Mo. Ct. App. 1987) (holding evidence that medical malpractice Plaintiff's expert witness physician had voluntarily surrendered his license to dispense narcotics was inadmissible impeachment); ***King v. Byrd***, 716 So.2d 831, 835 (Fla. 4th DCA 1998) (error for trial court to allow defense counsel to cross examine plaintiff's expert witness with questions concerning past disciplinary proceedings since such questions are an improper attack on the witness' credibility); ***Heshelman v. Lombardi***, 454 N.W. 2d 603 (Mich. Ct. App. 1990) (trial court abused discretion in allowing cross examination of medical expert regarding prior claims of malpractice as it is not probative of his truthfulness or competency and knowledge – such allegations of malpractice are analogous to unproven charges of

criminal activity); ***Stickney v. Wesley Medical Center***, 768 P.2d 253 (Kan. 1989) (affirming in part on grounds that plaintiff sought to improperly impeach defense medical expert with extrinsic evidence involving an unrelated lawsuit); ***Manhardt v. Tamton***, 832 So.2d 129 (Fla. 2nd DCA 2002) (Plaintiff entitled to new trial, in part, after defense counsel improperly questioned plaintiff expert about prior lawsuits); ***Morrow v. Stivers***, 836 S.W.2d 464 (Kent. Ct. App. (1992) (trial court properly precluded counsel from asking plaintiff medical expert on cross examination whether he had his license to practice medicine suspended for five years due to passing hepatitis to several patients, citing general rule that a witness cannot be cross examined on a collateral matter which is irrelevant to the issue at hand); ***Hathcock v. Wood***, 815 So.2d 502 (Ala. 2001)(affirming district court's refusal to allow counsel from asking plaintiff medical expert on cross examination as to the probationary status of his professional license, citing that under Rule 608(b), the only kind of evidence that may be presented as to an expert's character for truthfulness is evidence regarding the expert's general reputation in the community for untruthfulness or opinion testimony from another competent witness).

Although no such reported decisions exist on this narrow topic in Idaho, the majority of these case authorities have adopted rules of evidence which are identical or nearly identical to those in Idaho. These decisions aptly demonstrate the improper nature of cross examination questions which seek to delve into an experts past lawsuits and board matters. Such allegations are analogous to unproven accusations which may not be used for impeachment purposes. The attempt at impeachment using such evidence does not address the expert's skill, knowledge, or qualifications as an expert medical witness; instead, its calculated effect is to simply cast a pall of disparagement

over the doctor's testimony by reason of irrelevant misconduct. For these reasons, such evidence should be excluded at the trial.

In Idaho, medical malpractice actions are governed by Idaho Code § 6-1012. In this case, Plaintiff's claim against Dr. Kerr is judged relative to his compliance with the standard of health care practice applicable to a physician engaged in the medical specialty of cosmetic surgery in Boise, Idaho in 2010. Any discussions of any other suits involving any other case or expert, would involve injecting into the trial collateral issues, a different standard of health care practice and a different time for which no expert testimony has been disclosed. For the foregoing reasons, the Court should enter an order prohibiting Plaintiff from presenting evidence or testimony regarding any Defendant or defense expert's prior medical malpractice lawsuits, claims and/or licensing matters of any kind.

3. Plaintiff Should Be Prohibited From Presenting Evidence, Or Discussing In Any Way, Defense Expert Gregory Laurence, M.D.'S Yet To Be Resolved Indictment By A Federal Grand Jury.

Defendants move to prohibit Plaintiff Charles Ballard, his counsel, or any of his witnesses from in any way, directly or indirectly, mentioning to the jury, during either *voir dire*, Plaintiff's case in chief, cross-examination or rebuttal, or opening or closing statements, introducing evidence, submitting jury instructions, mentioning, or offering testimony or documents of any kind relating to the issue of Dr. Gregory Laurence's federal grand jury indictment.

Dr. Gregory Laurence is a defense standard of practice expert from Tennessee. At his October 2013 deposition, Dr. Laurence was questioned by Plaintiff's counsel regarding a federal grand jury indictment filed against him and others which was

filed in Colorado for alleged violation of 26 U.S.C. § 7212(a) and 18 U.S.C. § 2 – Corrupt Endeavor to Obstruct or Impede Due Administration of the Internal Revenue Laws and Aiding and Abetting) and for alleged violation of 18 U.S.C. § 1503 – Obstruction of Justice). The indictment was handed down in May 2013 and this matter is still simply at the indictment phase. No trial date, plea or conviction of any kind has been entered against Dr. Laurence. The defense contends that to allow any reference to Dr. Laurence's indictment at the trial would be unfairly prejudicial, irrelevant and arguably raise an appeal issue.

Under I.R.E. 401, information regarding a defense expert's grand jury indictment is irrelevant and under I.R.E 402, is not admissible. The disputed facts and issues in this matter relate to Plaintiff's allegations of medical malpractice involving the death of Krystal Ballard. Whether Dr. Laurence, who is acting as a defense expert, has been indicted by a federal grand jury on an unrelated contested tax issue is an entirely collateral issue which has absolutely no tendency to make the existence of facts related to Plaintiff's allegations of medical malpractice more or less probable. Therefore, information regarding his indictment is irrelevant and not admissible.

Even if this Court were to conclude that information regarding Dr. Laurence's grand jury indictment to be somehow relevant, its probative value is grossly outweighed by the risk of unfair prejudice to the Defendants. As a result, it should be excluded under I.R.E 403. More to the point, I.R.E. 608(b) prohibits the admission of extrinsic evidence of a witness's prior misconduct to impeach a witness's credibility. While there is an exception under I.R.E. 609 for impeachment by evidence of conviction of a crime, that exception does not apply to Dr. Laurence's indictment which is not a

conviction of any kind. Rule 609(a) states:

> For the purpose of attacking the credibility of a witness,, evidence of the fact that the witness **has been convicted of a felony** and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness.

(Emphasis added). Furthermore, under Federal Rule of Evidence 609, which I.R.E. 609 was modeled after, "the following do not qualify as convictions, i.e., are inadmissible [under Rule 609]: an indictment, an arrest, acts that may be criminal but have not been prosecuted ...." ***Frazier v. IMED Corp.***, 2003 WL 1984366, *3 (Del. Super. Ct. April 25, 2003) (citing 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 609.03, at 609-13 to 609-14 (citations omitted) (Joseph M. McClaughlin ed., 2d ed. 2002) (internal quotations omitted). In the instant case, extrinsic evidence regarding Dr. Laurence's grand jury indictment is inadmissible because not been convicted of a felony.

If allowed into evidence, Dr. Laurence would be unfairly impeached by the jury without him ever being able to defend himself. It would open up an entirely irrelevant issue which would consume court time and force the defense to interrupt the trial in order to present a mini-trial on the collateral issue of why Dr. Laurence is not guilty of tax evasion. Finally, use of the indictment would not even be relevant for impeachment purposes because Dr. Laurence did not deny its existence, but rather he truthfully admitted in his deposition all about the indictment before opposing counsel elected to produce the indictment.

For the foregoing reasons, the Court should enter an order prohibiting

Plaintiff from presenting any evidence or testimony regarding defense expert Dr. Laurence's grand jury indictment.

DATED this 25th day of March, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2014, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
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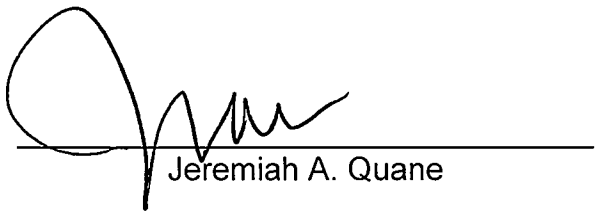

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM

COME NOW, Defendants, by and through their counsel of record, Quane Jones McColl, PPLC, respectfully request the following jury instruction Nos. 1 through 28 and Special Verdict Form.

DATED this 25th day of March, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2014, I served a true and correct copy of the foregoing DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM by delivering the same to each of the following, by the method indicated below, addressed as follows:

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_____
Jeremiah A. Quane

DEFENDANTS' REQUESTED

INSTRUCTION NO. 1

These instructions define your duties as members of the jury and the law that applies to this case. Your duties are to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. In so doing, you must follow these instructions. You must consider them as a whole, not picking out one or disregarding others. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rule of law. At times during the trial, I may sustain an objection to a question without permitting the witness to answer it or to an offered exhibit without receiving it into evidence. I will do this when the question called for testimony that was not admissible or when the exhibit itself was inadmissible. In reaching your decision, you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. In addition, where an answer is given or an exhibit received, I may instruct that it be stricken from the record, that you disregard it and that you dismiss it from your minds. I will do this when it becomes apparent that the evidence

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

was inadmissible only after it had been presented to you. In reaching your decision, you may not consider this testimony or exhibit. Except as explained in this instruction, none of my rulings are intended by me to indicate any opinion concerning the evidence in this case.

The arguments and remarks of the attorneys involved in this case are intended to help you in understanding the evidence and applying the instructions, but they are not themselves evidence. If any argument or remark has no basis in the evidence, then you should disregard it. However, there are two exceptions to this rule: (1) An admission of fact by one attorney is binding on his party; and (2) stipulations of fact by all attorneys are binding on all parties.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In evaluating the testimony, you should consider such items as: the interest, bias or prejudice of any witness in the outcome of this case; the age and appearance of the witness and the manner in which he gives his testimony; the

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

opportunity that the witness had to observe the facts about which he testified; the contradiction, if any, of a witness's testimony by other evidence; any statements made by the witness at other times that are inconsistent with his present testimony; any evidence regarding a witness's general reputation for truth, honesty or integrity; and any felony conviction of a witness.

In evaluating the exhibits, you should consider such items as: the circumstances under which the exhibit was prepared; and the probability that the exhibit accurately reflects what it is intended to show in light of the other evidence of the case.

IDJI 100

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 2

As you can well surmise, this case is important to both sides, and each party to the suit is entitled to your full and fair consideration. You are not to associate in any way with the parties, their attorneys, agents or witnesses. You are likewise not to discuss the case with anyone, or permit anyone to discuss the case with you, whether within or without the courthouse, during the course of the trial; and you are not yourself to contact anyone in an attempt to discuss or gain a greater understanding of the case. In the event that anyone attempts to discuss the case with you or to influence your decision, you will report it to me promptly. You are not even to discuss the case among yourselves until you retire to the jury room to deliberate at the close of the entire case, and you are not to form or express any opinion on the case until you have heard all of the testimony and have had the benefit of my instructions as to the law which applies to the case. You should not go to the place where any alleged event occurred unless the Court orders a supervised jury visit to that place.

IDJI 109

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 3

The Defendants deny the claims of the Plaintiff.

IDJI 104

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 4

I remind you, ladies and gentlemen of the jury, that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case until after I finally submit the case to you.

IDJI 110

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 5

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

IDJI 112. (Modified.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 6

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves one of the facts on which a party has the burden of proof in the case, without resorting to inference. Circumstantial evidence is evidence that indirectly proves one of the facts on which a party has the burden of proof in the case, by means of proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI 123

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 7

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion.

IDJI 124. (Modified.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 8

A deposition is testimony taken under oath before the trial and preserved in writing or upon videotape. This evidence is entitled to neither more nor less consideration than you would give the same testimony had the witness testified here.

IDJI 124. (Modified.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 9

Certain evidence is about to be presented to you by an interrogatory and an answer to the interrogatory. An interrogatory is a written question from one party and answered by another during the course of a case. This evidence is entitled to the same consideration you would give had the witness been asked the interrogatory and then answered it from the witness stand.

You will only have the interrogatory and the answer read to you in court. Although there is a record of the interrogatory and answer to the interrogatory, this record will not be available to you during your deliberations.

I.R.E. 801(d)(2)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 10

Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose.

Your attention was called to these matters when the evidence was admitted.

IDJI 127. (Modified.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 11

The Plaintiff has the burden of proving, by direct expert testimony and by a preponderance of all the competent evidence, that at the time and place of the incident in question Defendant Dr. Brian Kerr failed to meet the applicable standard of health care practice of the community in which such care was provided as such standard then existed with respect to the class of health care provider to which Defendant Dr. Brian Kerr belonged and in which he was functioning.

In addition, the Plaintiff has the burden of proving that the failure of Defendant Dr. Brian Kerr to meet the applicable standard of health care practice caused the injuries of the Plaintiff.

The Defendants have no burden of proof on any issue in the case.

Idaho Code § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 12

Individual providers of health care, such as Dr. Brian Kerr in this case, shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account their training, experience, and fields of medical specialization.

Idaho Code § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 13

The standard of health care practice means the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the events in question.

Shane v. Blair, 139 Idaho 126, 75 P.3d 180 (2003); ***McDaniel v. Inland and Northwest Renal Care Group Idaho, LLC***, 159 P.3d 856 (2007), 144 Idaho 219

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 14

You must determine the applicable standard of health care practice and professional learning, skill and care required of Dr. Brian Kerr only from the testimony of those persons, including Dr. Brian Kerr, who have testified as expert witnesses as to such standard in this case.

Idaho Code § 6-1013 and § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO.15

The quality or appropriateness of the standard of health care practice is not for you to decide.

You must apply the standard of health care practice that you determine to be applicable and you must not consider or decide whether that standard of health care practice is appropriate, inappropriate or deficient.

Based on I.C. § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 16

You are not permitted to assume or conclude that the standard of health care practice applicable to Dr. Brian Kerr is uniform throughout the State of Idaho.

Ramos v. Dixon, 144 Idaho 32 (2007), I.C. § 6-1012.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 17

As used in these instructions, the term "community" refers to that geographical area ordinarily served by the licensed general hospital where the medical care complained of was provided.

Idaho Code § 6-1012

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 18

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

IDJI 230; ***Hilden v. Ball***, 117 Idaho 314, 787 P.2d 1122 (1989); ***Fussell v. St. Clair***, 120 Idaho 591, 595, 818 P.2d 295, 299 (1991).

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 19

In instructing you on the subject of damages, I do not express any opinion as to whether Plaintiff is or is not entitled to damages.

IDJI 900

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 20

You are instructed, in considering the issue of damages, that a physician is not liable for any pre-existing injury, disease, condition or disability which is not the natural and proximate result of the actions of the physician. In other words, you cannot award damages to the Plaintiff if the damage resulted from the natural progress of any injury, disease, condition or disability which is attributable to causes other than the actions of the physician.

22 Am.Jur.2d ***Damages*** § 122, at 174. (Modified).

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 21

You may not include as damages any amount that you might add for the purpose of punishing the Defendants or to make an example of them for the public good or to prevent other incidents. Such damages would be punitive and they are not authorized in this action.

BAJI 14.61 (6th ed.)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 22

An award of damages is not subject to any income taxes, and you should not consider such taxes if you decide to make such an award.

IDJI 937

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 23

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

BAJI 1.00 (6th ed.). (Modified)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 24

The law forbids you to determine any issue in this case by chance. Thus, if you determine that the Plaintiff is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take the independent estimate of each juror of the amount to be awarded and then to average such estimates to set the amount of your award.

IDJI 143

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 25

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused; and he may hesitate to change his position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

IDJI 140

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 26

On retiring to the jury room, select one of your number as a Foreperson, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the one conforming to your conclusions and return the other unused.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon a verdict, you should fill it out, if necessary, and have it signed. If your verdict is unanimous, your Foreperson alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict(s), you will notify the bailiff, who will then return you into open court.

IDJI 144

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 27

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

IDJI 142

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 28

In this case, you will be given a Special Verdict form to use in returning your verdict. I will read the Verdict Form to you now:

We, the Jury, answer the Special Verdict form as follows:

QUESTION NO. 1: Did Defendant Dr. Brian Kerr fail to meet the applicable standard of health care practice of the community in which such care was provided, as such standard existed at the time such care was provided, with respect to the class of health care provider to which Dr. Brian Kerr belonged and in which he was functioning, and did such failure proximately cause the death of Krystal Ballard?

ANSWER: YES_____ NO_____

If you answered the above question "No," then simply sign the verdict form and inform the bailiff that you are done. If you answered the above question "Yes," please answer Question No. 2.

QUESTION NO. 2: What is the total amount of damages sustained by the Plaintiff for

Economic damages: $_____

Non-Economic damages: $_____

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 29

Now that you have been chosen as jurors for this trial, you are required to decide this case based solely on the evidence and the exhibits that you see and hear in this courtroom. "The case" includes anything you see or hear in the courtroom, or on any case questionnaire you completed, anything said by the lawyers, the Judge, Court staff, and everyone else in the courtroom. At the end of the case, I will give you instructions about the law that you must apply, and you will be asked to use that law, together with the evidence you have heard, to reach a verdict. In order for your verdict to be fair, you must not be exposed to any other information about the case, the law, or any of the issues involved in this trial during the course of your jury duty. This is very important, and so I am taking the time to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. This means you may not speak to anyone, including your family or friends. You may not do any research about the case with any electronic device. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, iPads, Smartphones, PDAs, or any other electronic device. You may not do

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

any personal medical research or investigation, including visiting any of the places involved in this case, using Internet maps or Google, talking to any possible witnesses, or creating your own demonstrations or reenactments of the events which are the subject of this case.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. In particular, you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other websites. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

The court recognizes that these rules and restrictions may affect activities that you would consider to be normal and harmless, and I assure you that I am very much aware that I am asking you to refrain from activities that may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Some of you may have heard about trials where the jurors are not permitted to go home at night, or were sequestered for the entire length of the trial. For a variety of reasons, this is something we rarely do. It is far more of an imposition on your lives than the court wishes to make. However, it was effective in keeping jurors away from information that might affect the fairness of the trial—that was the entire purpose.

You must not engage in any activity, or be exposed to any information, that might unfairly affect the outcome of this case. Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court and the taxpayers. If any juror is exposed to any outside information, or has any difficulty whatsoever in following these instructions, please notify the court immediately.

If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that to the court as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. These

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. After the trial, you will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 30

Jury Instruction regarding Courtroom Conduct

While court is in session, jurors are not permitted to use electronic devices unless specifically authorized by the court. This includes sending or receiving phone calls, voice mails, text messages, tweets, or accessing the internet. No electronic device may be used to record, photograph or film any of the court proceedings. When you arrive at the courthouse in the morning, you will be asked to give any electronic devices to the court officer. These devices will be returned to you at the end of the court day. You will be provided with a telephone number in the courtroom that your family may use to contact you in the event of an emergency. Any emergency message will be received by the court staff and communicated to you at the appropriate time.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. 31

Jury Instruction regarding Jury Deliberations

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You many not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

These instructions define your duties as members of the jury and the law that applies to this case. Your duties are to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. In so doing, you must follow these instructions. You must consider them as a whole, not picking out one or disregarding others. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rule of law. At times during the trial, I may sustain an objection to a question without permitting the witness to answer it or to an offered exhibit without receiving it into evidence. I will do this when the question called for testimony that was not admissible or when the exhibit itself was inadmissible. In reaching your decision, you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. In addition, where an answer is given or an exhibit received, I may instruct that it be stricken from the record, that you disregard it and that you dismiss it from your minds. I will do this when it becomes apparent that the evidence was inadmissible only after it had been presented to you. In reaching your decision, you may not consider this testimony or exhibit. Except as explained in this instruction, none of my rulings are intended by me to indicate any opinion concerning the evidence

in this case.

The arguments and remarks of the attorneys involved in this case are intended to help you in understanding the evidence and applying the instructions, but they are not themselves evidence. If any argument or remark has no basis in the evidence, then you should disregard it. However, there are two exceptions to this rule: (1) An admission of fact by one attorney is binding on his party; and (2) stipulations of fact by all attorneys are binding on all parties.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In evaluating the testimony, you should consider such items as: the interest, bias or prejudice of any witness in the outcome of this case; the age and appearance of the witness and the manner in which he gives his testimony; the opportunity that the witness had to observe the facts about which he testified; the contradiction, if any, of a witness's testimony by other evidence; any statements made by the witness at other times that are inconsistent with his present testimony; any evidence regarding a witness's general reputation for truth, honesty or integrity; and any felony conviction of a witness.

In evaluating the exhibits, you should consider such items as: the circumstances under which the exhibit was prepared; and the probability that the exhibit accurately reflects what it is intended to show in light of the other evidence of the case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

As you can well surmise, this case is important to both sides, and each party to the suit is entitled to your full and fair consideration. You are not to associate in any way with the parties, their attorneys, agents or witnesses. You are likewise not to discuss the case with anyone, or permit anyone to discuss the case with you, whether within or without the courthouse, during the course of the trial; and you are not yourself to contact anyone in an attempt to discuss or gain a greater understanding of the case. In the event that anyone attempts to discuss the case with you or to influence your decision, you will report it to me promptly. You are not even to discuss the case among yourselves until you retire to the jury room to deliberate at the close of the entire case, and you are not to form or express any opinion on the case until you have heard all of the testimony and have had the benefit of my instructions as to the law which applies to the case. You should not go to the place where any alleged event occurred unless the Court orders a supervised jury visit to that place.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The Defendants deny the claims of the Plaintiff.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

I remind you, ladies and gentlemen of the jury, that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case until after I finally submit the case to you.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves one of the facts on which a party has the burden of proof in the case, without resorting to inference. Circumstantial evidence is evidence that indirectly proves one of the facts on which a party has the burden of proof in the case, by means of proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

A deposition is testimony taken under oath before the trial and preserved in writing or upon videotape. This evidence is entitled to neither more nor less consideration than you would give the same testimony had the witness testified here.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Certain evidence is about to be presented to you by an interrogatory and an answer to the interrogatory. An interrogatory is a written question from one party and answered by another during the course of a case. This evidence is entitled to the same consideration you would give had the witness been asked the interrogatory and then answered it from the witness stand.

You will only have the interrogatory and the answer read to you in court. Although there is a record of the interrogatory and answer to the interrogatory, this record will not be available to you during your deliberations.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose.

Your attention was called to these matters when the evidence was admitted.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The Plaintiff has the burden of proving, by direct expert testimony and by a preponderance of all the competent evidence, that at the time and place of the incident in question Defendant Dr. Brian Kerr failed to meet the applicable standard of health care practice of the community in which such care was provided as such standard then existed with respect to the class of health care provider to which Defendant Dr. Brian Kerr belonged and in which he was functioning.

In addition, the Plaintiff has the burden of proving that the failure of Defendant Dr. Brian Kerr to meet the applicable standard of health care practice caused the injuries of the Plaintiff.

The Defendants have no burden of proof on any issue in the case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Individual providers of health care, such as Dr. Brian Kerr in this case, shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account their training, experience, and fields of medical specialization.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The standard of health care practice means the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the events in question.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You must determine the applicable standard of health care practice and professional learning, skill and care required of Dr. Brian Kerr only from the testimony of those persons, including Dr. Brian Kerr, who have testified as expert witnesses as to such standard in this case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The quality or appropriateness of the standard of health care practice is not for you to decide.

You must apply the standard of health care practice that you determine to be applicable and you must not consider or decide whether that standard of health care practice is appropriate, inappropriate or deficient.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You are not permitted to assume or conclude that the standard of health care practice applicable to Dr. Brian Kerr is uniform throughout the State of Idaho.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

As used in these instructions, the term "community" refers to that geographical area ordinarily served by the licensed general hospital where the medical care complained of was provided.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

In instructing you on the subject of damages, I do not express any opinion as to whether Plaintiff is or is not entitled to damages.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You are instructed, in considering the issue of damages, that a physician is not liable for any pre-existing injury, disease, condition or disability which is not the natural and proximate result of the actions of the physician. In other words, you cannot award damages to the Plaintiff if the damage resulted from the natural progress of any injury, disease, condition or disability which is attributable to causes other than the actions of the physician.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You may not include as damages any amount that you might add for the purpose of punishing the Defendants or to make an example of them for the public good or to prevent other incidents. Such damages would be punitive and they are not authorized in this action.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

An award of damages is not subject to any income taxes, and you should not consider such taxes if you decide to make such an award.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

The law forbids you to determine any issue in this case by chance. Thus, if you determine that the Plaintiff is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take the independent estimate of each juror of the amount to be awarded and then to average such estimates to set the amount of your award.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused; and he may hesitate to change his position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a Foreperson, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the one conforming to your conclusions and return the other unused.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon a verdict, you should fill it out, if necessary, and have it signed. If your verdict is unanimous, your Foreperson alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict(s), you will notify the bailiff, who will then return you into open court.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

In this case, you will be given a Special Verdict form to use in returning your verdict. I will read the Verdict Form to you now:

We, the Jury, answer the Special Verdict form as follows:

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ANSWER: YES_____ NO_____

If you answered the above question "No," then simply sign the verdict form and inform the bailiff that you are done. If you answered the above question "Yes," please answer Question No. 2.

QUESTION NO. 2: What is the total amount of damages sustained by the Plaintiff for

Economic damages: $_____

Non-Economic damages: $_____

DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Now that you have been chosen as jurors for this trial, you are required to decide this case based solely on the evidence and the exhibits that you see and hear in this courtroom. "The case" includes anything you see or hear in the courtroom, or on any case questionnaire you completed, anything said by the lawyers, the Judge, Court staff, and everyone else in the courtroom. At the end of the case, I will give you instructions about the law that you must apply, and you will be asked to use that law, together with the evidence you have heard, to reach a verdict. In order for your verdict to be fair, you must not be exposed to any other information about the case, the law, or any of the issues involved in this trial during the course of your jury duty. This is very important, and so I am taking the time to give you some very detailed explanations about what you should do and not do during your time as jurors.

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DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Jury Instruction regarding Courtroom Conduct

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DEFENDANTS' REQUESTED

INSTRUCTION NO. _____

Jury Instruction regarding Jury Deliberations

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You many not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 SPECIAL VERDICT

We, the jury, answer the Special Verdict as follows:

QUESTION NO. 1: Did Defendant Dr. Brian Kerr fail to meet the applicable standard of health care practice of the community in which such care was provided, as such standard existed at the time such care was provided, with respect to the

class of health care provider to which Dr. Brian Kerr belonged and in which he was functioning, and did such failure proximately cause the death of Krystal Ballard?

ANSWER: YES_____ NO_____

If you answered the above question "No," then simply sign the verdict form and inform the bailiff that you are done. If you answered the above question "Yes," please answer Question No. 2.

QUESTION NO. 2: What is the total amount of damages sustained by Plaintiffs?

Economic damages: $_____

Non-Economic damages: $_____

DATED this ____ day of _____, 2014.

_____
Foreperson

_____

_____

_____

_____

_____

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 DEFENDANTS' EMERGENCY MOTION TO VACATE TRIAL OF APRIL 8, 2014

Defendants respectfully move the Court for its order vacating the scheduled trial of this case April 8, 2014 on the grounds that Defendant Brian Kerr was injured in a bike accident and is unable to attend the scheduled trial because of his injuries. The Affidavit of his treating physician, Dr. Britani Hill is attached.

DATED this 28th day of March, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2014, I served a true and correct copy of the foregoing DEFENDANTS' EMERGENCY MOTION TO VACATE TRIAL OF APRIL 8, 2014 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896

_____
Jeremiah A. Quane

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF DR. BRITANI HILL

STATE OF IDAHO)
: ss.
County of Ada)

Britani Hill, M.D., having been first duly sworn upon oath, deposes and says:

1. The information and events recited herein is based upon your Affiant's personal knowledge and experience.

2. I am a physician licensed by the Idaho State Board of Medicine and I have medical staff privileges at Saint Alphonsus Regional Medical Center.

3. I am the attending physician for Brian Kerr, I admitted Brian Kerr to Saint Alphonsus Regional Medical Center on March 20, 2014 as a result of injuries that were, upon information and belief, suffered by him in a bicycle accident on March 19, 2014.

4. Initially, Mr. Kerr was admitted to the Intensive Care Unit. He remained under my care for the duration of his hospitalization and was discharged on March 27, 2014.

5. Mr. Kerr is continuing to receive care for his injuries, including the administration of narcotic drugs.

6. I have been informed that Mr. Kerr is a Defendant in a lawsuit, and that a three-week trial is scheduled to begin on April 8, 2014. Based on Mr. Kerr's injuries, his continuing medical treatment and medications he is taking, I believe he will have difficulty in attending and participating in the trial proceedings.

7. I consider Brian Kerr not to be medical stable and he is impaired so as to prevent him attending his trial.

FURTHER your Affiant saith not.

Britani Hill
BRITANI HILL, M.D.

SUBSCRIBED AND SWORN to before me this 27 day of March, 2014.

(SEAL)

April Medley
Notary Public
State of Idaho

April Medley
Notary Public for Idaho
Residing at Ada County, Idaho
Commission expires 10/09/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF DR. BRITANI HILL by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Scott McKay
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Attorneys for Plaintiff

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Jeremiah A. Quane

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 MOTION FOR ORDER SHORTENING TIME

COME NOW Defendants, by and through their counsel of record, Quane Jones McColl, PLLC, and hereby move this Court for its order shortening the time for hearing said Defendants' Emergency Motion to Vacate Trial of April 8, 2014 to April 2,

2014 at 2:30 p.m., at the same time as the telephonic status conference that is scheduled.

This Motion is made upon the grounds and for the reasons that the Trial is set for April 8, 2014; therefore, Defendants' Emergency Motion to Vacate Trial of April 8, 2014 will need to be heard by the Court prior to that date.

This Motion is made upon the grounds and for the reasons stated in the Affidavit of Dr. Britani Hill, and documents and pleadings on file herein.

DATED this 28th day of March, 2014.

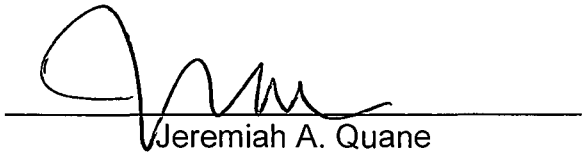
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2014, I served a true and correct copy of the foregoing MOTION FOR ORDER SHORTENING TIME by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

Bail/Tard ORIGINAL
4/2/14 SH

NO. _____
A.M. _____ FILED P.M. 3:10

APR 0 1 2014

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED February 21, 2014

Undersigned counsel for the Defendants hereby certifies that the Court

ordered exchange of information conference with counsel for the Plaintiff was conducted by means of the exchange of written correspondence as ordered by the Court 14 days before the trial date. This Certification is made to comply with the Court Order of February 21, 2014 and is subject to the trial of this case on April 8, 2014 being vacated.

Persons disclosed as possible witnesses for the Defendants

Dr. Brian Kerr

Susan Kerr

Briana Dumas

Donna Berg

Dr. Thomas Coffman

Dr. Charles Garrison

Dr. Gregory Laurence

Dr. Alan Frankle

Dr. John Lundeby

Dr. Geoffrey Stiller

Stephanie Miller

Dr. Karl Olson

Dr. Matthew Campbell

Dr. Glen Groben

Dr. Billy Morgan

Dr. Howard Schaff

Dr. Bertram Stemmler

Melissa Fellows

Cody Murphy

Wendy Vanderburgh

Dr. Tisha Fujii

Charles Ballard

Descriptive list of all exhibits proposed to be offered in evidence by the Defendants

1. Curriculum vitae of Dr. Kerr;
2. Curriculum vitae of Dr. Laurence;
3. Curriculum vitae of Dr. Garrison;
4. Curriculum vitae of Dr. Coffman;
5. Curriculum vitae of Dr. Frankle;
6. Curriculum vitae of Dr. Lundeby;
7. Curriculum vitae of Dr. Stiller.
8. Medical records of Dr. Kerr and Silk Touch Laser.
9. Records of Elmore Medical Center for treatment of Krystal Ballard.
10. Records of Elmore Ambulance Service for care and treatment of Krystal Ballard.
11. Records of Life Flight for care and treatment of Krystal Ballard.
12. Records of St. Alphonsus Regional Medical Center for treatment of Krystal Ballard.
13. Records of Ada County Coroner.

14. Autopsy Report for Krystal Ballard.

15. 21 photographs of Krystal Ballard taken by Dr. Kerr for his operative procedure.

16. 43 photographs of Krystal Ballard taken at autopsy.

17. 6 photographs of Susan Kerr that depict the positions of Krystal Ballard for the operative procedure of Dr. Kerr.

18. Photographs of brain and kidney tissue from the autopsy of Krystal Ballard prepared by Dr. Garrison that show the presence of fat emboli.

19. Autopsy tissue slides.

20. 4 photographs of Krystal Ballard that depict the entry sites by markings for liposuction and fat transfer.

21. Report of Dr. Morgan.

22. CT study of Krystal Ballard of July 25, 2010.

23. Report of Dr. Stemmler for chest x-ray of Krystal Ballard of July 25, 2010.

24. Report of Dr. Schaff for chest x-ray of Krystal Ballard of July 25, 2010.

25. Visible glass container that shows the quantity of fluid measured in milliliters or the equivalent in cubic centimeters.

26. Medical devices, equipment, supplies, packaged material, autoclave and instruments used by Dr. Kerr for his procedures with photographs of the same.

27. Compilation of data and database for operative procedures of Dr. Kerr by date, procedure and patient's first name from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 and the number of liposuction procedures, consisting of a total of 338 procedures.

28. Documents, records, material, data and calendars produced with Defendants responses to Plaintiff's First Requests for Production of Documents dated June 29, 2012.

29. For illustrative purposes, the following medical artist illustrations:

a. 18 depicting liposuction of anatomy with and without the cannula.

b. 1 depicting anatomy for fat transfer in the bilateral buttocks.

c. 1 depicting various tissue layers.

d. 1 depicting the content of the abdomen.

e. 1 depicting the urinary system.

f. 1 depicting gram negative and gram positive bacteria or rods.

30. Brochure of detergent.

31. Container of detergent.

32. Chronological record of medical care of Mountain home Air Force Base for Krystal Ballard dated July 23, 2010.

33. Medical records of United States Air Force identified as I-44 produced at the deposition of the Plaintiff.

Exhibits counsel have agreed may be received in evidence without

objection:

Defense exhibits to which this section applies are numbers 1 through 16, 19, 21, 22, 23 and 24.

The rest of defense exhibits are objected to by the Plaintiff on all grounds allowed by law.

Plaintiff's exhibits to which this section applies are numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 24 and 25.

The rest of Plaintiff's exhibits are objected to by the defense on all grounds allowed by law except that no objections will be asserted to the following exhibits on the basis of authenticity – numbers 12, 13, 15, 16, 17 and 18.

The Plaintiff disclosed the following exhibits at the exchange of information conference that undersigned counsel has numbered 1 through 37.

1. Medical records – charts for Silk Touch, Elmore Ambulance, Elmore Medical Center, St. Alphonsus Regional Medical Center, Ada County Coroner including Autopsy Report;

2. Cell phone record of Silk Touch;

3. Curriculum Vitaes of Dr. Sorensen, Dr. Nichols, Dr. Armitage and Cornelius Hofman;

4. Funeral placard;

5. Funeral placard;

6. Photo of Charles and Krystal;

7. Photo of Charles and Krystal;

8. Framed photos of Charles and Krystal;
9. Photo of Krystal tubing;
10. Marriage License;
11. Death Certificate;
12. Tillman Funeral Home invoice;
13. Artistic Flowers invoice;
14. Memorial program;
15. Bill from St. Alphonsus;
16. Bill from Elmore Medical Center;
17. Bill from Rost Funeral Home;
18. Bill from Lifeflight;
19. Memorandum – Extension of Enlistment for PCS (Elmendorf);
20. USAF Records Certification;
21. Line of Duty Determination;
22. Awards and Decorations info;
23. Air Force Achievement Medal;
24. Air Force Commendation Medal;
25. DJMS LES – Krystal;
26. DJMS LES – Charles;
27. Letter from Major Thomas Brown to Charles expressing sympathies;
28. Statement of Service;
29. Enlisted Performance Review 2010;

30. EPR 2009;

31. EPR 2008;

32. EPR 2007;

33. Reenlistment Eligibility Annex;

34. Air University CCAF Transcript;

35. BSU Transcript;

36. Embry-Riddle Transcript; and

37. University of Maryland Transcript.

DATED this 1st day of April, 2014.

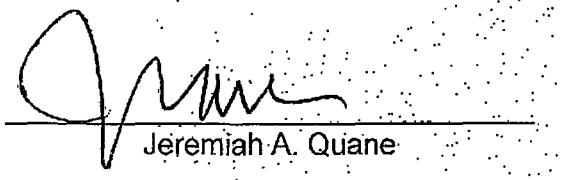
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2014, I served a true and correct copy of the foregoing CERTIFICATION OF DEFENSE COUNSEL PER THE AMENDED NOTICE OF TRIAL SETTING AND ORDER GOVERNING FURTHER PROCEEDINGS DATED February 21, 2014 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S RESPONSE TO DEFENDANTS' EMERGENCY MOTION TO VACATE TRIAL

ORIGINAL

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, and hereby responds to Defendants' Emergency Motion to Vacate Trial.

The circumstances necessitating Defendants' Emergency Motion to Vacate Trial are certainly unfortunate. While a civil defendant enjoys no constitutional right to be present at trial, Plaintiff is willing to consider accommodating Defendants' request to continue the trial so long as any such continuance is not for an unreasonably long period of time.

Initially, it is hardly clear from the Affidavit of Britani Hill, M.D., filed in support of the emergency motion, that the Defendant Brian Kerr, MD is unable to participate as necessary in the upcoming trial. On the one hand, Dr. Hill opines that she "believe[s] he will have difficulty in attending and participating in the trial proceedings." (Paragraph 6) Dr. Hill concludes: "I consider Brian Kerr not to be medical stable [sic] and he is impaired so as to prevent him attend his trial. [sic]" (Paragraph 7). Difficulty in attending trial does not equate to inability to attend trial. Notwithstanding, Plaintiff is not unsympathetic to Dr. Kerr's injuries and medical condition. Nor does Plaintiff wish to be subjected to a claim by defendants at trial or on appeal that Dr. Kerr was in fact unable to attend trial, or should he attend that he was otherwise limited by his medical condition.

With these considerations in mind, Plaintiff is willing to discuss the options available, if any, for an alternative trial date, and Plaintiff will be prepared to advise the Court of his position when this topic is addressed at the hearing scheduled for April 2, 2014.

Dated this 1st day of April, 2014.

Respectfully Submitted,

BAILEY & GLASSER LLP

By _____

P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2014, I served a true and correct copy of the foregoing **Plaintiff's Response to Defendants' Emergency Motion to Vacate Trial** by facsimile to the following:

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P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

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T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S PRETRIAL EXCHANGE OF INFORMATION CERTIFICATION

Plaintiff, Charles Ballard, through his attorneys, provides this certification concerning the parties' exchange of information conference as described in the Court's Amended Notice of Trial Setting and Order Governing Further Proceedings of February 21, 2014.

On October 22, 2013, the parties conferred for the purpose of exchanging pretrial information in advance of the first trial in this matter. By letter dated March 20, 2014 and emailed to defense counsel on that same date, plaintiff's counsel informed defense counsel that their position regarding trial exhibits remained the same and that we assumed defendants' position was likewise the same, but if not or if defense counsel felt a second pretrial conference was necessary, plaintiff's counsel was prepared to hold another pretrial conference at a mutually convenient time. (*See* **Exhibit A**, Email from B. McAllister to J. Quane Attaching Letter from P. Gregory Haddad to J. Quane.) Through this same letter, plaintiff's counsel again inquired of defendants' interest in exploring settlement as dictated by I.R.C.P. 16. Defendants did not respond to the foregoing letter.

Accordingly, plaintiff submits the foregoing regarding the matters described in Rule 16:

a. Plaintiff's Exhibits to be Received Into Evidence Without Objection

During the aforementioned conference of October 22, 2013, the parties agreed that the following exhibits would be received in evidence without objection. An asterisk "*" notes the exhibits that were offered and admitted into evidence during the November 2013 trial of this matter that ended in a mistrial:

Funeral Placards for Krystal Ballard (2) *

Photos of Charles & Krystal (2) *

Framed Photos of Charles & Krystal *

Photo of Krystal Tubing *

Marriage License *

Death Certificate *

Silk Touch Medical Records (redacted to reflect Court's limine ruling) *

Elmore Ambulance Medical Records *

Elmore Medical Center Medical Records *

St. Alphonsus Regional Medical Center Medical Records *

Ada County Coroner Records, Including Autopsy Report, Photos, and Tissue Slides *

Curricula Vitaes for Testifying Expert Witnesses *

CT Scans of Krystal Ballard *

b. Exhibits to Which No Agreement was Reached

During the aforementioned conference of October 22, 2013, defense counsel stated an objection to the following exhibits "on all grounds" or alternatively no agreement was reached in advance of the November 2013 trial. An asterisk "*" notes the exhibits that were offered and admitted into evidence during the November 2013 trial of this matter that ended in a mistrial:

Tillman Funeral Home Invoice *

Artistic Flowers Invoice *

Memorial Program for Krystal Ballard *

Bill from St. Alphonsus Regional Medical Center *

Bill from Elmore Medical Center *

Bill from Rost Funeral Home *

Bill from Lifeflight *

Memorandum - Extension of Enlistment for PCS (Elmendorf)

USAF Records Certification *

Line of Duty Determination *

Awards & Decorations Info *

Air Force Achievement Medal *

Air Force Commendation Medal *

DJMS LES – Krystal * (will redact to exclude insurance information)

DJMS LES – Charles * (will redact to exclude insurance information)

Letter from Major Thomas Brown to Charles Ballard following Krystal's death *

Statement of Service *

Enlisted Performance Review 2010 *

Enlisted Performance Review 2009 *

Enlisted Performance Review 2008 *

Enlisted Performance Review 2007 *

Reenlistment Eligibility Annex for Krystal *

Air University CCAF Transcript

BSU Transcript

Embry-Riddle Transcript

University of Maryland Transcript

Charts and Tables Generated and/or Employed by Plaintiff's Expert Economist, Cornelius Hofman *

Sound Surgical Technologies the VASER System VentX Suction Handpiece User's Guide *

Cell Phone Records of Dr. Kerr and Susan Kerr *

Twenty-one Photos Taken of Krystal Ballard by Dr. Kerr * (offered and admitted by

defendants)

Tissue Slides (Garrison) *

Autopsy Photos *

Photos of Tissue Slides from Autopsy (Nichols) *

c. Demonstrative Exhibits, Surgical Equipment and Devices, and Photos of Surgical Equipment and Devices

Both parties at the November 2013 trial identified certain surgical equipment, supplies, devices, and photos of same although no agreement was reached concerning admissibility. The Court denied admissibility of a jug of detergent and a brochure concerning detergent which had not been identified or produced by defendants in discovery.

d. Possible Witnesses for Plaintiff

On October 22, 2013, the parties agreed they would separately provide a list of possible trial witnesses. The following is plaintiff's list of possible trial witnesses.

Charles Ballard

Brian Kerr, M.D.

Susan Kerr

Donna Berg

Briana Kerr Dumas

Karl Olson, M.D.

Matthew Campbell, M.D.

Edward Jong Wook Kim, M.D.

Howard Schaff, M.D.

Erwin Sonnenberg

Glen Groben, M.D.

Dean Sorensen, M.D.

Keith Armitage, M.D.

George Nichols, M.D

Bertram Stemmler, M.D.

Billy R. Morgan, M.D.

Rachel Towler

Vincent Brooks

Leroy Chapman

Ray Roman

Jonelle Cadiz Buchanan (by Video Deposition)

Cornelius Hofman, GEC Group

Custodians of Records for Elmore Medical Center, Elmore Ambulance, Life Flight, SARMC, USAF

e. Offer of Mediation

Defendants have declined plaintiff's offer to engage in mediation and have not responded to plaintiff's invitation to discuss settlement.

Dated this 1st day of April, 2014.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By_____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2014, I served a true and correct copy of the foregoing **Plaintiff's Pretrial Exchange of Information Certification** by delivering the same to the following via facsimile:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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BAILEY & GLASSER, LLP
2855 Cranberry Square
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James B. Perrine jbperrine@baileyglasser.com
BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, AL 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S OPPOSITION AND RESPONSE TO DEFENDANTS' MOTIONS *IN LIMINE*

ORIGINAL

COMES NOW the Plaintiff, Charles Ballard, by and through his attorneys, pursuant to Idaho Code § 9-102, Idaho Rule of Evidence 103(c), and the Court's Amended Notice of Trial Setting and Order Governing Further Proceedings of February 21, 2014, and hereby opposes and responds to Defendants' Motions *in Limine*. Plaintiff incorporates by reference his prior Responses to Defendants' Motions *in Limine*, filed October 29, 2013, as if that filing was fully set forth herein.

Plaintiff relies on his October 29, 2013, filing because Defendants' current Motions *in Limine*, including the legal reasoning presented by memorandum in support of those motions, are substantively identical to Defendants' previous filings, even insofar as Defendants include the same trial date of November 5, 2013. (*Compare* Mem. in Supp. Of Defs.' Mots. *in Limine*, Oct. 21, 2013, *with* Mem. in Supp. Of Defs.' Mots. *in Limine*, March 25, 2014.) Contrary to Defendants' recent filing, however, circumstances involving defense expert, Dr. Gregory Laurence, are quite different today than they were in October.

No longer does Dr. Laurence face mere allegations. On February 6, 2014, Dr. Laurence entered a guilty plea to the federal felony offense of Corruptly Endeavoring to Impede the Due Administration of the Internal Revenue Laws. (*See* Exhibit B to Aff. of [Pl.'s] Counsel, March 25, 2014 (Plea Agreement).) At that time, Dr. Laurence admitted to committing the criminal acts serving as the factual basis for that plea. (*Id.*)

By Plaintiff's response of October 29, 2013, Plaintiff presented the following arguments:

I. Defendants' First and Second Motions *in Limine* Should be Denied Because Plaintiff Should be Permitted to Put on Evidence of Dr. O'Neil's Competence to Serve as the Source of All Three Defense Standard of Care Experts' Knowledge of the Applicable Standard of Care;

II. Defendants' Third Motion *in Limine* [as to the Admissibility of Evidence Pertaining to the Criminal Proceedings Pending Against Dr. Laurence] Should be Denied;

III. Defendants' Fourth Motion *in Limine* Should be Denied to the Degree Dr. Kerr Opens the Door for Cross-Examination on the Issue of Liability Insurance;

IV. Defendants' Fifth Motion *in Limine* [to Preclude Evidence That Defendants or Defendants' Witnesses Have Been Previously Represented by Defense Counsel] Should be Denied to the Degree it Seeks to Preclude Proper Cross-Examination of Defendants' Expert Witnesses; and

V. Defendants' Sixth Motion *in Limine* Regarding Obamacare is Unopposed.

On account of Dr. Gregory Laurence's guilty plea, Plaintiff now responds to Defendants' Third Motion *in Limine* by reference to his sixteenth motion *in limine*, which Plaintiff incorporates as if it was fully set forth herein. By that motion *in limine*, Plaintiff argues that Dr. Gregory Laurence's recent guilty plea to a federal felony offense is admissible, as are the underlying facts contained within his plea agreement, which Dr. Laurence now admits are true. (*See* Pl.'s Not. of Reliance on Previously Filed Consolidated Mots. *in Limine* and Supp. Mots. *in Limine* 4-14, March 25, 2014.) For the reasons stated in Plaintiff's sixteenth motion *in limine*, Defendants' Third Motion *in Limine* should be denied.

Dated this 1st day of April, 2014.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2014, I served a true and correct copy of the foregoing **Plaintiff's Opposition and Response to Defendants' Motions *in Limine*** by delivering the same to the following via facsimile:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Morgantown, WV 26508
T: (304) 594-0087; F: (304) 594-9709

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BAILEY & GLASSER, LLP
3000 Riverchase Galleria, Suite 905
Birmingham, AL 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL

ORIGINAL

AFFIDAVIT OF P. GREGORY HADDAD

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, TO WIT:

I, P. Gregory Haddad, as the attorney for Plaintiff, Charles Ballard, subscribed hereto by authority duly given, after being duly sworn, upon his oath, state and allege the following.

1. I am one of the attorneys representing Plaintiff in this litigation.

2. On this date, Plaintiff filed his Pretrial Exchange of Information Certification.

3. A true and accurate copy of the exhibit referenced within Plaintiff's Pretrial Exchange of Information Certification is attached hereto as follows.

4. A true and accurate copy of Brian McAllister's March 20, 2014, email to Mr. Quane attaching P. Gregory Haddad's letter to Mr. Quane of the same date is attached hereto at **Exhibit A.**

And further affiant saith not.

P. Gregory Haddad

STATE OF WEST VIRGINIA;
COUNTY OF MONONGALIA, to-wit:

Taken, subscribed and sworn to before me this 1st day of April, 2014.

My Commission expires: Dec. 16, 2021.

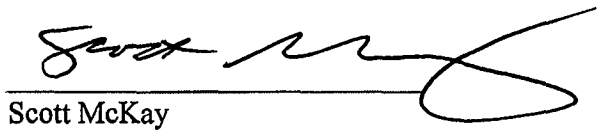
Notary

OFFICIAL SEAL
DOROTHY A. SOMMERS
NOTARY PUBLIC
STATE OF WEST VIRGINIA
525 Tyrone Road
Morgantown, WV 26508
My Commission Expires Dec 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2014, I served a true and correct copy of the foregoing ***Affidavit of Counsel*** by delivering the same to the following by facsimile:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519



Scott McKay

Debi Presher

From: Brian J. McAllister [bmcallister@baileyglasser.com]
Sent: Thursday, March 20, 2014 8:30 AM
To: jaq@quanelaw.com; corina@quanelaw.com
Cc: Philip G. Haddad; Scott McKay; Debi Presher; Farrah Caruthers; Brian J. McAllister
Subject: {Ballard, Charles}{Matter No.[10-03362]}
Attachments: 693116.pdf

Mr. Quane and Ms. Ferris –

Attached please find a letter from Greg Haddad.

Thank you.

Brian J. McAllister :: Lawyer
2855 Cranberry Square :: Morgantown WV 26508
Office 304.594.0087 :: **Fax** 304.594.9709

BAILEY&GLASSER LLP

EXHIBIT A

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

March 20, 2014

VIA EMAIL ONLY

Jeremiah A. Quane, Esq.
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
PO Box 1576
Boise, Idaho 83701

Re: *Ballard v. Kerr, et al.*

Dear Mr. Quane:

Pursuant to the Amended Notice of Trial Setting filed on February 21, 2014, the parties are directed to hold a conference for exchange of information and discussion of matters specified by IRCP 16(a) and 16(b) not later than fourteen (14) days prior to trial. We previously conducted such a conference on October 22, 2013, at your office.

Our position regarding your trial exhibits remains the same, and we assume your position regarding our exhibits is likewise the same. Thus, unless you now have a different position, or unless you contemplate different trial exhibits, it does not appear that a second conference is necessary. If you feel that there is a need for such a conference, we can make ourselves available at a mutually convenient time next week to conduct the conference telephonically.

Rule 16 also requires us to discuss settlement. At your invitation, we previously provided you with a settlement demand by letter dated June 10, 2013. You did not respond to this demand. You now have the benefit of having observed the presentation of plaintiff's claims at trial. We believe the presentation of those claims would have resulted in a substantial jury verdict against your clients absent the mistrial. With that said, we also recognize that every case has risk, and we are willing to take that risk into consideration in the context of a settlement. If your clients are interested in exploring settlement of this case, I invite you to present a reasonable counter-offer, to which we will promptly respond after discussing with SSgt Ballard.

I look forward to hearing from you concerning the above matters.

Sincerely,

/s/ P. Gregory Haddad

P. Gregory Haddad, Esq.

PGH/bjm
cc: Scott McKay, Esq. (via email)

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBORAH A. BAIL
District Judge

April 2, 2014

FILE MINUTES

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR and SILK TOUCH LASER,

Defendants.

Case No. CVOC12-4792

TIME SET FOR: Telephonic Status Conference

Greg Haddad and Scott McKay on behalf of the Plaintiff

Jeremiah Quane on behalf of the Defendants

Quane argues Motion to Vacate Jury Trial

Haddad has no objection to the Motion to Vacate Jury Trial if the continuance is brief

The Court vacates the Jury Trial set for April 8th. Re-sets the Jury Trial for September 16 @ 9:30 am. Defense has until tomorrow to contact witnesses.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV-OC-2012-04792

NOTICE OF RE-SETTING TRIAL

The above-entitled matter has been re-set for jury trial on:

September 16, 2014 @ 9:30 a.m. and continue for three (3) weeks.

- ▶ All discovery has been completed.
- ▶ All trial exhibits have been identified.

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR ADA COUNTY

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of April, 2014, I mailed (served) a true and correct copy of the within instrument to:

SCOTT MCKAY
ATTORNEY AT LAW
PO BOX 2772
BOISE ID 83701

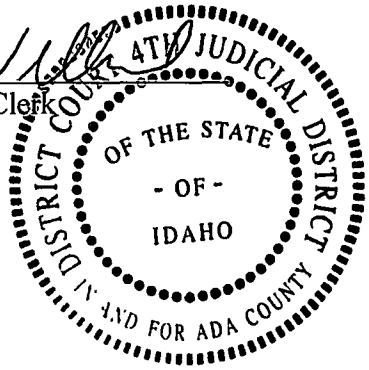
GREG HADDAD
ATTORNEY AT LAW
2855 CRANBERRY SQ
MORGANTOWN WV 26508

JAMES PERRINE
ATTORNEY AT LAW
3000 RIVERCHASE GALLERIA STE 905
BIRMINGHAM AL 35244

JEREMIAH QUANE
ATTORNEY AT LAW
PO BOX 1576
BOISE ID 83701

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk



Paid/Tara
mlk 8/7/14

NO. _____
A.M. _____ FILED P.M. 4

AUG 06 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT, LLP
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Birmingham, AL 35244
T: (205) 988-9253; F: (205) 733-4896

Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF CHANGE OF ADDRESS

SM

ORIGINAL

PLEASE TAKE NOTICE, that, effective immediately, the address for the undersigned Plaintiff's counsel will be as follows:

P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
6 Canyon Road, Suite 200
Morgantown, West Virginia 26508

Telephone and facsimile numbers will remain unchanged. Please amend your contact information accordingly.

Dated this 6th day of August, 2014.

Respectfully Submitted,

BAILEY & GLASSER LLP

By _____
P. Gregory Haddad

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2014, I served a true and correct copy of the foregoing **Notice of Change of Address** by delivering the same to the following via U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
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101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

Scott McKay

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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US Bank Plaza
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P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 BRIEF ON USE OF DEPOSITIONS AT TRIAL

The Idaho Rules of Civil Procedure provide when a deposition may be used at trial. ***See*** I.R.C.P. 32(a). Idaho Rule of Civil Procedure Rule 32(a) provides when a deposition may be used at trial as follows:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Idaho Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state of Idaho, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

. . . .

I.R.C.P. 32(a).

In determining whether a deposition may be used at trial, the distinction between parties and non-parties is important. Only two sections of I.R.C.P. 32(a) apply to a non-party witness's deposition. ***See*** I.R.C.P. 32(a). I.R.C.P. 32(a)(1) allows any party to use any deposition at trial to impeach the testimony of a deponent as a witness. ***See*** I.R.C.P. 32(a)(1). I.R.C.P. 32(a)(3) permits the deposition of a party or a non-party witness for any purpose ***if and only if*** the court finds that the deponent is dead, that the deponent is greater than 100 miles away from the place of trial, that the deponent is unable to testify due to age, illness, infirmity, or imprisonment, or that "exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." ***See*** I.R.C.P. 32(a)(3).

In the present case, since Dr. Coffman is not on the stand testifying, his deposition testimony cannot be read and used to impeach him. ***See*** I.R.C.P. 32(a)(1). Rule 32(a)(1) does not allow one witness to be impeached by the deposition testimony of another witness. ***Id.*** Dr. Coffman's deposition testimony cannot be used to impeach anyone but Dr. Coffman. ***Id.*** Therefore, I.R.C.P. 32(a)(1) does not apply and Dr. Coffman's deposition cannot be read for the purpose of impeachment during Dr. Kerr's testimony.

When a deposition is sought to be introduced during the testimony of someone other than the deponent himself, as is being done here, the deposition can be used for any purpose under the very limited circumstances enumerated in I.R.C.P. 32(a)(3). ***See*** I.R.C.P. 32(a)(3).

In the present case, Dr. Thomas Coffman is a non-party witness; therefore, I.R.C.P. 32(a)(3) applies and limits the use of his deposition at trial. ***See*** I.R.C.P. 32(a)(3). None of the limited circumstances enumerated in Rule 32(a)(3) are present however. Dr. Coffman is alive and well, and he is in Idaho. Moreover, he is within 100 miles from the Ada County Courthouse, as he is in Boise. Dr. Coffman is not in prison or of an age that affects his ability to testify. No exceptional circumstances exist in this case warranting the reading of Dr. Coffman's deposition during the Defendant Dr. Kerr's testimony.

The purpose of I.R.C.P. 32(a)(3) is to prevent the need for a continuance of the trial due to the witness's unavailability. ***See Alabama Power Co. v. Taylor***, 293 Ala. 484, 488, 306 So. 2d 236, 239 (1975) ("As we perceive it, the very purpose of [Rule 32(a)(3)] is to prevent the need for a continuance."). In the present matter, Dr. Coffman is not unavailable due to any of the enumerated reasons in I.R.C.P. 32(a)(3). Not only are none of the enumerated reasons present here, there is also no need to prevent the continuance of the trial. There is no danger of the trial continuing if Dr. Coffman's deposition is not read during Dr. Kerr's testimony. If the deposition of Dr. Coffman is permitted to be used during the presentation of the testimony of Dr. Kerr by Plaintiff's counsel, it will be tantamount to the admission of testimony that is inadmissible and a complete departure from the limitations of Rule 32(a) that govern the use of depositions at trial.

The Defendant respectfully submits that I.R.C.P. 32(a) is mandatory in nature. This rule prohibits the reading of Dr. Coffman's deposition during Dr. Kerr's testimony because none of the very limited circumstances in Rule 32(a)(3) exists. Therefore, the Plaintiff should be prohibited from reading any portion of Dr. Coffman's

deposition during Dr. Kerr's testimony.

DATED this 11 day of September, 2014.

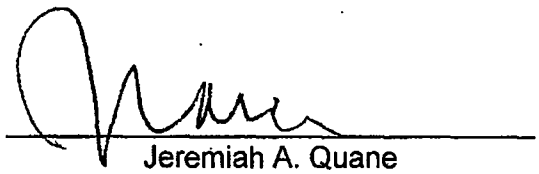
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of September, 2014, I served a true and correct copy of the foregoing BRIEF ON USE OF DEPOSITIONS AT TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

Bail/Tara
pup 9/12/14

A.M. FILED P.M. 4:19

SEP 11 2014

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 NOTICE OF FILING

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

Please find, attached, Defendants' Exhibit List.

ORIGINAL

DATED this 11th day of September, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September, 2014, I served a true and correct copy of the foregoing NOTICE OF FILING by delivering the same to each of the following, by the method indicated below, addressed as follows:

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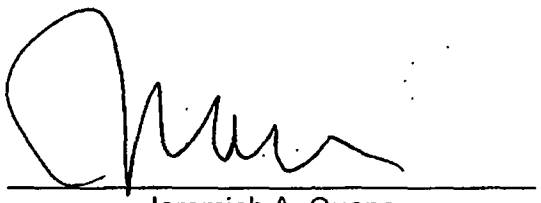

Jeremiah A. Quane

DEFENDANTS' EXHIBITS

Page 1

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
A	Curriculum vitae of Dr. Kerr			
B	Curriculum vitae of Dr. Laurence			
C	Curriculum vitae of Dr. Garrison			
D	Curriculum vitae of Dr. Coffman			
E	Curriculum vitae of Dr. Frankle			
F	Curriculum vitae of Dr. Lundeby			
G	Curriculum vitae of Dr. Stiller			
H	Medical records of Dr. Kerr and Silk Touch Laser			
I	Records of Elmore Medical Center for treatment of Krystal Ballard			
J	Records of Elmore Ambulance Service for care and treatment of Krystal Ballard			
K	Records of Life Flight for care and treatment of Krystal Ballard			
L	Records of St. Alphonsus Regional Medical Center for treatment of Krystal Ballard			
M	Records of Ada County Coroner			
N	Autopsy Report for Krystal Ballard			
O1 - O21	21 Photographs of Krystal Ballard taken by Dr. Kerr for his operative procedure			

DEFENDANTS' EXHIBITS

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Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
P1 – P43	43 Photographs of Krystal Ballard taken at autopsy			
Q1 – Q4	4 Photographs of Susan Kerr that depict the positions of Krystal Ballard for the operative procedure of Dr. Kerr			
R1 – R46	46 Photographs of brain and kidney tissue from the autopsy of Krystal Ballard prepared by Dr. Garrison that show the presence of fat emboli			

DEFENDANTS' EXHIBITS

Page 3

Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
S	Autopsy tissue slides			
T1 – T4	4 Photographs of Krystal Ballard that depict the entry sites by markings for liposuction and fat transfer			
U	Report of Dr. Morgan			
V	CT study of Krystal Ballard of July 25, 2010 (44 films)			
W	Report of Dr. Stemmler for chest x-ray of Krystal Ballard of July 25, 2010			
X	Report of Dr. Schaff for chest x-ray of Krystal Ballard of July 25, 2010			
Y	Visible glass container that shows the quantity of fluid measured in milliliters or the equivalent in cubic centimeters			

DEFENDANTS' EXHIBITS

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Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
Z1 – Z42	Various medical devices, equipment, supplies, packaged material, autoclave and surgical instruments used by Dr. Kerr for the liposuction and fat transfer procedure with illustrative photographs of the same			
AA	Compilation of operative procedures of Dr. Kerr from December of 2007 through December 23, 2010, with Krystal Ballard identified on July 21, 2010 with the total number of liposuction procedures, consisting of 338.			
BB	Documents, records, material, data and calendars produced with Defendants response to Plaintiff's First Requests for Production of Documents dated June 29, 2012			

DEFENDANTS' EXHIBITS

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Ballard v. Kerr, etal.

Ada County Case No. CV OC 1204792

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	DENIED
CC1 – CC18	18 Medical illustrations depicting liposuction of anatomy with and without cannula of Krystal Ballard			
DD	Medical illustrations depicting anatomy for fat transfer in the bilateral buttocks of Krystal Ballard			
EE	Medical illustrations depicting various tissue layers			
FF	Medical illustrations depicting the content of the abdomen			
GG	Medical illustrations depicting the urinary system			
HH	Medical illustrations depicting gram negative and gram positive bacteria or rods			
II	Brochure for detergent			
JJ	Container of detergent			
KK	Chronological record of medical care of Mountain Home Air Force Base for Krystal Ballard dated July 23, 2010			
LL	Medical records of United States Air Force identified as I-44 produced at the deposition of the Plaintiff			

Time	Speaker	Note
08:41:24 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 1**
09:06:50 AM	Plaintiff's attorneys	Greg Haddad & Scott McKay
09:07:08 AM	Defendant's attorneys	Jeremiah Quane & Terry Jones
09:33:56 AM	Judge	Calls case
09:34:01 AM		the jury is not present
09:34:09 AM	S. McKay	Moves to exclude witnesses
09:34:22 AM	Judge	witnesses are excluded except parties and party representatives
09:34:49 AM	S. McKay	Moves to exclude mention of the prior trial
09:35:07 AM	Judge	it may be mentioned as a prior proceeding
09:35:55 AM	J. Quane	Responds
09:36:35 AM	S. McKay	Moves to allow jurors to ask questions
09:38:48 AM	Judge	will allow jurors to ask questions
09:39:00 AM	J. Quane	objects to juror questions
09:44:39 AM	S. McKay	objects to Defendant's exhibits II and JJ
09:45:39 AM	J. Quane	Responds
09:45:49 AM	Judge	Will not allow it now but if it becomes relevant it will be taken up outside the presence of the jury
09:48:35 AM	Judge	instructs counsel
09:56:26 AM	J. Quane	comments
10:00:39 AM		Court recesses
10:01:04 AM		Court resumes
10:11:37 AM		the prospective jury panel is present
10:11:55 AM	Judge	instructs the prospective jury panel
10:12:54 AM	Clerk	Calls roll
10:16:28 AM	Clerk	Swears in the prospective jury panel
10:22:44 AM	Judge	Voir dires the prospective jury panel
10:35:03 AM	Clerk	Draws twenty-six names
10:43:03 AM		Juror # 179 is excused by the Court with cause
10:49:48 AM		Juror # 163 is excused by the Court with cause
11:00:24 AM		Juror # 107 is excused by the Court with cause
11:03:10 AM		Juror # 108 is excused by the Court with cause
11:04:56 AM		Juror # 119 is excused by the Court with cause
11:09:00 AM	S. McKay	Voir dires the prospective jury panel
11:27:04 AM		Juror # 87 is excused by the Court with cause
11:28:00 AM		Juror # 125 is excused by the Court with cause
11:43:01 AM		Juror # 120 is excused by the Court with cause
11:45:55 AM		Juror # 93 is excused by the Court with cause
11:59:55 AM	S. McKay	passes the panel with cause
12:00:06 PM		Court recesses
12:16:13 PM		Court resumes

12:16:17 PM		the prospective jury panel is present
12:16:19 PM	J. Quane	Voir dires the prospective jury panel
01:01:52 PM	J. Quane	passes the panel with cause
01:02:42 PM	Judge	Thanks and excuses the jury
01:10:12 PM		counsel exercise their peremptory challenges
01:26:23 PM	Judge	Seats the trial jury
01:31:00 PM	Judge	Thanks and excuses the jury
01:31:03 PM	Judge	admonishes the jury
01:31:16 PM		Court recesses
03:01:22 PM		Court resumes
03:01:25 PM		the jury is present
03:01:34 PM	Clerk	Swears in the trial jury
03:07:49 PM	Judge	Reads preliminary jury instructions
03:14:41 PM	G. Haddad	Opening statement
03:51:08 PM	J. Quane	Opening statement
03:56:07 PM	G. Haddad	Objection
03:56:11 PM	Judge	Objection is sustained
04:41:49 PM	G. Haddad	Objection - relevance
04:41:51 PM	Judge	Objection is sustained
05:03:42 PM	G. Haddad	Objection
05:05:51 PM	G. Haddad	withdraws objection
05:13:44 PM	Judge	admonishes the jury
05:14:12 PM		Court recesses

Time	Speaker	Note
08:45:11 AM		CVOC12-4792 Ballard v Kerr Jury Trial - Day 2
08:45:36 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
08:46:47 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
09:34:36 AM	Judge	Calls case
09:34:41 AM		the jury is not present
09:34:51 AM	S. McKay	counsel agree to exchange the following day witnesses by 6 pm
09:36:58 AM	S. McKay	Exhibits # 1, 5, 5a, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 & 21 are identified and moves to admit
09:38:50 AM	Judge	Exhibits # 1, 5, 5a, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 & 21 are admitted
09:40:07 AM	S. McKay	objects to reference to Defendant's exhibit - call from Krystal to Air Force
09:41:27 AM	Judge	that exhibit can't be referenced at all
09:41:45 AM		the jury is now present
09:42:08 AM	G. Haddad	Calls Dean Sorensen, sworn, direct examination
10:05:57 AM	J. Quane	Objection - lack of foundation
10:05:58 AM	Judge	Objection is overruled
10:07:38 AM	J. Quane	Objection - non-responsive
10:07:40 AM	Judge	Objection is overruled
10:20:27 AM	J. Quane	Objection - form of the question
10:20:33 AM	Judge	Objection is overruled
10:21:57 AM	G. Haddad	Moves to publish Deposition of Brian Kerr
10:23:11 AM		Deposition of Brian Kerr is published
10:31:58 AM		admonishes the jury
10:32:05 AM		Court recesses
10:53:02 AM		Court resumes
10:53:12 AM		the jury is present
10:53:14 AM	G. Haddad	continues direct examination of the witness - Dean Sorensen
10:54:08 AM	G. Haddad	Moves to publish answers to interrogatories
10:54:22 AM	J. Quane	Objection - not disclosed
10:54:35 AM	Judge	Objection is overruled
10:55:02 AM		Answers to interrogatories is published
10:57:09 AM	J. Quane	Objection - cause for conclusion
10:57:40 AM	Judge	Objection is overruled
10:58:10 AM	J. Quane	Objection - cause for conclusion
10:58:16 AM	Judge	Objection is overruled
11:14:18 AM	J. Quane	Objection
11:14:20 AM	Judge	Objection is overruled
11:20:40 AM	J. Quane	Objection - mis-quote
11:20:49 AM	Judge	Objection is overruled

11:22:15 AM	J. Quane	Cross-examination of the witness - Dean Sorensen
11:29:44 AM	G. Haddad	Objection - speculation
11:29:49 AM	Judge	Objection is sustained
11:59:19 AM	Judge	admonishes the jury
11:59:22 AM		Court recesses
01:31:58 PM		Court resumes
01:32:03 PM		the jury is present
01:32:15 PM	J. Quane	continues cross-examination of the witness - Dean Sorensen
02:05:07 PM	J. Quane	would like to make an offer of proof re: website photo
02:07:10 PM	Judge	excuses the jury
02:07:11 PM	J. Quane	Makes an offer of proof
02:07:25 PM	Judge	will not allow the photo to be shown to the jury
02:07:41 PM		Court recesses
02:31:40 PM		Court resumes
02:31:47 PM		the jury is present
02:31:54 PM	J. Quane	continues cross-examination of the witness - Dean Sorensen
03:05:12 PM	G. Haddad	Objection - relevance and outside the scope
03:05:22 PM	J. Quane	Responds
03:07:03 PM	Judge	Objection is sustained
03:07:26 PM	G. Haddad	Objection - foundation
03:07:29 PM	Judge	Objection is overruled
03:15:55 PM	G. Haddad	Objection - relevance
03:15:58 PM	Judge	Objection is sustained
03:16:47 PM	G. Haddad	Objection
03:17:03 PM	Judge	excuses the jury
03:18:13 PM	J. Quane	makes an offer of proof
03:22:27 PM	T. Jones	comments
03:23:52 PM	Judge	Objection is sustained
03:24:16 PM		Court recesses
03:37:04 PM		Court resumes
03:37:12 PM		the jury is present
03:37:20 PM	J. Quane	continues cross-examination of the witness - Dean Sorensen
03:45:06 PM		Moves to publish deposition of the witness - Dean Sorensen
03:45:12 PM	G. Haddad	Objection - relevance
03:47:20 PM	Judge	Allows the deposition of Dean Sorensen to be published
04:05:39 PM	G. Haddad	Objection - based on Court's ruling
04:07:21 PM	Judge	Inquires of the witness
04:20:10 PM	G. Haddad	Re-direct examination of the witness - Dean Sorensen
04:20:55 PM	J. Quane	Objection
04:20:58 PM	Judge	Objection is overruled

04:21:21 PM	J. Quane	Objection - lack of foundation
04:21:23 PM	Judge	Objection is overruled
04:21:38 PM	J. Quane	Objection - leading
04:21:47 PM	Judge	Objection is overruled
04:21:58 PM	J. Quane	Objection - lack of foundation
04:22:00 PM	Judge	Objection is overruled
04:22:13 PM	J. Quane	Objection - beyond the scope
04:22:20 PM	Judge	Objection is overruled
04:22:29 PM	J. Quane	Objection - beyond the scope
04:22:46 PM	Judge	re-phrase question
04:23:19 PM	J. Quane	Objection - relevance and beyond the scope
04:23:32 PM	Judge	Objection is overruled
04:25:21 PM	J. Quane	Objection - lack of foundation
04:25:22 PM	Judge	Objection is overruled
04:27:36 PM	J. Quane	Objection - redundant
04:27:50 PM	Judge	Objection is overruled
04:28:10 PM	J. Quane	Objection
04:28:14 PM	Judge	Objection is overruled
04:29:12 PM	J. Quane	Objection - beyond the scope
04:29:24 PM	Judge	Objection is overruled
04:37:03 PM	J. Quane	Objection - non-responsive
04:37:09 PM	Judge	Objection is overruled
04:41:20 PM		jury questions are handed to the Court
04:43:25 PM		side-bar
04:48:36 PM	Judge	Inquires of the witness - Dean Sorensen
04:53:25 PM	J. Quane	Re-cross examination of the witness - Dean Sorensen
04:57:56 PM		admonishes the jury
04:57:59 PM	Judge	excuses the jury
04:58:58 PM	Judge	instructs counsel regarding jury questions
05:02:57 PM	J. Quane	Exhibits # MM and NN are marked and identified - makes an offer of proof for the admission of the exhibits
05:07:04 PM	Judge	The exhibits will not be admitted
05:07:18 PM		Court recesses

Time	Speaker	Note
9:07:09 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 3**
9:07:30 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
9:07:42 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:21:15 AM	Judge	Calls case
9:21:21 AM		the jury is not present
9:21:23 AM	S. McKay	Exhibit # 2 previously marked is identified
9:21:37 AM	S. McKay	Moves to admit Exhibit # 2
9:21:43 AM	J. Quane	No objection
9:21:45 AM	Judge	Exhibit # 2 is admitted
9:22:21 AM	S. McKay	Argues previous filed Motion in Limine
9:26:15 AM	Judge	The ruling on the previous Motion in Limine stands
9:30:37 AM	J. Quane	comments regarding testimony of witnesses not discussing previous trial
9:34:48 AM		Court recesses
9:37:09 AM		Court resumes
9:37:13 AM		the jury is present
9:37:24 AM	G. Haddad	Calls George Nichols, sworn, direct examination
9:56:01 AM	J. Quane	Objection
9:56:04 AM	Judge	Objection is overruled
9:57:17 AM	J. Quane	Objection - non-disclosure
9:57:29 AM	G. Haddad	Responds
9:57:46 AM	Judge	Objection is overruled
10:30:16 AM	J. Quane	Objection - improper use of a deposition
10:30:21 AM	Judge	Objection is sustained
10:37:18 AM		admonishes the jury
10:37:21 AM		Court recesses
10:54:14 AM		Court resumes
10:54:21 AM		the jury is present
10:54:49 AM	G. Haddad	continues direct examination of the witness - George Nichols
11:11:07 AM	J. Quane	Cross-examination of the witness - George Nichols
11:50:49 AM	Judge	admonishes the jury
11:50:52 AM		Court recesses
1:46:16 PM		Court resumes
1:46:28 PM		the jury is present
1:46:43 PM	J. Quane	continues cross-examination of the witness - George Nichols
2:46:55 PM	G. Haddad	Objection

2:47:15 PM	Judge	Objection is overruled
3:14:40 PM		admonishes the jury
3:14:43 PM		Court recesses
3:29:53 PM		Court resumes
3:30:07 PM		the jury is present
3:30:12 PM	J. Quane	continues cross-examination of the witness - George Nichols
3:35:44 PM	G. Haddad	Re-direct examination of the witness - George Nichols
3:36:36 PM	J. Quane	Objection - mis-statement
3:36:39 PM	Judge	Objection is overruled
3:37:52 PM	J. Quane	Objection
3:37:55 PM	Judge	Objection is overruled
3:41:24 PM	J. Quane	Objection - leading
3:41:31 PM	Judge	Objection is overruled
3:50:08 PM	J. Quane	Objection - foundation
3:50:10 PM	Judge	Objection is overruled
3:54:20 PM	J. Quane	Re-cross examination of the witness - George Nichols
3:57:14 PM	Judge	excuses the witness - George Nichols
3:58:20 PM	G. Haddad	Video Deposition of Janelle Buchanan
4:34:48 PM		side-bar
4:37:28 PM	G. Haddad	Video Deposition of Janelle Buchanan
5:02:18 PM	Judge	admonishes the jury
5:02:24 PM		Court recesses

Time	Speaker	Note
8:36:24 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 4**
8:37:53 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
8:38:00 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:29:12 AM	Judge	Calls case
9:29:16 AM		the jury is not present
9:29:25 AM	S. McKay	provides the Court a transcript of cross-examination of the witness - Jonelle Buchanan
9:30:39 AM	Judge	will not allow that line of questioning in cross-examination of the witness - Jonelle Buchanan
9:32:21 AM	Judge	instructs counsel regarding side remarks. They are not to be made.
9:33:01 AM	Judge	There was an objection to a question of the witness Jonelle Buchanan. That objection was overruled.
9:34:42 AM		the jury is present
9:34:49 AM	G. Haddad	Video Deposition of Jonelle Buchanan continued
9:36:18 AM	J. Quane	Reads questions and answers from cross-examination of the witness - Jonelle Buchanan
9:54:05 AM	G. Haddad	Calls Brian Kerr, sworn, direct examination
10:03:08 AM	J. Quane	Objection - relevance
10:03:13 AM	Judge	Objection is overruled
10:04:49 AM	J. Quane	Objection
10:04:52 AM	Judge	Objection is overruled
10:05:33 AM	J. Quane	Objection - relevance
10:05:35 AM	Judge	Objection is overruled
10:08:04 AM	J. Quane	Objection - form of the question
10:08:13 AM	Judge	Re-phrase the question
10:10:43 AM	J. Quane	Objection
10:10:50 AM	Judge	Objection is overruled
10:18:54 AM	J. Quane	Objection
10:18:59 AM	Judge	Objection is overruled
10:28:49 AM	J. Quane	Objection - argumentative
10:28:54 AM	Judge	Re-phrase the question
10:33:43 AM	J. Quane	Objection - form of the question
10:33:46 AM	Judge	Objection is overruled
10:35:14 AM	G. Haddad	Exhibit # 48 previously marked is identified
10:35:28 AM	G. Haddad	Moves to admit Exhibit # 48
10:35:42 AM	J. Quane	No objection
10:35:45 AM	Judge	Exhibit # 48 is admitted
10:35:51 AM	Judge	admonishes the jury
10:35:54 AM		Court recesses
10:57:41 AM		Court resumes

10:57:46 AM		the jury is present
10:58:03 AM	G. Haddad	continues direct examination of the witness - Brian Kerr
11:03:44 AM	J. Quane	Objection
11:03:53 AM	Judge	Objection is overruled
11:06:56 AM	J. Quane	Objection
11:07:10 AM	Judge	Objection is overruled
11:10:50 AM	J. Quane	Objection - repetitious
11:10:52 AM	Judge	Objection is overruled
11:11:21 AM	J. Quane	Objection - repetitious
11:11:24 AM	Judge	Objection is sustained
11:15:58 AM	J. Quane	Objection
11:16:00 AM	Judge	Objection is overruled
11:16:31 AM	J. Quane	Objection - lack of foundation
11:16:44 AM	Judge	Objection is overruled
11:19:19 AM	G. Haddad	moves to publish CDC guidelines
11:20:32 AM	Judge	The guidelines may be read but not published or admitted
11:25:24 AM	J. Quane	Cross-examination of the witness - Brian Kerr
11:28:03 AM	G. Haddad	Objection - leading
11:28:06 AM	Judge	Objection is overruled
11:28:44 AM	G. Haddad	Objection - leading
11:28:46 AM	Judge	Objection is overruled
11:30:37 AM	G. Haddad	Objection - leading and foundation
11:30:48 AM	Judge	Objection is sustained
11:32:16 AM	G. Haddad	Objection - leading
11:32:19 AM	Judge	Objection is overruled
11:35:51 AM		jury questions are handed to the Court
11:39:34 AM	Judge	Inquires of the witness - Brian Kerr
11:47:15 AM	G. Haddad	Re-direct examination of the witness - Brian Kerr
11:52:07 AM	Judge	excuses the witness
11:52:14 AM		admonishes the jury
11:52:17 AM		Court recesses
1:31:42 PM		Court resumes
1:31:46 PM		the jury is present
1:31:51 PM	G. Haddad	Calls Glen Groben, sworn, direct examination
1:36:19 PM	J. Quane	Objection - leading
1:36:23 PM	Judge	Objection is sustained
2:01:38 PM	J. Quane	Objection - leading
2:01:41 PM	Judge	Objection is overruled
2:07:31 PM	J. Quane	Objection - leading
2:07:32 PM	Judge	Objection is overruled

2:12:17 PM	J. Quane	Objection - leading
2:12:20 PM	Judge	Objection is sustained
2:15:51 PM	J. Quane	Cross-examination of the witness - Glen Groben
2:18:01 PM	G. Haddad	Re-direct examination of the witness - Glen Groben
2:18:39 PM	J. Quane	Objection - asked and answered
2:18:41 PM	Judge	Objection is overruled
2:18:57 PM		jury questions are handed to the Court
2:19:11 PM		side-bar
2:22:24 PM	Judge	Inquires of the witness - Glen Groben
2:26:00 PM	Judge	excuses the witness - Glen Groben
2:26:10 PM	S. McKay	Exhibits # 29,30,32,31,33,34,37,38,39,40,41,42,43 previously marked are identified, moves to admit
2:27:21 PM	J. Quane	Objects to Exhibits # 29,31,32,33,34,37,38,39,40,41,42 and 43 - relevance
2:28:07 PM	S. McKay	Responds
2:28:41 PM	J. Quane	Responds
2:29:37 PM	Judge	Exhibits # 29-34, 37-43 are admitted
2:30:59 PM	Judge	admonishes the jury
2:31:03 PM		Court recesses
2:44:48 PM		Court resumes
2:44:52 PM		the jury is present
2:44:54 PM	S. McKay	Calls Vincent Brooks, sworn, direct examination
2:49:28 PM	J. Quane	Objection - relevance
2:49:35 PM	Judge	Objection is overruled
2:52:22 PM	J. Quane	Objection - leading
2:52:24 PM	Judge	Objection is overruled
3:32:43 PM	J. Quane	Cross-examination of the witness - Vincent Brooks
3:37:55 PM		jury questions are handed to the Court
3:38:58 PM		side-bar
3:40:21 PM	Judge	Inquires of the witness - Vincent Brooks
3:41:29 PM	Judge	excuses the witness - Vincent Brooks
3:41:41 PM	Judge	admonishes the jury
3:42:46 PM		Court recesses

Time	Speaker	Note
8:24:18 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 5**
8:24:41 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
8:25:04 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:19:48 AM		Calls case
9:19:54 AM		the jury is not present
9:19:56 AM	S. McKay	counsel stipulated to swap out a better quality copy of Exhibit 5
9:20:44 AM	S. McKay	counsel stipulate to admit Exhibit # 4, previously marked and identified
9:20:56 AM	Judge	Exhibit # 4 is admitted
9:21:01 AM	S. McKay	Exhibit # 35 previously marked is identified, moves to admit
9:22:35 AM	J. Quane	Argues objection to the admission of Exhibit # 35
9:25:24 AM	S. McKay	Hands the Court a bench brief
9:28:49 AM	Judge	won't allow any inquiry to taxes and social security
9:28:59 AM	Judge	Exhibit # 35 is admitted
9:29:25 AM	J. Quane	continues argument in opposition of the admission of exhibit # 35
9:30:38 AM	Judge	Objection is overruled
9:31:39 AM		Court recesses
9:38:53 AM		Court resumes
9:38:58 AM		the jury is present
9:39:42 AM	S. McKay	Calls Cornelius Hofman, sworn, direct examination
9:41:50 AM	J. Quane	Objection - leading
9:41:52 AM	Judge	Objection is sustained
9:42:09 AM	J. Quane	Objection - leading
9:42:22 AM	Judge	Objection is overruled
10:00:04 AM	S. McKay	Exhibit # 51b previously marked is identified
10:02:23 AM	S. McKay	Moves to admit Exhibit # 51b
10:02:29 AM	J. Quane	Objection - redundant
10:02:32 AM	Judge	Objection is overruled
10:02:33 AM	Judge	Exhibit # 51b is admitted
10:06:02 AM	S. McKay	Exhibit # 51c previously marked is identified
10:06:44 AM	S. McKay	Moves to admit Exhibit # 51c
10:07:17 AM	J. Quane	Objection - speculation
10:07:29 AM	Judge	Objection is overruled
10:07:34 AM	Judge	Exhibit # 51c is admitted
10:07:53 AM	Judge	admonishes the jury
10:08:11 AM		Court recesses
10:40:36 AM		Court resumes

10:40:43 AM		the jury is present
10:40:51 AM	S. McKay	continues direct examination of the witness - Cornelius Hofman
10:42:34 AM	J. Quane	Objection - leading
10:42:37 AM	Judge	Objection is overruled
10:43:38 AM	S. McKay	Exhibit # 51d previously marked is identified
10:44:41 AM	S. McKay	Moves to admit Exhibit # 51d
10:44:44 AM	J. Quane	Objection
10:44:46 AM	Judge	Objection is overruled
10:44:49 AM	Judge	Exhibit # 51d is admitted
10:49:18 AM	S. McKay	Exhibit # 51k previously marked is identified
10:50:05 AM	S. McKay	Moves to admit Exhibit # 51k
10:50:08 AM	J. Quane	Objection
10:50:11 AM	Judge	Objection is overruled
10:50:14 AM	Judge	Exhibit # 51k is admitted
10:53:26 AM	S. McKay	Exhibit # 51m previously marked is identified
10:54:18 AM	S. McKay	Moves to admit Exhibit # 51m
10:54:23 AM	J. Quane	Objection
10:54:25 AM	Judge	Objection is overruled
10:54:27 AM	Judge	Exhibit # 51m is admitted
10:55:01 AM	S. McKay	Exhibits # 51l & 51n previously marked are identified
10:56:13 AM	S. McKay	Moves to admit Exhibits # 51l & 51n
10:56:15 AM	J. Quane	Objection
10:56:17 AM	Judge	Objection is overruled
10:56:20 AM	Judge	Exhibits # 51l & 51n are admitted
11:02:11 AM	S. McKay	Exhibit # 51a previously marked is identified
11:02:37 AM	S. McKay	Moves to admit Exhibit # 51a
11:02:38 AM	J. Quane	Objection - foundation
11:02:45 AM	S. McKay	Responds
11:04:41 AM	Judge	Objection is overruled
11:04:44 AM	Judge	Exhibit # 51a is admitted
11:09:14 AM	J. Quane	Objection - leading
11:09:22 AM	Judge	Objection is overruled
11:12:28 AM	J. Quane	Cross-examination of the witness - Cornelius Hofman
11:24:53 AM	S. McKay	Objection - asked and answered
11:24:55 AM	Judge	Objection is sustained
11:28:16 AM	S. McKay	Objection - relevance
11:28:54 AM	Judge	Re-phrase the question
11:32:06 AM	S. McKay	Objection - asked and answered
11:32:08 AM	Judge	Objection is overruled
11:50:01 AM	S. McKay	Objection - asked and answered

11:50:03 AM	Judge	Objection is overruled
11:51:42 AM	S. McKay	Objection - asked and answered
11:51:44 AM	Judge	Objection is sustained
12:05:32 PM	S. McKay	Re-direct examination of the witness - Cornelius Hofman
12:10:23 PM		jury questions are handed to the Court
12:10:54 PM		side-bar
12:13:26 PM	Judge	Inquires of the witness - Cornelius Hofman
12:15:13 PM	Judge	admonishes the jury
12:15:16 PM		Court recesses
1:50:34 PM		Court resumes
1:50:42 PM		the jury is not present
1:50:47 PM	J. Quane	Would like to read deposition of next witness - Charles Ballard
1:52:58 PM	G. Haddad	Responds
1:56:05 PM	Judge	Would allow portions of the deposition to be read
1:57:29 PM	J. Quane	Argues regarding testimony of neighbor
1:59:26 PM	Judge	will not allow it at this point but will re-visit the issue later
2:00:55 PM	S. McKay	Responds
2:04:04 PM		the jury is present
2:04:21 PM	S. McKay	Calls Charles Ballard, sworn, direct examination
2:41:56 PM	J. Quane	Objection - leading
2:41:57 PM	Judge	Objection is sustained
2:56:56 PM	J. Quane	Objection - leading
2:56:59 PM	Judge	Objection is sustained
3:13:21 PM	S. McKay	Exhibits # 22, 23, 25, 26, 27 & 28 previously marked are identified
3:15:08 PM	J. Quane	Objection - hearsay
3:15:11 PM	Judge	Objection is overruled
3:15:40 PM	J. Quane	Objection - hearsay & lack of foundation
3:15:50 PM	Judge	Objection is overruled
3:16:25 PM	J. Quane	Objection - lack of foundation & hearsay
3:16:35 PM	Judge	Objection is overruled
3:17:04 PM	J. Quane	Objection - hearsay & lack of foundation
3:17:06 PM	Judge	Objection is overruled
3:17:37 PM	J. Quane	Objection - hearsay & lack of foundation
3:17:39 PM	Judge	Objection is overruled
3:18:04 PM	J. Quane	Objection - hearsay & lack of foundation
3:18:06 PM	Judge	Objection is overruled
3:18:12 PM	S. McKay	Moves to admit Exhibits # 22, 23, 25, 26, 27 & 28
3:18:28 PM	J. Quane	Objection - hearsay
3:18:39 PM	Judge	admonishes the jury

3:19:55 PM		Court recesses
3:39:02 PM		Court resumes
3:39:13 PM		the jury is not present
3:39:17 PM	S. McKay	comments
3:39:31 PM	J. Quane	Objection
3:40:35 PM	S. McKay	Hands the Court Certificate of Authetication
3:41:04 PM	Judge	Objection is overruled
3:41:15 PM	Judge	Exhibits # 22, 23, 25, 26, 27 & 28 are admitted
3:44:13 PM		the jury is present
3:44:34 PM	S. McKay	continues direct examination of the witness - Charles Ballard
3:46:05 PM	J. Quane	Objection - narrative
3:46:07 PM	Judge	Objection is overruled
3:56:42 PM	J. Quane	Cross-examination of the witness - Charles Ballard
4:09:22 PM		Deposition of Charles Ballard is published
4:10:02 PM	S. McKay	Objection - assumes facts
4:10:05 PM	Judge	Objection is sustained
4:13:52 PM	S. McKay	Objection - assumes facts
4:13:58 PM	Judge	Objection is sustained
4:18:01 PM	S. McKay	Objection - assumes facts
4:18:06 PM	Judge	Objection is overruled
4:30:38 PM	S. McKay	Objection
4:31:42 PM	Judge	would like more of the transcript read now
4:39:41 PM	S. McKay	Objection - asked and answered
4:39:47 PM	Judge	Objection is sustained
4:54:36 PM	S. McKay	Objection - relevance
4:54:40 PM	Judge	Objection is sustained
4:54:55 PM	Judge	admonishes the jury
4:55:06 PM		Court recesses

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S BENCH BRIEF RE TAXES

1. **Defendants should be forbidden from arguing about the tax consequences of the jury's award or suggesting to the jury that Mr. Ballard's lost financial support from Krystal Ballard be reduced to account for taxation.**

Idaho Code § 5-311 defines the recoverable damages in an action for wrongful death. It provides that the heirs of the decedent may recover such damages "as under all the circumstances

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of the case may be just." Consistent with this, the applicable model jury instruction regarding wrongful death damages, IDJI 9.05, provides that "the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by defendant's negligence." With respect to financial support, this instruction provides for recovery of this as follows:

> The plaintiff's loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the plaintiff in the future, but for the decedent's death, taking into account the plaintiff's life expectancy, the decedent's age and normal life expectancy, the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

IDJI 9.05

Neither the instruction, nor the statute, makes any reference to taxes, and the "just" and "fair" language requires that no such reference be advanced. To allow otherwise impermissibly penalizes a plaintiff whether their award be non taxable or taxable. More specifically, in the event the IRS determined that the award should not be taxed, a defendant should not have the benefit of jury imposed reduction to account for its non taxability. On the other hand, if a component of the award is taxable, a defendant should likewise not be permitted to argue a jury should reduce the award to account for taxes as doing so would amount to a plaintiff being taxed twice – first by the jury in reducing the award and later by the IRS upon the assessment of an additional tax. Neither is just or fair and neither should be permitted.

The Idaho Supreme Court has recognized as much in finding the trial court properly barred cross examination of the plaintiff's economic expert concerning taxation and affirming the award of damages in a personal injury case:

> Defendants assert that the trial court should not have (1) allowed the economic expert to testify that any damage award was subject to income taxes, (2) denied defendants cross-examination of the economic expert, and (3) failed to cure the testimony of the economic expert by giving a proper instruction to the jury. We disagree.

We first note that we do not address defendants' challenge to the testimony of the economic expert concerning taxation of any damage awards. Defendants did not object at the time of the economic expert's testimony to the question posed about taxes or to his answer. Even in their briefs on appeal, they make no argument and cite no authority for their contention that it was improper for the trial court to allow the economic expert to testify regarding taxes. *See State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (concluding that "[a] party waives an issue cited on appeal if either authority or argument is lacking").

We turn then to defendants' contention that the trial court should have allowed them to cross-examine the economic expert concerning taxation of any damage award. In *State v. Marek*, 112 Idaho 860, 736 P.2d 1314 (1987), the Court pointed out that "[t]he control of cross-examination of a witness is committed to the sound discretion of the trial judge, and absent a showing of prejudice, a limitation of cross-examination imposed by a trial judge will not be overturned on appeal." *Id.* at 867, 736 P.2d at 1321. Without reaching the question of any prejudice there may have been to defendants, we conclude that the instructions the trial court gave the jury concerning the taxability of a damage award cured any error there may have been. *Barry v. Arrow Transp. Co.*, 83 Idaho 41, 47, 358 P.2d 1041, 1045 (1960). The trial court gave the jury three different instructions concerning taxation of damage awards, all of which instructed the jury to disregard tax consequences. We conclude that collectively these instructions cured any problem created by the economic expert's testimony concerning taxation.

Concerning the trial court's refusal to give defendants' requested IDJI 937 instruction, we exercise free review. *Hook v. B.C. Inv., Inc.*, 125 Idaho 453, 455, 872 P.2d 716, 718 (1994). We review a trial court's decision refusing to give a proposed jury instruction "to determine whether the instructions, taken as a whole, fairly and accurately reflect the issues and the applicable law." *Lankford v. Nicholson Mfg. Co.*, 126 Idaho 187, 189, 879 P.2d 1120, 1122 (1994). "If the Court finds that the instructions adequately present the issues and state the applicable law, the Court will not reverse the trial court." Id. "The giving of an erroneous jury instruction does not generally justify granting of a new trial unless the appellant can establish that he or she was prejudiced thereby, and that the error affected the jury's conclusion." *Sherwood v. Carter*, 119 Idaho 246, 260, 805 P.2d 452, 466 (1991).

In the present case, the trial court instructed the jury to disregard tax consequences in rendering any damage award. Even though the trial court's instruction did not take the extra step contained in [former] IDJI 937 of telling the jury that any personal injury award was not subject to income taxes, the effect of the instructions the trial court gave was to direct the jury not to consider the taxation of any damage award. We presume the jury followed this instruction.

Inama v. Brewer, 132 Idaho 377, 382, 973 P.2d 148, 153 (1999).

Accordingly, the defendants in the present case should be forbidden from arguing about

the tax consequences of the jury's award or arguing or suggesting to the jury that Charles Ballard's lost financial support from Kyrstal Ballard be reduced to account for taxation.

DATED this 23rd day of September, 2014.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 23rd, 2014, a true and correct copy of the foregoing was served upon the following via hand delivery:

Jeremiah A. Quane
Terrance Jones
QUANE JONES McCOLL PLLC

Scott McKay

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S BENCH BRIEF RE ADMISSIBILITY OF MEDICAL BILLS

The evidence presented during plaintiff's case in chief establishes that on Wednesday, July 21, 2010, Defendant Dr. Brian Kerr performed a cosmetic surgical procedure on Krystal Ballard. Plaintiff has established through the testimony of medical experts called during plaintiff's case that Dr. Kerr failed to meet the applicable standard of health care practice

concerning the cleaning, disinfecting and sterilizing of reusable medical equipment used on Mrs. Ballard during this surgical procedure and as a consequence, she was infected and died approximately 4 days after Dr. Kerr's surgical procedure.

Following Dr. Kerr's procedure and at approximately 2 am on the morning of Sunday, July 25, 2010, paramedics were summoned to Mrs. Ballard's home in Mountain Home. Mrs. Ballard was transported by paramedics to the Elmore County Medical Center where she was admitted. Later that morning, Life Flight was called by Elmore Medical Center medical staff and Mrs. Ballard was transported that morning by air ambulance to Saint Alphonsus Medical Center in Boise where she was admitted at 7:20 am. Mrs. Ballard died approximately 17 hours later with the time of her death pronounced at 12:38 am on July 26, 2010.

Mrs. Ballard survived for less than 24 hours after Elmore County paramedics were called to her home. The medical records describing the care and treatment of Mrs. Ballard during this period were admitted at trial by agreement of the parties. More specifically, the parties agreed to the admission of the following medical records which have been admitted: Elmore Ambulance (plaintiff's exhibit 6); Elmore Medical Center (plaintiff's exhibit 7) and Saint Alphonsus Regional Medical Center (plaintiff's exhibit 8). The medical experts that have testified to date including Dean Sorensen, M.D., George Nichols, M.D. and Glen Groben, M.D., have addressed the medical treatment Mrs. Ballard received following her admission at Elmore Medical Center up to the time of her death at Saint Alphonsus.

During the trial, Mrs. Ballard's husband, Plaintiff Charles Ballard identified the medical bills he received in connection with the above described care and treatment of his wife. These medical bills are comprised of the bills for Elmore Medical Center (plaintiff's exhibit 26), Saint Alphonsus Regional Medical Center (plaintiff's exhibit 25) and Life Flight (plaintiff's exhibit

28). Defendants acknowledge that each of the foregoing medical bills are authentic – and indeed plaintiff produced certificates of authenticity for each medical record and bill from the custodian of records for each provider. Defendants further acknowledge that Krystal Ballard received medical care and treatment from each of these providers which are described in the corresponding medical records admitted by agreement of the parties. Nevertheless, defendants argue that the Court should not admit these three medical bills because plaintiff has not adequately established that the medical care established in each bill was reasonable and necessary. The Court admitted the foregoing three medical bills over the objection of defendants subject to a motion to strike these exhibits pending citation to relevant authority concerning the admissibility of the bills.

The Court properly admitted each of the three medical bill exhibits.

1. **The Court Properly Admitted the Medical Bills Related to the Emergency Medical Treatment of Krystal Ballard**

Each of the medical bills at issue were identified by Charles Ballard as relating to the care and treatment of his wife, Krystal. This care and treatment closely followed the surgical treatment performed by Dr. Kerr and the bills mirror the medical treatment described in the medical bills which defendants agreed should be admitted in evidence. The medical bills cover a period of less than 24 hours and reflect the futile efforts of the providers to save Mrs. Ballard's life. Defendants agree that each of these medical bills is authentic.

In *Van Brunt v. Stoddard*, 136 Idaho 681, 686, 39 P.3d 621, 626 (2001), the Idaho Supreme Court addressed the admission of summaries of medical bills and the attached records in a personal injury trial where the defendant objected to introduction of these summaries of medical bills and records offered by the plaintiff. The admission of the records in that case was based on the plaintiff's testimony relating to the medical expense summary that he had prepared

and the defense argued that, since only the plaintiff had testified, the summaries were admitted without foundation showing the treatment was reasonably related to the accident and that the amounts of the bills were reasonable for the services provided. *Id.*

In rejecting the argument of the defense, the Supreme Court held "[o]rdinarily, testimony by the patient or by the physician or the health care provider on the amounts charged or paid for medical services is sufficient evidence of the reasonable value of the services *in the absence of some showing to the contrary.*" *Id.* (emphasis added). The Court noted that where the record reveals direct testimony that the injuries and resulting medical expense incurred after the incident were proximately caused by the injuries received in the incident, there is no error in the admission of the medical bill and treatment summaries. *Id.*

Similarly, in *In re Doe*, 146 Idaho 277, 280, 192 P.3d 1101, 1104 (Ct. App. 2008), the Idaho Court of Appeals considered a challenge to the admission of medical bills at a restitution hearing offered by the victim of a battery committed by a juvenile. Counsel for the juvenile and his guardian objected to admission of the bill arguing there was insufficient foundation that the services rendered were reasonable, medically necessary, and "linked" to Doe's actions. *Id.* The magistrate refused admission of the bills which was affirmed by the district court.

On appeal, the Idaho Court of Appeals first noted the broad discretion of the trial court concerning the admission of evidence and that its judgment concerning this admission will be reversed only upon an abuse of discretion. *Id.* at 281, 192 P. 3d. at 1105, *citing State v. Howard,* 135 Idaho 727, 731–32, 24 P.3d 44, 48–49 (2001); *State v. Zimmerman,* 121 Idaho 971, 973–74, 829 P.2d 861, 863–64 *(1992).* Notwithstanding, the Court discussed the holding by the Supreme Court in *Van Brunt* and held the magistrate court erred in refusing admission of various medical bills testified to by C.L., the crime victim. These bills, which the Court ruled should have been

admitted, included bills from Saint Alphonsus Regional Medical Center, Ada County Paramedics, Gem State Radiology, Southwest Idaho Ear, Nose and Throat and Idaho Emergency Physicians. By way of example, the Court provided the following explanation for the admission of two of these medical bills:

> Exhibit 2, the bill from St. Alphonsus Regional medical Center for $4,741.30, also should have been admitted as there was sufficient evidence presented tying it to the attack. Not only did C.L. testify that he had been taken to St. Alphonsus and was treated there after being battered, but the bill itself identifies C.L. as the patient and lists the date of the services provided as the same date the attack occurred. Importantly, the bill also provides a descriptive breakdown of services provided to C.L., allowing the inference that these are treatments that would logically be provided to a victim who had been struck in the face.
>
> The court also erred in excluding Exhibit 3, the bill from Ada County Paramedics for $766.44. That C.L. received these services as a result of the crime was supported by C.L.'s testimony that he was taken from the scene to St. Alphonsus in an ambulance. Additionally, the bill lists the date of the trip as the same date the attack occurred, indicates that C.L. was the person transported, and notes that he was taken from the scene of the crime (9140 Emerald St.) to St. Alphonsus (1055 N. Curtis). The bill also provides a descriptive breakdown of services provided and the amounts charged for each. This information in concert with C.L.'s testimony provided adequate foundation for its admission.

Id, 146 Idaho at 282, 192 P.3d at 1106.

In the present case, the medical bills all refer to Krystal Ballard and correlate to the medical services provided to Mrs. Ballard that are described in the corresponding admitted medical records. The dates of service reflected in these bills correlate to the treatment of Mrs. Ballard reflected in these medical records. These services occurred over a period of less than 24 hours and closely followed the surgical procedure performed by Dr. Kerr. Plaintiff has presented expert medical testimony which directly links the medical treatment reflected in these medical records (which in turn are reflected in the medical bills) to this surgical procedure and to the death of Mrs. Ballard. Further, this expert testimony describes how the treatment by the medical providers was rendered in an attempt to save Mrs. Ballard's life – which ultimately proved

unsuccessful. Mr. Ballard identified each bill as relating to the treatment of his spouse following the call to the Elmore paramedics.

Defendants have made no "showing to the contrary" concerning the reasonableness of the services reflected in the medical bills. In fact, defendants acknowledge the authenticity of these medical bills and agreed to the admission of the medical records which correspond directly to the services described in the medical bills.

In sum, plaintiff provided an adequate foundation for the admission of each medical bill and the Court properly admitted each medical bill exhibit.

DATED this 24th day of September, 2014.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, a true and correct copy of the foregoing was served upon the following via hand delivery:

Jeremiah A. Quane
Terrance Jones
QUANE JONES McCOLL PLLC

Scott McKay

Time	Speaker	Note
8:11:00 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 6**
8:11:10 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
8:11:21 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:25:52 AM		Calls case
9:25:57 AM		the jury is not present
9:27:11 AM	J. Quane	comments re: depositions
9:27:14 AM		Court recesses
9:35:08 AM		Court resumes
9:35:13 AM		the jury is present
9:35:24 AM	J. Quane	continues cross-examination of the witness - Charles Ballard
10:05:01 AM	S. McKay	Objection - vague
10:05:07 AM	Judge	Objection is overruled
10:16:58 AM	S. McKay	Objection
10:16:59 AM	S. McKay	withdraws the objection
10:17:22 AM	S. McKay	Re-direct examination of the witness - Charles Ballard
10:27:15 AM		jury questions are handed to the Court
10:27:57 AM		side-bar
10:30:25 AM	Judge	Inquires of the witness - Charles Ballard
10:32:26 AM	J. Quane	Re-cross examination of the witness - Charles Ballard
10:33:45 AM	S. McKay	Objection - mis-characterization
10:34:04 AM	J. Quane	Responds
10:34:39 AM	Judge	excuses the witness - Charles Ballard
10:34:51 AM	Judge	admonishes the jury
10:35:00 AM		Court recesses
10:59:31 AM		Court resumes
10:59:36 AM		the jury is not present
10:59:49 AM	S. McKay	will be calling one more witness
11:00:46 AM		the jury is present
11:01:18 AM	S. McKay	Calls Susan Kerr, sworn, direct examination
11:03:16 AM	J. Quane	Objection - leading
11:03:18 AM	Judge	Objection is overruled
11:09:43 AM	J. Quane	Cross-examination of the witness - Susan Kerr
11:14:12 AM	S. McKay	Objection - beyond the scope
11:14:14 AM	Judge	Objection is overruled
11:15:29 AM	S. McKay	Re-direct examination of the witness - Susan Kerr
11:17:50 AM		jury questions are handed to the Court
11:18:00 AM		side-bar
11:18:42 AM	Judge	Inquires of the witness - Susan Kerr

11:19:18 AM	Judge	excuses the witness - Susan Kerr
11:19:26 AM	S. McKay	The Plaintiff rests
11:19:41 AM	J. Quane	Calls Brian Kerr, previously sworn, direct examination
11:33:02 AM	J. Quane	Exhibit # A previously marked is identified
11:33:07 AM	J. Quane	Moves to admit Exhibit # A
11:33:10 AM	G. Haddad	No objection
11:33:13 AM	Judge	Exhibit # A is admitted
12:00:19 PM	Judge	admonishes the jury
12:00:25 PM		Court recesses
1:34:26 PM		Court resumes
1:34:30 PM		the jury is not present
1:34:36 PM	G. Haddad	comments regarding motion in limine
1:38:44 PM		the jury is present
1:38:47 PM	J. Quane	continues direct examination of the witness - Brian Kerr
1:46:13 PM	G. Haddad	Objection
1:46:16 PM	Judge	Objection is overruled
2:05:36 PM	G. Haddad	Objection - foundation
2:05:41 PM	Judge	Objection is sustained
2:33:47 PM	G. Haddad	Objection - non-disclosure
2:33:56 PM	Judge	Objection is overruled
2:55:44 PM	Judge	admonishes the jury
2:55:53 PM		Court recesses
3:16:02 PM		Court resumes
3:16:05 PM		the jury is present
3:17:41 PM	J. Quane	continues direct examination of the witness - Brian Kerr
3:35:55 PM	G. Haddad	Objection - asked and answered
3:35:57 PM	Judge	Objection is sustained
3:48:59 PM		side-bar
4:04:21 PM		admonishes the jury
4:04:24 PM		Court recesses
4:15:35 PM		Court resumes
4:15:39 PM		the jury is present
4:15:48 PM	J. Quane	continues direct examination of the witness - Brian Kerr
4:25:40 PM	J. Quane	Exhibits # O1-O21 previously marked are identified
4:26:03 PM	J. Quane	Moves to admit Exhibits # O1-O21
4:26:07 PM	G. Haddad	No objection
4:26:10 PM	Judge	Exhibits # O1-O21 are admitted
5:00:09 PM	Judge	admonishes the jury
5:00:12 PM		Court recesses

Time	Speaker	Note
8:59:04 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 7**
8:59:48 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
8:59:55 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:21:06 AM	Judge	Calls case
9:21:06 AM		the jury is not present
9:21:18 AM	T. Jones	Argues for admission of Exhibits # KK for impeachment purposes
9:23:02 AM	Judge	The exhibit is not going to be admitted. It is not impeachment or relevant
9:26:44 AM	T. Jones	counsel stipulate to Exhibits # K & T
9:26:57 AM	Judge	Exhibits # K & T are admitted
9:32:09 AM	T. Jones	Argues for redactions to be shown to the jury from Exhibit # 5
9:34:33 AM	G. Haddad	Responds
9:43:31 AM	Judge	will allow testimony by Briana re: medical instructions given
9:50:44 AM		the jury is present
9:51:29 AM	T. Jones	Calls Briana Dumas, sworn, direct examination
10:00:04 AM	T. Jones	Exhibits # Z14, Z20-Z25 & Z52 previously marked is identified
10:00:45 AM	T. Jones	Moves to admit Exhibits # Z14, Z20-Z25 & Z52
10:00:50 AM	S. McKay	No objection
10:00:53 AM	Judge	Exhibits # Z14, Z20-Z25 & Z52 are admitted
10:12:52 AM	S. McKay	Objection - lack of foundation
10:12:54 AM	Judge	Objection is sustained
10:27:41 AM	S. McKay	Objection - relevance
10:27:47 AM	Judge	Objection is sustained
10:30:00 AM	S. McKay	Cross-examination of the witness - Briana Dumas
10:34:53 AM	T. Jones	Objection - argumentative
10:34:58 AM	Judge	Objection is overruled
10:40:46 AM	Judge	admonishes the jury
10:40:50 AM		Court recesses
11:03:43 AM		Court resumes
11:03:47 AM		the jury is present
11:03:50 AM	S. McKay	continues cross-examination of the witness - Briana Dumas
11:09:43 AM	T. Jones	Objection - argumentative
11:09:45 AM	Judge	Objection is sustained
11:11:06 AM	T. Jones	Objection - repetitious
11:11:19 AM	Judge	Objection is sustained
11:15:54 AM		Deposition of Briana Dumas is published

11:19:15 AM	T. Jones	Objection - beyond the scope
11:19:18 AM	Judge	Objection is overruled
11:20:48 AM	T. Jones	Re-direct examination of the witness - Briana Dumas
11:29:37 AM		jury questions are handed to the Court
11:29:42 AM		side-bar
11:32:37 AM	Judge	Inquires of the witness - Briana Dumas
11:33:40 AM		Court recesses
1:56:40 PM		Court resumes
1:56:46 PM		the jury is present
1:57:07 PM	Judge	Inquires of the witness - Briana Dumas
2:03:40 PM	T. Jones	Re-direct examination of the witness - Briana Dumas
2:04:34 PM	S. McKay	Re-cross examination of the witness - Briana Dumas
2:06:03 PM	T. Jones	Objection - asked and answered
2:06:05 PM	Judge	Objection is overruled
2:06:43 PM	T. Jones	Objection - legal question
2:06:53 PM	Judge	Objection is overruled
2:10:28 PM	Judge	excuses the witness - Briana Dumas
2:10:51 PM	T. Jones	Calls Geoffrey Stiller, sworn, direct examination
2:12:14 PM	T. Jones	Exhibit # G previously marked is identified
2:12:31 PM	T. Jones	Moves to admit Exhibit # G
2:12:36 PM	S. McKay	No objection
2:12:41 PM	Judge	Exhibit # G is admitted
2:40:19 PM	G. Haddad	Objection - foundation
2:40:21 PM	Judge	Objection is overruled
2:42:13 PM	G. Haddad	Objection - relevance
2:42:22 PM	Judge	Objection is overruled
2:43:38 PM	G. Haddad	Objection - relevance
2:43:44 PM	Judge	Re-phrase the question
2:49:13 PM	G. Haddad	Objection - non-disclosure
2:50:12 PM		Jury is excused
2:50:39 PM	T. Jones	makes an offer of proof
2:52:54 PM	G. Haddad	Responds
2:59:05 PM	Judge	Objection is overruled
3:01:24 PM		the jury is present
3:01:26 PM	T. Jones	continues direct examination of the witness - Geoffrey Stiller
3:20:34 PM	G. Haddad	Objection - foundation
3:20:41 PM	Judge	Objection is overruled
3:28:01 PM	G. Haddad	Objection - foundation
3:28:03 PM	Judge	Objection is overruled
3:32:10 PM	Judge	admonishes the jury

3:32:15 PM		Court recesses
3:46:46 PM		Court resumes
3:46:52 PM		the jury is present
3:46:55 PM	T. Jones	continues direct examination of the witness - Geoffrey Stiller
3:48:29 PM	G. Haddad	Objection -
3:49:12 PM	Judge	Re-phrase the question
3:52:07 PM	G. Haddad	Objection - beyond the scope
3:52:31 PM		side-bar
3:57:05 PM	Judge	Re-phrase the question
4:02:55 PM	G. Haddad	Objection - compound
4:02:58 PM	Judge	Objection is overruled
4:08:32 PM	G. Haddad	Objection - foundation
4:08:36 PM	Judge	Objection is overruled
4:28:40 PM	G. Haddad	Objection - asked and answered
4:28:42 PM	Judge	Objection is overruled
4:29:45 PM	G. Haddad	Objection - relevance
4:29:53 PM	T. Jones	Responds
4:30:12 PM	Judge	Objection is sustained
4:30:40 PM	G. Haddad	Objection - asked and answered
4:30:43 PM	Judge	Objection is overruled
4:31:16 PM	G. Haddad	Objection - asked and answered
4:31:21 PM	Judge	Objection is sustained
4:33:00 PM	G. Haddad	Objection - argumentative
4:33:06 PM	Judge	Objection is sustained
4:34:02 PM	G. Haddad	Objection - argumentative & leading
4:34:11 PM	Judge	Objection is sustained
4:34:43 PM	G. Haddad	Objection
4:34:46 PM	Judge	Objection is overruled
4:36:09 PM	G. Haddad	Objection - speculative
4:36:24 PM	Judge	Objection is sustained
4:37:28 PM	G. Haddad	Objection - leading, asked and answered
4:37:30 PM	Judge	Objection is sustained
4:37:48 PM	G. Haddad	Cross-examination of the witness - Geoffrey Stiller
4:38:22 PM		Deposition of Geoffrey Stiller is published
4:46:55 PM	T. Jones	Objection
4:46:59 PM	Judge	Objection is overruled
4:57:39 PM	T. Jones	Objection - over broad
4:57:46 PM	Judge	Objection is overruled
4:58:19 PM	Judge	admonishes the jury
4:58:49 PM		Court recesses

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' BENCH MEMO RE: THE INTRODUCTION OF AIR FORCE MEDICAL RECORDS OF KRYSTAL BALLARD FOR IMPEACHMENT PURPOSES

Defendants seek to introduce a July 23, 2010 Air Force medical clinic record for Krystal Ballard to be used for the purpose of impeachment. Plaintiff contends

that this record should not be used because it was not included as an exhibit in Defendants' Exhibit List at the last trial. This is not a valid objection, however, as the document is admissible for purposes of impeachment. Pursuant to Idaho Rules of Civil Procedure Rule 16(h), the defense is not required to disclose impeachment exhibits.

The Defendants intend to use this Air Force record to impeach Mrs. Ballard based on the inconsistency of her statements made in a number of hours to Air Force health care provider Kristina K. Swartz versus what she told Dr. Kerr on July 23, 2010 just hours later. The Air Force medical record dated July 23, 2010, a copy of which is attached hereto, reflects that Mrs. Ballard told Kristina K. Swartz that she was in pain in her back as a result of having slid down the stairs the previous night for which she took an old prescription of Norco. No mention is made of her having had the prior surgical procedure with Dr. Kerr which is something that would have been included in the record had it been disclosed by Mrs. Ballard. Hours later on the same date, however, Mrs. Ballard told a different story completely to Dr. Kerr, and she said that she was having pain in her buttocks with no mention of having fallen down any stairs.

In this wrongful death action, the inconsistent statements of Mrs. Ballard are proper to raise to the jury to consider.

A. The Defense is Entitled to Introduce Mrs. Ballard's Air Force Medical Record For Impeachment Purposes.

The Defense is entitled to introduce the Air Force medical record of Mrs. Ballard for impeachment purposes. The Plaintiff in this case, Charles Ballard, stands in the shoes of Krystal Ballard and may not recover in this case unless Krystal Ballard could have recovered had she sued the Defendants herself. The Plaintiff is subject to all of the

defenses of the Defendants to claims and suits of Krystal Ballard as if she had sued the Defendants, and the Plaintiff is subject to the Rules of Evidence that would apply if Krystal Ballard had sued the Defendants. For this reason, the inconsistent statements of Krystal Ballard can be used for impeachment purposes when offered into evidence by the Defense, regardless that Krystal Ballard made those statements. The credibility of Mrs. Ballard should in all fairness be subject to impeachment since the Plaintiff stands in her shoes.

Defendants are entitled to impeach Krystal Ballard with her obviously inconsistent statements. The jury is entitled to know that Mrs. Ballard told the Air Force health care provider that she was in pain in her back not her buttocks and that it was because she slid down the stairs, not from the surgical procedure. The jury is entitled to know that within about two hours of her statement to the Air Force Medical Clinic, Mrs. Ballard told Dr. Kerr something completely different. The jury should be entitled to make its own observations and come to its own conclusions with respect to Mrs. Ballard's truthfulness and credibility. A jury could infer that since the two aforementioned statements are inconsistent, that Krystal Ballard's other statements to Dr. Kerr and others are untruthful.

B. The Inconsistent Statements of Mrs. Ballard are Imputed to Plaintiff Charles Ballard in this Wrongful Death Action.

The Defense submits that Idaho law supports that the inconsistent statements of Mrs. Ballard are imputed to Plaintiff Charles Ballard. A decedent's negligence in a wrongful death action is imputed to the plaintiff due to the derivative nature of a wrongful death action. ***See Woodburn v. Manco***, 137 Idaho 502, 506, 50

P.3d 997, 1001 (2002) (stating that the negligence of a decedent is imputed to a plaintiff in a wrongful death action). By this same reasoning, a decedent's inconsistent statements would also be admissible to impeach the actions of the decedent in a wrongful death action.

C. I.R.E. 806 Also Supports that the Defense Should be Allowed to Introduce the Medical Record for Impeachment Purposes.

Idaho Rules of Evidence Rule 806 provides as follows:

> When a hearsay statement,[1] or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes **if declarant had testified as a witness**. Evidence of a statement or conduct by the declarant at any time, inconsistent with declarant's hearsay statement, is not subject to any requirement that declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

I.R.E. 806 (emphasis added).

It is apparent that I.R.E. 806 contemplates the use of impeachment evidence in order to call into question the hearsay statements of non-testifying declarants. ***See State v. Hernandez***, 191 Ariz. 553, 557, 959 P.2d 810, 814 (Ct. App. 1998) (finding that Arizona Rule of Evidence 806, which is similar to I.R.E. 806, "clearly contemplates use of impeachment evidence to discredit hearsay statements by

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1 This refers to all hearsay statements regardless whether those hearsay statements could be introduced at trial because they fall within one of the hearsay exceptions. A statement that falls within a hearsay exception is still considered hearsay, and the hearsay exceptions contained within the rules of evidence do not alter the fact that these statements are still hearsay statements.

non-testifying declarants . . . ."). The language of I.R.E. 806 indicates that the credibility of an unavailable hearsay declarant can be attacked, and this is evident by the language in I.R.E. 806 which states that any evidence that would be admissible **if declarant had testified** as a witness is admissible to support the impeachment of that declarant.

In the present case, Mrs. Ballard's medical records, including statements she made to various health care providers, have been admitted into evidence because they fall within one or more hearsay exceptions. Particularly, Defendant Dr. Kerr's records pertaining to his care and treatment of Mrs. Ballard have been admitted. These records, which have been admitted by stipulation, also fall within several hearsay exceptions. For example, the hearsay exception contained within I.R.E. 803(4) allows statements made for purposes of medical treatment to be admitted. ***See*** I.R.E. 803(4). Further, the medical records also fall within the business records exception. ***See*** I.R.E. 803(6); ***United States v. Hall***, 419 F.3d 980, 987 (9th Cir. 2005) (finding that medical records from a hospital visit fall within the business records exception, and statements made to a doctor fall within the statements made for purpose of medical diagnosis or treatment exception). These two exceptions apply to allow the introduction of Dr. Kerr's medical records containing statements of Mrs. Ballard.

Since the hearsay statements of Mrs. Ballard to Defendant Dr. Kerr have been admitted, impeachment evidence of Mrs. Ballard's statements to the Air Force health care provider should also be admitted, pursuant to I.R.E. 806. ***See*** I.R.E. 806. Defendants submit that they are entitled to impeach Mrs. Ballard's statements by any means that would have been permissible had Mrs. Ballard been present and testified. ***See*** I.R.E. 806; ***State v. Hernandez***, 191 Ariz. 553, 557, 959 P.2d 810, 814 (Ct. App.

1998) (quoting ***State v. Valencia,*** 186 Ariz. 493, 501, 924 P.2d 497, 505 (App.1996) ("Rule 806 'specifically permits impeachment of a hearsay statement made by an absent declarant by any means which would have been permissible had the declarant been present and testified.'"). Since pursuant to I.R.E. 613(b) the Defense could have introduced the Air Force medical record had Mrs. Ballard testified at trial, it follows that the Defense should be able to introduce the record in Mrs. Ballard's absence pursuant to I.R.E. 806.

Further, there is no question that the statement contained within the Air Force medical record regarding the fall down the stairs is attributable to Mrs. Ballard. Although Kristina Swartz will not be testifying at trial, the Court can reasonably infer from the face of the Air Force record that Mrs. Ballard was the actual source of the statements at issue. It is clear from the record that Mrs. Ballard is the only source of the information, as there is no indication that anyone else attended the appointment with her. The record is clear, and there is no ambiguity presented in the record that would indicate that anyone other than Mrs. Ballard made the statement.

The Defense respectfully submits that it should be allowed to introduce the Air Force medical record to impeach Mrs. Ballard because I.R.E. 806 supports admitting the Air Force record regardless that Mrs. Ballard will not be testifying at trial. Had Mrs. Ballard testified at trial, I.R.E. 613(b) would have supported the introduction of the Air Force record, as I.R.E. 613(b) allows the admission of extrinsic evidence of a prior inconsistent statement when the witness is afforded an opportunity to explain or deny the inconsistent statement. ***See*** I.R.E. 613(b). Since I.R.E. 613(b) would have supported the admission of the record had Mrs. Ballard testified at trial, it follows that I.R.E. 806 supports

the admission of the Air Force medical record.

D. Impeachment Exhibits Are Not Required to Be Disclosed.

Defendants submit that they are not required to disclose impeachment evidence under the Idaho Rules of Civil Procedure. Idaho Rules of Civil Procedure Rule 16(h) provides as follows:

> In the event no final pre-trial conference is held, the court may enter an order directing the parties to file with the court and serve on all opposing counsel, or upon parties not represented by counsel, a list of all exhibits to be offered at trial and a list of the names and addresses of all witnesses which such party may call to testify at the trial, **except for impeachment witnesses and exhibits**. Any exhibits or witnesses discovered after such disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered. Failure to comply with this rule may be grounds for excluding an exhibit from admission into evidence or for excluding a witness from testifying in the trial of the action. Provided the court, for good cause shown and in order to prevent injustice may permit additional exhibits to be used or additional witnesses to testify at the trial.

I.R.C.P. 16(h) (emphasis added).

Since impeachment evidence is not required to be disclosed, Defendants respectfully submit that they should be allowed to introduce Mrs. Ballard's July 23, 2010 Air Force medical record for impeachment purposes. Moreover, the Air Force medical records that Defendants seek to admit were produced by Plaintiff more than a year ago in discovery. Furthermore, these records were referred to by Dr. Stiller at the first trial last November. As a result, there is no unfair surprise, and Plaintiff is well aware of both the existence and the contents of the record.

Therefore, Defendants request that this Court allow the use of the July 23,

2010 Air Force medical record for impeachment purposes. The jury is entitled to know about Mrs. Ballard's inconsistent statements so it can make its own observations and conclusions regarding her veracity and because there is no unfair surprise to Plaintiff.

DATED this 24th day of September, 2014.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2014, I served a true and correct copy of the foregoing DEFENDANTS' BENCH MEMO RE: THE INTRODUCTION OF AIR FORCE MEDICAL RECORDS OF KRYSTAL BALLARD FOR IMPEACHMENT PURPOSES by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

Terrence S. Jones

Patient: BALLARD, KRYSTAL MELISSA
Treatment Facility: 366TH MEDICAL GROUP
Patient Status: Outpatient

Date: 23 Jul 2010 1246 MDT
Clinic: PURPLE PCO CLINIC

Appt Type: T-CON*
Provider: SWARTZ,KRISTINA K

Call Back Phone: (917)-549-6924

Reason for Telephone Consult: [mmh]meds

AutoCites Refreshed by SWARTZ,KRISTINA K @ 23 Jul 2010 1622 MDT

Problems

Chronic:
- Rash:
- Patellofemoral syndrome of the left knee
- Visit for: occupational health/fitness exam
- Contraceptives
- Cervical Pap smear
- Visit for: administrative purposes
- Refractive error
- Vesicles were seen
- Urinary tract infection
- Chronic allergic conjunctivitis
- Keratitis in the right eye
- Vaginal foreign body
- Bacterial vaginosis
- Gastroenteritis
- Oligomenorrhea
- Allergic rhinitis
- Secondary amenorrhea
- Visit for: screening for malignant breast neoplasm
- Contraceptive management
- Visit for: military services physical
- Vaginitis
- Myopia

Allergies
- No Known Allergies

Active Medications

Active Medications	Status	Sig	Refills Left	Last Filled
Fluticasone Propionate 0.05%, Spray, Nasal	Active	U TWO SPRAYS IN AA NS QD #2 RF3	3 of 3	12 Jul 2010
Esomeprazole Magnesium Trihydrate 20mg, Capsule, Oral	Active	T1 CAP PO BID F14D THEN T1 CAP PO QD THEREAFTER #60 RF3	3 of 3	09 Jun 2010
Sodium Fluoride, Gel/Jelly, Dental	Active	USE TWICE DAILY AFTER BRUSHING - APPLY PEA-SIZED AMOUNT TO TOOTHBRUSH AND APPLY TO ALL TEETH -- SPIT, DO NOT RINSE AFTER USE FOR 30 MIN. #1 RF6	5 of 6	20 May 2010
Etonogestrel + Ethinyl Estradiol, (Nuvaring), Device, Vaginal	Active	INSERT 1 RING VAG F21 THEN REMOVE F7 AND REPEAT #3 RF4	3 of 4	20 May 2010
HYDROCODONE-ACETAMINOPHEN (HYDROCODONE BIT/ACETAMINOPHEN), 10MG-325MG, TABLET, ORAL, MALLINCKRODT PH, 100 ea. BOTTLE	Active		1 of 1	06 Oct 2008
HYDROCODONE-ACETAMINOPHEN (HYDROCODONE BIT/ACETAMINOPHEN), 10MG-325MG, TABLET, ORAL, MALLINCKRODT PH, 100 ea. BOTTLE	Active		NR	15 Sep 2008
CEPHALEXIN (CEPHALEXIN MONOHYDRATE), 250 MG, CAPSULE, ORAL, RANBAXY PHARMAC, 100 ea. BOTTLE	Active		NR	15 Sep 2008

23 Jul 2010 1248
Facility: 366th Medical Group Clinic: Purple PCO Clinic Provider: SWARTZ, KRISTINA K.

LMP: 08 Dec 2008. Date Basis: unknown.

SO Note Written by SWARTZ,KRISTINA K @ 23 Jul 2010 1623 MDT
History of present Illness
The Patient is a 27 year old female.
PCM: ALLEN
LAST SEEN IN CLINIC:
CONTACT: (917)-549-6924

Supervisor had her call to document in her records that she took an old perscription of norco last night.

A/P Written by SWARTZ,KRISTINA K @ 23 Jul 2010 1631 MDT
1. visit for: administrative purpose: Pt. reports she slid down the stairs last night and used an old Rx of Norco. Not using today, made her sick. Now using ES Tylenol and Motrin. Pt. would just like to have documented in her records that she used it. Also, inquiring about DLC for her back in case she doesn't get better. Advised pt. to call at 0700 on Monday morning for same-day appt. if she is still having problems, will need to be seen in Clinic prior to DLC being issued. Leave msg. for Nurse if diff. obtaining appt. Pt. verbalized an understanding of instructions.

Disposition Last updated by SWARTZ,KRISTINA K @ 23 Jul 2010 1632 MDT
Follow up: as needed with PCM.

Signed By SWARTZ, KRISTINA K (Registered Nurse, 366th Medical Group) @ 23 Jul 2010 1632

CHANGE HISTORY
The following Disposition Note Was Overwritten by SWARTZ,KRISTINA K @ 23 Jul 2010 1630 MDT:
Disposition section was last updated by SWARTZ,KRISTINA K @ 23 Jul 2010 1630 MDT - see above.Previous Version of Disposition section was entered/updated by HUBBARD,MICHAELA @ 23 Jul 2010 1249 MDT.

David Z. Nevin (ISB#2280), dnevin@nbmlaw.com
Scott McKay (ISB#4309), smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S REQUEST FOR CURATIVE JURY INSTRUCTION TO ADDRESS DEFENDANTS' VIOLATION OF PRETRIAL RULING

Prior to the trial in this matter, this Court instructed the parties that no mention of the previous trial in November 2013 should occur in front of the jury. The Court further ruled that to the extent it was necessary to refer to witness testimony from this prior trial, the parties could prefer to a "prior proceeding" or prior testimony without referring to a "trial." Notwithstanding

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the Court's ruling in this regard, defense witness Briana (Kerr) Dumas referred to this prior trial during her testimony before the jury on September 25, 2014. This testimony prejudices Mr. Ballard as the jury may now speculate about why there was a prior trial, why there is now a second trial and question the validity of his claims. The Court recognized as much in its very clear directive that no mention of this prior trial be made.

Accordingly, Plaintiff requests that the Court give the following curative jury instruction to address this violation of the Court's ruling:

> You have heard reference during this trial to a prior proceeding in November 2013. Yesterday, a witness for the defendants testified that this prior proceeding was a prior trial in this case. I had instructed the parties before the start of this trial that no mention of this prior trial should be made because I was afraid that a reference to a prior trial would influence your decision in this case. My instruction was not followed by this defense witness.
>
> I am now compelled to inform you that a trial in the case now before you began in November of 2013, but it was not completed or submitted to the prior jury. It was not completed because a defense witness in that trial failed to abide by a pretrial ruling from this court. This violation prejudiced Mr. Ballard to such a degree that I declared a mistrial and ordered a new trial.
>
> The fact that this earlier trial was not completed should not play a part in your deliberations or consideration of the evidence in this case.

DATED this 26th day of September, 2014.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2014, a true and correct copy of the foregoing was served upon the following via hand delivery:

Jeremiah A. Quane
Terrance Jones
QUANE JONES McCOLL PLLC

Scott McKay

Time	Speaker	Note
08:38:48 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 8**
08:40:37 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
08:44:06 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
09:37:42 AM	Judge	Calls case
09:37:46 AM		the jury is present
09:38:01 AM	G. Haddad	continues cross-examination of the witness - Geoffrey Stiller
09:41:49 AM	T. Jones	Objection - foundation
09:41:53 AM	Judge	Objection is overruled
09:48:36 AM	G. Haddad	moves to publish letter from counsel to witness
09:48:53 AM	T. Jones	Objection - relevance
09:49:42 AM	Judge	The letter will not be published
09:56:02 AM	G. Haddad	moves to publish a statement from Health & Welfare
09:58:35 AM	T. Jones	Objection - relevance & foundation
09:58:46 AM	G. Haddad	asks questions to lay foundation
10:00:26 AM	T. Jones	Objection
10:07:27 AM	Judge	the letter will not be published
10:10:47 AM	T. Jones	Objection - mis-characterzation
10:10:55 AM	Judge	Objection is sustained
10:12:47 AM	T. Jones	Objection - relevance
10:12:51 AM	Judge	Objection is overruled
10:13:54 AM	T. Jones	Objection - asked and answered
10:13:56 AM	Judge	Objection is overruled
10:14:37 AM	T. Jones	Objection - argumentative
10:14:39 AM	Judge	Objection is overruled
10:15:46 AM	T. Jones	Objection
10:15:57 AM	Judge	Objection is overruled
10:28:56 AM	T. Jones	Objection - compound
10:28:58 AM	Judge	Objection is sustained
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10:46:38 AM		Court recesses
11:07:34 AM		Court resumes
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11:07:44 AM	G. Haddad	continues cross-examination of the witness - Geoffrey Stiller
11:18:56 AM	T. Jones	Objection - asked and answered
11:18:59 AM	Judge	Objection is sustained
11:22:38 AM	T. Jones	Objection
11:22:40 AM	Judge	Objection is overruled

11:24:22 AM	T. Jones	Objection
11:24:26 AM		Jury is excused
11:25:04 AM	T. Jones	Argues objection
11:27:02 AM	Judge	Objection is sustained
11:27:47 AM		Court recesses
11:36:29 AM		Court resumes
11:36:38 AM		the jury is present
11:36:41 AM	G. Haddad	continues cross-examination of the witness - Geoffrey Stiller
11:40:21 AM	T. Jones	Re-direct examination of the witness - Geoffrey Stiller
11:45:59 AM	G. Haddad	Objection - leading
11:46:01 AM	Judge	Objection is overruled
11:46:32 AM	G. Haddad	Objection - asked and answered
11:46:34 AM	Judge	Objection is sustained
11:47:17 AM	G. Haddad	Objection - beyond the scope
11:47:36 AM	Judge	Objection is overruled
11:48:37 AM	G. Haddad	Objection
11:48:45 AM	Judge	Re-phrase the question
11:49:06 AM	G. Haddad	Objection - leading
11:49:08 AM	Judge	Objection is sustained
11:49:30 AM	G. Haddad	Objection - leading
11:49:32 AM	Judge	Objection is sustained
11:49:40 AM	G. Haddad	Objection - asked and answered
11:49:42 AM	Judge	Objection is sustained
11:52:50 AM	G. Haddad	Objection - leading
11:52:53 AM	Judge	Objection is overruled
11:54:10 AM	G. Haddad	Objection - beyond the scope
11:54:13 AM	Judge	Objection is sustained
11:54:25 AM	G. Haddad	Objection - leading
11:54:27 AM	Judge	Objection is overruled
11:55:33 AM	G. Haddad	Objection - overly broad
11:55:38 AM	Judge	Objection is overruled
11:59:27 AM	G. Haddad	Objection - foundation
11:59:31 AM	Judge	Objection is overruled
11:59:58 AM	G. Haddad	Objection - leading
12:00:00 PM	Judge	Objection is overruled
12:00:49 PM		jury questions are handed to the Court
12:00:59 PM		side-bar
12:12:49 PM	Judge	Inquires of the witness - Geoffrey Stiller
12:20:01 PM	T. Jones	Re-direct examination of the witness - Geoffrey Stiller
12:21:05 PM	G. Haddad	Objection - leading and beyond the scope
12:21:11 PM	Judge	Objection is overruled

12:21:26 PM	G. Haddad	Objection - beyond the scope
12:21:36 PM	Judge	Objection is sustained
12:21:44 PM	G. Haddad	Re-cross examination of the witness - Geoffrey Stiller
12:25:03 PM	Judge	excuses the witness - Geoffrey Stiller
12:25:15 PM	Judge	admonishes the jury
12:25:17 PM		Court recesses
01:59:57 PM		Court resumes
02:00:00 PM		the jury is not present
02:00:07 PM	S. McKay	Argues to strike the testimony of Goffrey Stiller
02:12:05 PM	T. Jones	Argues in opposition to striking the testimony of Geoffrey Stiller
02:31:54 PM	Judge	will not strike the testimony of Geoffrey Stiller
02:45:55 PM		Court recesses
02:50:16 PM		Court resumes
02:50:34 PM		the jury is present
02:50:45 PM	T. Jones	Calls John Lundeby, sworn, direct examination
02:52:08 PM	T. Jones	counsel stipulate to the admission of Exhibit # F
03:04:18 PM	Judge	Exhibit # F is admitted
03:05:08 PM	G. Haddad	Objection - relevance
03:05:09 PM	Judge	Objection is sustained
03:11:33 PM	G. Haddad	Objection - relevance
03:11:43 PM	Judge	Objection is overruled
03:18:39 PM	G. Haddad	Objection - beyond the scope
03:18:42 PM	Judge	Objection is overruled
03:43:20 PM	G. Haddad	Objection - speculation
03:43:22 PM	Judge	Objection is overruled
03:46:59 PM	G. Haddad	Objection - relevance
03:47:02 PM	Judge	Objection is sustained
03:50:48 PM	G. Haddad	Objection - foundation
03:50:58 PM	T. Jones	asks questions to lay foundation
03:52:17 PM	Judge	admonishes the jury
03:52:21 PM		Court recesses
04:07:29 PM		Court resumes
04:07:33 PM		the jury is present
04:07:44 PM	T. Jones	continues the direct examination of the witness - John Lundeby
04:09:17 PM	G. Haddad	Objection
04:09:23 PM	Judge	Objection is overruled
04:18:56 PM	G. Haddad	Objection
04:19:00 PM	Judge	Objection is overruled
04:21:03 PM	G. Haddad	Objection - beyond the scope
04:21:24 PM	Judge	Objection is sustained
04:24:48 PM	G. Haddad	Objection - speculation and relevance

04:25:00 PM	Judge	Objection is overruled
04:28:07 PM	G. Haddad	Cross-examination of the witness - John Lundeby
04:34:37 PM		Deposition of John Lundeby is published
04:40:27 PM	Judge	strikes any testimony regarding transcripts of Dr. Groben's testimony
04:46:27 PM	T. Jones	Objection - foundation
04:46:30 PM	Judge	Objection is overruled
04:51:20 PM	T. Jones	Objection - foundation
04:51:26 PM	Judge	Objection is overruled
04:53:19 PM	T. Jones	Objection - foundation
04:53:22 PM	Judge	Objection is overruled
05:02:13 PM	T. Jones	Objection - relevance
05:02:16 PM	Judge	Objection is overruled
05:06:37 PM	Judge	admonishes the jury
05:06:46 PM		Court recesses
05:11:21 PM		Court resumes
05:11:28 PM		the jury is present
05:11:31 PM	G. Haddad	continues cross-examination of the witness - John Lundeby
05:12:56 PM	T. Jones	Re-direct examination of the witness - John Lundeby
05:13:09 PM	G. Haddad	Objection - foundation
05:13:11 PM	Judge	Objection is overruled
05:14:09 PM	Judge	excuses the witness - John Lundeby
05:14:21 PM	Judge	admonishes the jury
05:14:27 PM		Court recesses
05:18:02 PM		Court resumes
05:18:06 PM		the jury is not present
05:18:15 PM	S. McKay	Argues for a curative jury instruction
05:18:30 PM	S. McKay	comments regarding counsel's comments
05:19:26 PM	J. Quane	comments
05:20:53 PM	Judge	comments regarding counsel's comments
05:23:42 PM		Court recesses

Time	Speaker	Note
8:32:37 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 9**
8:33:00 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
8:33:06 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:35:22 AM	Judge	Calls case
9:35:30 AM		the jury is present
9:35:40 AM	J. Quane	Calls Thomas Coffman, sworn, direct examination
9:42:24 AM	J. Quane	Exhibit # D previously marked is identified, moves to admit
9:42:26 AM	G. Haddad	No objection
9:42:29 AM	Judge	Exhibit # D is admitted
9:58:45 AM	G. Haddad	Objection - leading & foundation
9:58:47 AM	Judge	Objection is sustained
9:59:05 AM	G. Haddad	Objection - leading & foundation
9:59:07 AM	Judge	Objection is sustained
10:00:23 AM	G. Haddad	Objection - leading & un-disclosed opinion
10:00:43 AM	Judge	Jury is excused
10:02:11 AM	J. Quane	Hands the Court the deposition of the witness - Thomas Coffman
10:07:55 AM	Judge	Re-phrase the question
10:08:35 AM		the jury is present
10:09:06 AM	Judge	Inquires of the witness - Thomas Coffman
10:09:56 AM	J. Quane	continues direct examination of the witness - Thomas Coffman
10:11:25 AM	G. Haddad	Objection - leading
10:11:34 AM	Judge	Objection is overruled
10:12:35 AM	G. Haddad	Objection - speculation
10:12:44 AM	Judge	Objection is overruled
10:15:51 AM	G. Haddad	Objection - leading & speculation
10:16:01 AM	Judge	Objection is sustained
10:16:38 AM	G. Haddad	Objection - leading & asked and answered
10:17:20 AM	Judge	Objection is overruled
10:19:31 AM	G. Haddad	Cross-examination of the witness - Thomas Coffman
10:19:46 AM	J. Quane	Objection
10:19:49 AM	Judge	Objection is overruled
10:21:27 AM	J. Quane	Objection -
10:21:33 AM	Judge	Objection is overruled
10:21:54 AM		Deposition of the witness is published - Thomas Coffman
10:23:41 AM	J. Quane	Objection - beyond the scope
10:23:51 AM	Judge	Objection is overruled

10:27:30 AM	J. Quane	Objection - misstates the testimony
10:27:33 AM	Judge	Objection is overruled
10:27:56 AM	J. Quane	Objection - misstates the testimony
10:27:58 AM	Judge	Objection is overruled
10:28:54 AM	J. Quane	Objection - beyond the scope
10:28:56 AM	Judge	Objection is overruled
10:29:47 AM	J. Quane	Objection
10:29:50 AM	Judge	Objection is overruled
10:31:55 AM	J. Quane	Objection - relevance
10:31:58 AM	Judge	Objection is overruled
10:34:11 AM	J. Quane	Objection - beyond the scope
10:34:12 AM	Judge	Objection is overruled
10:35:33 AM	J. Quane	Objection - beyond the scope
10:35:36 AM	Judge	Objection is overruled
10:36:35 AM	J. Quane	Objection - relevance & beyond the scope
10:36:48 AM	Judge	Objection is overruled
10:38:18 AM	J. Quane	Objection - relevance
10:38:25 AM	Judge	Objection is sustained
10:39:03 AM	J. Quane	Objection - relevance & beyond the scope
10:41:08 AM	Judge	Objection is sustained
10:41:28 AM	J. Quane	Objection - asked and answered
10:41:30 AM	Judge	Objection is overruled
10:47:25 AM	J. Quane	Objection - relevance & beyond the scope
10:47:28 AM	Judge	Objection is overruled
10:49:56 AM	J. Quane	Re-direct examination of the witness - Thomas Coffman
10:50:14 AM	G. Haddad	Objection - leading
10:50:16 AM	Judge	Objection is overruled
10:51:41 AM	G. Haddad	Objection
10:51:43 AM	Judge	Objection is sustained
10:52:56 AM		jury questions are handed to the Court
10:53:05 AM		side-bar
10:59:00 AM	Judge	Inquires of the witness - Thomas Coffman
11:05:50 AM	G. Haddad	Re-cross examination of the witness - Thomas Coffman
11:07:28 AM	J. Quane	Objection - relevance
11:07:30 AM	Judge	Objection is overruled
11:09:40 AM	J. Quane	Objection - relevance
11:09:44 AM	Judge	Objection is sustained
11:09:57 AM	Judge	excuses the witness - Thomas Coffman
11:10:06 AM	Judge	admonishes the jury
11:10:11 AM		Court recesses

11:30:03 AM		Court resumes
11:30:10 AM		the jury is present
11:30:13 AM	J. Quane	Calls Brian Kerr, previously sworn, direct examination
11:37:25 AM	J. Quane	Exhibits # Q1-Q4 previously marked are identified for demonstrative purposes only
11:38:03 AM	G. Haddad	no objection to demonstrative purposes only
11:38:05 AM	Judge	Exhibits # Q1-Q4 are not admitted but may be used for demonstrative purposes only
12:02:46 PM	Judge	admonishes the jury
12:02:54 PM		Court recesses
1:39:50 PM		Court resumes
1:39:50 PM		the jury is present
1:39:50 PM	J. Quane	continues direct examination of the witness - Brian Kerr
1:40:56 PM	J. Quane	Exhibit # Z16, Z35 & Z36 previously marked are identified for demonstrative purposes only
1:42:12 PM	G. Haddad	no objection to demonstrative purposes only
1:42:14 PM	Judge	Exhibits # Z35 & Z36 are not admitted but may be used for demonstrative purposes only
2:07:45 PM	G. Haddad	Objection - relevance
2:07:47 PM	Judge	Objection is sustained
2:18:33 PM	G. Haddad	Objection - leading
2:18:34 PM	Judge	Objection is overruled
2:46:53 PM	Judge	admonishes the jury
2:46:58 PM		Court recesses
3:00:28 PM		Court resumes
3:00:33 PM		the jury is present
3:00:42 PM	J. Quane	continues direct examination of the witness - Brian Kerr
3:14:48 PM		side-bar
3:19:03 PM	Judge	Jury is excused
3:20:27 PM	Judge	will allow the witness to review his notes to refresh his recollection
3:44:53 PM		the jury is present
3:45:19 PM	J. Quane	continues direct examination of the witness - Brian Kerr
3:48:20 PM	G. Haddad	Objection - leading
3:48:22 PM	Judge	Objection is overruled
3:50:12 PM	G. Haddad	Objection - compound & leading
3:50:19 PM	Judge	Objection is sustained
3:50:49 PM	G. Haddad	Objection - leading
3:50:51 PM	Judge	Objection is overruled
3:54:19 PM	G. Haddad	Objection - matter of law

3:54:22 PM	Judge	Objection is sustained
4:04:02 PM	G. Haddad	Objection - improper use of deposition
4:04:15 PM	Judge	Objection is overruled
4:05:46 PM	G. Haddad	Objection
4:05:49 PM	Judge	Objection is sustained
4:07:31 PM	G. Haddad	Objection - leading
4:07:34 PM	Judge	Objection is sustained
4:07:43 PM	G. Haddad	Objection - leading and foundation
4:07:50 PM	Judge	Re-phrase question
4:08:50 PM	G. Haddad	Objection - leading
4:08:52 PM	Judge	Objection is overruled
4:10:20 PM	G. Haddad	Objection
4:10:25 PM	Judge	Objection is overruled
4:11:39 PM	G. Haddad	Objection
4:11:45 PM	Judge	Objection is overruled
4:13:00 PM	G. Haddad	Objection - misrepresentation of testimony
4:13:02 PM	Judge	Objection is sustained
4:14:02 PM	G. Haddad	Objection - leading
4:14:04 PM	Judge	Objection is sustained
4:15:30 PM	G. Haddad	Objection - waiver issue
4:15:34 PM	Judge	Objection is overruled
4:19:33 PM	G. Haddad	Objection - speculation
4:19:45 PM	Judge	Re-phrase question
4:31:24 PM	G. Haddad	Objection - hearsay
4:31:26 PM	Judge	Objection is sustained
4:32:49 PM	G. Haddad	Objection - hearsay & leading
4:33:01 PM	Judge	Re-phrase question
4:40:32 PM	G. Haddad	Objection - relevance
4:40:35 PM	Judge	Objection is overruled
4:48:40 PM	G. Haddad	Objection - leading
4:48:42 PM	Judge	Objection is sustained
4:48:48 PM	Judge	admonishes the jury
4:48:55 PM		Jury is excused
4:50:08 PM	T. Jones	Exhibit # Z52 should have been identified as Z43
4:51:14 PM	T. Jones	comments re: order & revised order
4:54:15 PM	Judge	instructs counsel
4:56:39 PM		Court recesses

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No.: CV OC 2012-04792

REVISED ORDER RE: UNAUTHORIZED RECORDING/TRANSCRIBING AND USE OF UNOFFICIAL TRANSCRIPTS

The prior order is withdrawn

On September 26, 2014, late in the afternoon session in this trial, defendants' counsel, Terrence Jones, attempted to place before the jury in this case an unofficial transcript of the testimony of Dr. Groben, a witness who had testified in the first week of the trial for the plaintiff. Mr. Jones represented to the court and the jury that it was a transcript of Dr. Groben's trial testimony. Plaintiff's counsel made a timely objection which was sustained since it was not proper to show the purported transcript in any event. The court's official reporter almost immediately advised the court that she had not been asked to prepare Dr. Groben's full trial testimony and had not prepared any official transcript of Dr. Groben's trial testimony. She later advised the court that she had given a small portion of unedited, rough notes to counsel but cautioned counsel that it was not an official transcript and could not be used in that fashion.

It is a fundamental duty of every court to preserve the integrity of all trials and trial records. There are strict rules adopted by the Idaho Supreme Court which govern the

qualifications and training of district court reporters. The Supreme Court's rules are designed to ensure the integrity of the record. Court reporters are sworn officers of the court who are bound by their oath to honestly and accurately prepare transcripts of court proceedings and make a verbatim record of all oral communications. A court reporter certified in accordance with ICAR 21 is required to report all civil trials. Standards of accuracy are required for official transcripts. ICAR 27 (e) provides:

> **(e) Use of official transcripts of district court proceedings.** In all cases where a party desires to place in evidence a transcript or partial transcript of a district court proceeding, or disclose the contents of a transcript during the examination of a witness, the transcript must be an official transcript as provided in subsection (d) of this rule.

In order to ensure that the record is accurate and meets the requirements of Idaho law:

1. No document purporting to be a trial transcript of this trial or the previous trial which ended in a mistrial as a result of the defense violation of an order in limine may be shown in any manner whatsoever in open court without first advising the court of the intention to do so and the legitimate legal basis for doing so outside the presence of the jury with sufficient time for the court to confirm that it is indeed an official transcript.

2. No counsel may engage in any recording of these proceedings by any device whatsoever for the recording or transmission of sounds or images from this trial. No electronic device capable of recording or transmitting sounds or images shall be activated while the electronic device is in the courtroom.

3. The bailiff will be directed to confiscate any devices used in violation of this Order and they will not be returned until the jury

has rendered its verdict. The bailiff is authorized to inspect for recording devices being used in violation of this Order.

It is so ordered.

Dated this 30th day of September, 2014.

Deborah A. Bail
District Judge

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S REQUEST FOR SUPPLEMENTAL JURY INSTRUCTIONS RE DEATH CERTIFICATE AND THE ELEMENT OF PROXIMATE CAUSE

Plaintiff, Charles Ballard, through his attorneys, requests that the Court use the appended instruction regarding a certificate of death and proximate cause in addition to the instructions previously submitted by Plaintiff. The proposed instructions are based upon the Idaho Supreme Court's decision in *Corey v. Wilson*, 93 Idaho 54, 56, 454 P.2d 951, 953 (1969) (death certificate) and *Sheridan v. St. Luke's Regional Medical Center, et al.*, 135 Idaho 775, 25 P.3d 88 (2001) (proximate cause). Both instructions are accurate statements of the law and will assist the jury in deciding this case.

Dated this 1st day of October, 2014.

Respectfully submitted,
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2014, I served a true and correct copy of the foregoing ***Plaintiff's Request for Supplemental Jury Instructions*** by hand delivering the same to the following by hand delivery:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL, PLLC

Scott McKay

PLAINTIFF'S JURY INSTRUCTION NO. ___

The facts stated in a certificate of death are presumed to be true unless proven otherwise.

Corey v. Wilson, 93 Idaho 54, 56, 454 P.2d 951, 953 (1969)

Plaintiff withdraws 10/2/2014

Given _____
Refused _____
Modified _____
Covered _____
Other Withdrawn during jury instruction discussion by plaintiff.

PLAINTIFF'S JURY INSTRUCTION NO. __

The element of proximate cause can be established through a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.

Sheridan v. St. Luke's Regional Medical Center, et al., 135 Idaho 775, 25 P.3d 88 (2001)

Given _____
Refused _____
Modified _____
Covered By standard instruction with example. DAB
Other ~~IDJI~~ IDJI 1.24.2 + ex.

ORIGINAL

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Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S OFFER OF PROOF RE: RECORDS OF DR. KERR'S EXPERIENCE PERFORMING LIPOSUCTION

STATE OF IDAHO)
: Ss.
County of Ada)

Jeremiah A. Quane, having been first duly sworn upon oath, deposes and

says:

1). I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2). The court has ruled that the defense may not utilize defense trial Exhibit AA, a copy of which is attached hereto and labeled as Exhibit AA. This document does not refer to infections or complications or lack thereof, but rather simply lists Defendant Dr. Kerr's other liposuction procedures up through 2010. Plaintiff's objected to the use of this exhibit or any reference being made to the absence of other patient infections on the ground that the medical records for all of these patients were not timely produced to Plaintiff's counsel. While the court has ruled on this issue, the defense was not allowed the opportunity to make a record in this trial opposing the Plaintiff's contentions. The following is offered for that purpose.

3). That attached hereto as Exhibit A is a true and correct copy of excerpts of Dr. Thomas Coffman's deposition which was taken by the Plaintiff on August 20, 2013. At his deposition on pages 40-41, Plaintiff's counsel, Mr. Haddad, refers to, having received the document which comprises exhibit AA, Dr. Kerr's patient list which contains the first names for patients undergoing 388 other liposuction procedures Dr. Kerr had performed including Krystal Ballard.

4). That on September 16, 2013, Dr. Kerr supplemented his discovery response to Plaintiff's Interrogatory No. 20 in which the patient list was again referred to and Susie Kerr is identified as the person who will testify about it. A true and correct copy of this discovery supplementation is attached hereto as Exhibit B.

5). That on September 26, 2013, counsel for Dr. Kerr wrote to Mr. Haddad stating that Plaintiff's counsel's Susie Kerr's request to conduct a second deposition of Susie Kerr was made less than 60 days prior to trial and outside the time frame provided for in the Court's scheduling order and that the Defense would not voluntarily agree to produce her for a second time on that basis. A true and correct copy of that letter is attached hereto as Exhibit C.

6). That on Friday, September 27, 2013, Plaintiff's counsel, Mr. Haddad, issued a notice of deposition duces tecum for Susie Kerr for her to sit for a second deposition on Tuesday, October 2, 2013 at noon. A true and correct copy of that document is attached hereto as Exhibit D.

7). That on Tuesday, October 1, 2013, counsel for Dr. Kerr sent an email to Plaintiff's counsel, Mr. Haddad, confirming that Susie Kerr will not be produced the following day because the notice of deposition was untimely and based on defense counsel's letter of September 26. Plaintiff was informed that if he still sought to further depose Susie Kerr that he would need to seek court involvement. A true and correct copy of that document is attached hereto as Exhibit E.

8). Nothing further was done to address this issue by Plaintiff's counsel who then waited until the trial in November 2013, to instead represent to the court that the Defense had been properly requested, but had failed to produce the materials related to other patient medical records. The defense disputes that the medical records of other patients were ever properly or timely requested in discovery by Plaintiff's counsel and that the attached documents establish this fact which the defense has now tried on multiple occasions to share with the court despite rulings that information regarding other patient

infections will not be admitted at this trial.

FURTHER your Affiant saith not.

Jeremiah A. Quane

SUBSCRIBED AND SWORN to before me this 1st day of October, 2014.

(SEAL)

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

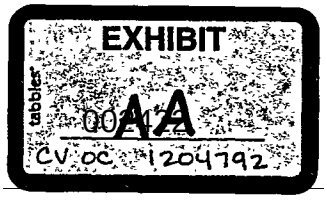
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S OFFER OF PROOF by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

Jeremiah A. Quane

Last Name	First Name	Date of Tx	procedures
Kerr	Susan Kerr	12.11.2007	abdomen
	Tiffany	12.11.07	upper arms, abdomen
	Erica	12.24.07	abdomen, love handles, flank
	Mike	12.28.07	abdomen, love handles & flank



Last Name	First Name	Date of Tx	procedures
	Vicki	01.29.08	neck
	Donna	01.31.08	thighs
	Julie	02.01.08	full ab, love handles, bra fat
	ruth	02.02.08	lower ab, under bum, outer hips
	Jane	02.08.08	inner & outer thigh, knees
	Matthew	02.08.08	abdomen, flanks
	Nancy	02.11.08	neck, full abdomen & luvs
	Matthew	02.21.08	abdomen, chest
Kerr	Susan	02.25.08	luv handles, flank
	Ruth	02.25.08	luvs, inner thigh
	Jennifer	02.28.08	banana roll, inner & outer thigh
	Char	02.29.08	abdomen
	Patty	03.03.08	abdomen
	Patty	03.03.08	abdomen
	Cheryl	03.04.08	abdomen, flank & loves
	Timothy	03.11.08	abdomen, flanks
	Joni	03.13.08	abdomen, neck
	Mike	04.01.08	abdomen & flank touch up
	Kristyn	04.03.08	abdomen, flank, inner thigh, tootsie roll, upper arm
	Simone	04.07.08	abdomen & flank
	Dee	04.09.08	abdomen, flanks
	Cindy	04.11.08	abdomen
	Tauni	04.17.08	inner & outer thigh, tootsie roll
	Tonya	04.18.08	abdomen, hips, inner thigh
	Dennis	04.19.08	abdomen, flanks, neck
	Myrna	05.08.08	flanks,abdomen
	Cindy	05.13.08	abdomen
	Molly	05.13.08	abdomen
	Sheila	05.15.08	abdomen, outer leg, flanks, Fat transfer to face
	LeAnn	05.19.08	full ab
	Vicki	05.19.08	flank & bra fat
	Patricia	05.20.08	inner and outer thigh
	Melinda	05.21.08	inner & outer thighs
	Jennifer	05.21.08	inner & outer thighs
	Debbie	05.22.08	abdomen, flank
	JoAnn	05.22.08	abdomen, chin
	Kimber	05.29.09	abdmen & flank
	Kim	06.06.08	abdomen & love handles
	Diane	06.26.08	abdomen
	Teresa	07.03.08	abdomen, flanks
	Teresa	07.03.08	abdomen, flanks
	Randae	07.10.08	abdomen, flank, neck
	Patty	07.11.08	abdomen touch up
	Patty	07.11.08	lower abdomen
	Kathy	07.12.08	upper & lower abdomen
	Lisa	07.16.08	abdomen, fllank
	Krissie	07.17.08	abdomen
	Jenny	07.24.08	abdomen, bra & back fat,
	Pam	07.25.08	abdomen, lateral waist
	Steve	07.30.08	abdomen, love handles & chest
	Mary Ann	07.30.08	neck
	Nancy	07.31.08	hips
	Lyubov	08.09.08	abdomen
	Jeanette	08.15.08	abdomen, thorax, waist, lat bra fat area
	Nancy	08.19.08	luv handles
	Kendall	09.03.08	arms
	Denis	09.04.08	Breast
	Beverly	09.05.08	abs & flank
	Debbie	09.08.08	abdomen
	Eleanor	09.16.08	abdomen, lat waist, flank and lateral bra area
	Jennifer	09.16.08	outer & inner thigh, buttocks
	Marion	09.17.08	waist, flank, neck, bra fat

	Jenny	09.19.08	arm, lat waist, flank
	Michelle	09.23.08	abdomen, lateral waist & thigh
	Jennifer	09.25.08	inner/outer thigh, knees
	Ernie	09.26.08	luvs, chest
	Kimber	10.02.08	abdomen, luv handles and flanks
	Lisa	10.07.08	outer & inner thigh, abdomen
	Patty	10.30.08	abdomen, flank, waist and bra area, arms, butt
	Kim	11.04.08	abdomen, waist, fat transfer to face
	Katie	11.12.08	inner & outer thighs
	Becky	11.17.08	arms
	linda	12.08.08	fulll ab, hips, luv, bra fat
	Erica	12.27.08	abdomen, luv handles and flanks
	MANDI	12.28.08	abdomen, chin, inner thighs, arms

Last Name	First Name	Date of Tx	procedures
	Terri	01.07.09	abdomen & neck, fat transfer to face
	Phyllis	01.15.09	abd, luv, bra fat
	Kayce	01.16.09	abdomen, luv handles, flank
	Leah	01.19.09	ankles
	Barbara	01.20.09	ful abd, chest from hip to armpit
	Polly	01.21.09	abd, luvs & flank
	Jennifer	01.22.09	abd
	Cheryl	01.22.09	abd
	Cathi	01.23.09	full ab, luv, bra fat
	Jenny	01.23.09	abdomen, outer thighs
	Barbara	01.26.09	inner & outer thigh,
	Kerry	01.28.09	ankle, thigh, knee
	Ruth	01.30.09	outer thigh
	Carole	02.10.09	ab, luv, flank, bra fat
	Beverly	02.11.09	abdomen, luv handles
	Julie	02.13.09	inner & outer thigh
	Christina	02.16.09	abd, waist, outer thigh
	Linda	02.17.09	upper arm & lower arms, neck
	Helena	02.18.09	abdomen
	Jacque	02.18.09	full abdomen
	Phyllis	02.19.09	outer, inner thigh, knees
	LeAnn	02.20.09	outer & inner thigh, knee
	Liz	02.23.09	abdomen, full waist and flank
	Judie	02.26.09	full abdomen
	Bonnie	03.04.09	abdomen, lat waist & flank, & bra fat
	Vicki	03.05.09	neck & lower jowels
	Jennifer	03.06.09	lat thigh touch up, fat transfer to outer thight
	Joyce	03.10.09	inner & outer thigh, fat transfer to labia & face
	Kristi	03.11.09	outer & inner thigh, flanks, fat transfer to face
	Gentry	03.19.09	ab, luv handles
	Sherrie	03.20.09	abd, outer thighs
	Kristin	03.21.09	chin, neck, arm
	Sherri	03.26.08	abdomen and flanks
	Barbara	03.30.09	upper arms, fat transfer to breast
	Connie	03.30.09	arms, fat transfer to face
	Chris	04..20.09	abdomen, lateral waist
	Carole	04.01.09	arm & bra fat
	Sherri	04.07.08	Fat transfer to face
	Leslie	04.09.09	outer & inner thigh
	Jackie	04.10.09	outer & inner thigh & knees
	Patricia	04.13.09	abd, lat waist & thorax
	Nola	04.21.09	full abd, luv & flank
	Patty	04.21.09	abd touch up, bra fat
	Judy	04.22.09	neck
	Bruce	04.28.09	abdomen & luv handles
	Jackie	04.29.09	ankles, arms
	Cheri	04.30.09	neck
	MaryAnn	05.01.09	Upper & lower arms, fat transfer to face
	Kim	05.06.09	arm, fat transfer to breasts
	Kelly	05.07.09	knees, f/t to breast
	Debra	05.14.09	inner thigh, ft to face and breast
	Tina	05.19.09	full ab, flank, bra fat
	Alisa	05.20.09	abd, luv, bra fat, flank
	Kendra	05.29.09	full ab, armpit

Ed	05.30.09	abd, lateral waist & flank
Marion	06.01.09	leg, thigh, arm, chest wall, f/t to breast
Tina	06.02.09	outer thighs, f/t to buttocks scar
Letty	06.02.09	ab, luv, flank, f/t to butt
Lisa	06.03.09	abdomen, waist,bra fat, knees and right upper leg
Shanna	06.13.08	abdomen, lateral waist, inner & outer thigh, upper lat buttocks, fat transfer to face
Donna	06.17.09	outer thighs
Tara	06.15.09	neck
Donna	06.17.09	thighs
Cheryl	06.22.09	full ab, waist & flank
Cheryl	06.24.09	inner thigh,bra fat, fat transfer to breast?
Anthony	07.06.09	abdomen, lateral waist
Michelle	07.07.09	ab & fat transfer to face
Aaron	07.08.09	breast, neck
Jackie	07.30.09	full ab, love handles
Terri	07.31.09	abd, waist, neck f/t to breast
Stacy	08.19.09	full ab, waist ft to face/hands/breast
Keil	08.27.08	breast, full ab
Carrie	08.27.09	full ab, flank, inner/outer thigh
Glenn	09.03.09	abd, lateral waist & flank
Teresa	09.04.09	abdomen & waist
Teresa	09.04.09	abdomen and lateral waist
Chris	09.08.09	breast
Phyllis	09.17.09	abd anterior, lower inner thigh
Ann	09.21.09	full abd, lat waist & flank
Maureen	09.22.09	full abd, inner thigh
Carol	09.23.09	full abdomen
Jennifer	09.25.08	outer thighs
linda	09.25.09	arms
LaDoena	09.30.09	abd, flank
LaDoena	09.30.09	abd, flank, bra fat
gladys	10.01.09	ab,bra fat, fat transfer to breast
Tarena	10.02.09	abdomen, flank, love handles
Lori	10.14.09	Lower ab, neck,
Katie	10.21.09	outer & inner thigh f/t to breast
Minni	10.22.09	abdomen, flank
Lisa	11.13.09	love handle, flank, outer thigh
Brandy	11.16.09	abdomen, flanks
Helena	11.18.09	ab, love handles, neck
Jackie	11.19.09	upper knee, arms
Marion	11.20.09	ankle, calfs, inner thigh, axilla, flank,
ruth	11.23.09	knees, lateral waist
Julia	11.24.09	outer & inner thigh, fat transfer to breast
Theresa	11.25.09	abd, lat waist, neck f/t to breast
Ashley	12.04.09	abdome, lateral waist & flank
Jim	12.11.09	abd, waist, chest
Travis	12.14.09	neck
Alyson	12.15.09	abdomen, lat waist & flank
Becky	12.17.09	ab, luv, inner thigh
LeaAnn	12.18.09	abd, waist, butt f/t
Adrienne	12.18.09	outer thigh
Caiyun	12.21.09	ab, luv, bra fat,
Janina	12.23.09	abd, waist, neck f/t to breast
John	12.24.09	chest
Theresa	12.24.09	outer & inner thigh f/t to breast

Last Name	First Name	Date of Tx	procedures
	Tawnja	1.5.10	ab, flank bra
	Christine	1.8.10	thighs, waist
	Brandy	1.14.10	abd, flank, thigh
	nancy	1.25.10	neck, torso, lateral waist, thorax FAT transfer
	Julie	1.29.10	ab revision , FAT transfer
	olivia	2.4.10	abd FAT to lip
	Christine	2.5.10	abd, arms, inner thigh
Kerr	Susan	2.10.10	ab touch up
	Jennifer	2.10.10	lat outer thigh
	Linda	2.11.10	flank, FAT
	Stephen	2.17.10	neck
	HHaleena	2.18.10	ab
	Pamela	2.19.10	ab, flank, FAT face
	Linda	2.23.10	abd, flank
	Deborah	2.24.10	abd, flank
	Tina	3.1.10	Ab, flank
	Karrie	3.1.10	outer thighs
	Janet	3.3.10	thighs, FAT breast,face, hands
	Letty	3.4.10	abd, arm, FAT bust, butt
	Chris	3.5.10	chest touch up
	Jennifer	3.5.10	knees, abdomen, outer thigh
	Kelly	03.08.10	abd, lat waist
	Angie	3.11.10	inner, outer thigh, FAT breast
	Lisa	3.10.10	outer thigh, FAT breast
	Linda	3.10.10	REVision thighs
	Erin	3.12.10	flank, FAT breast
	Janet	3.16.10	neck, FAT to face
	Patricia	3.18.10	abd, arms, FAT to butt
	Jessica	3.19.10	abd, waist
	Michelle	3.22.10	abd, lat waist
	Dwayne	3.23.10	ab, flank
	Geo	3.24.10	abdm flank
	Elsie	3.25.10	abd, flank, FAT face
	Kim	3.25.10	abd
	Ruth	4.5.10	lat thigh touch up
	Julia	4.6.10	thighs
	Nancie	4.8.10	abd, flank, FAT
	Emily	4.9.10	outer thigh, inner FAT to breast
	Pauline	4.12.10	abd, arms,
	Sandy	4.13.10	abdomen FAT
	Elizabeth	4.14.10	abd, flank, inner thigh
	Sara	4.16.10	arms, FAT breast
	Joanna	4.16.10	abd, waist
	Phyllis	4.19.10	touch up
	Jackie	4.21.10	3 areas, touch up, FAT
	Denise	4.30.10	abd, FAT to face
	Sandy	4.13.10	abdomen FAT
	Patty	4.13.10	abd TU, bra, Fat transfer
	Pauline	4.19.10	inner & outer thigh
	Tiffany	4.21.10	flanks
	Rebecca	4.22.10	abd
	Kathleen	4.30.10	thighs
	Deborah	5.2.10	arms
	Jeanie	5.4.10	ab, flank, FAT to breast
	Marianne	5.6.10	3 areas FAT to butt
	Trina	5.7.10	abd, waist thigh, FAT BUTT
	Dianne	5.14.2010	abd, FAT to face

	Loretta	5.17.10	abd, flank, bra, FAT
	Rhonda	5.18.2010	Thighs, FAT breast & butt
	Bette	5.18.10	flanks, arms
	Melissa	5.20.10	ab, flank
	Gwen	5.25.10	fat transfer
	Debbie	5.26.10	inner, outer thigh, FAT breast
	Jackie	5.28.10	thighs, FAT thighs
	Paula	5.28.10	abd
	Barbara	6.2.10	ab, waist, bra fat
	Mary	6.3.10	abd, thighs
	Lucy	6.4.10	3 areas(abdomen) FAT to hands
	Megan	6.8.10	abd, flank FAT
	Sheri	6.8.10	neck, jowels
	Valerie	6.9.10	ab, flank
	Sally	6.16.10	outer thigh, flank, FAT
	Brianna	6.17.10	knees, thighs, flank
	Melinda	6.18.10	abdm, flank waist
	Deborah	6.20.10	abd, flank, bra
	Sara	6.21.10	ab, waist, bra fat,
	Pamela	6.22.10	neck, jaw, abd, FAT to face
	Tracy	6.24.10	abdomen, flank
	Brenda	6.25.10	breast, thigh
	Deborah	6.30.10	arms
	Carolyn	7.1.10	abdm flank, FAT to face
	Linda	7.7.10	abd
	Kaye	7.6.10	abd, flank, arms, FAT to breast
	Shawn	7.13.10	neck
Ballard	Krystal	07.21.10	full abdomen, luv handles, flank & fat transfer to butt
	Roxann	07.22.10	abd, lat waist
	BECKY	07.23.10	Abd, flanks, fat transfer breast
	Melinda	7.24.10	arms, FAT to breast
	Christopher	7.26.10	abd, flank, neck
	Barbie	7.27.10	jaw, neck
	Becky	7.28.10	ab, luvs, fat transfer breast
	Jessica	7.29.10	abd, lat, waist, flank, breast
	Melinda	7.30.10	thighs
	Beverly	8.3.10	neck
	WAFAA	8.4.10	Abd, lat waist, flank
	Mike	8.5.10	abd, flank
	Kristen	8.6.10	abd, flank
	Mary	8.13.10	abd, flank
	Becky	8.19.10	thighs
	Dennis	8.19.10	neck
	Bonnie	08.19.10	neck
	Josie	8.25.10	abd, fat transfer breast
	Vicki	08.30.10	upper & lower ab
	Rita	9.01.10	abd, fat transfer
	Orie	09.02.10	ab, flank, fat transfer
	Molly	09.03.10	ab, flanks,
	Christine	09.15.10	elbo, inner knee , thight
	Jackie	09.15.10	abd, upper ab, lat waist & back
	Lee	09.16.10	abd, chest
	Melinda	09.16.10	upper, lower abdomen large
	Melissa	9.20.10	arms
	Ginger	9.21.10	abs, flanks, luvs
	Scott	9.22.10	abd, flank
	Amy	9.23.10	arms, bra
	Cindy	9.24.10	abd, butt banana roll

	Melissa	9.27.10	abd, flank
	Ashley	9.28.10	abd, lat waist, flank
	Molly	09.30.10	inner outer thigh
	Leta	9.30.10	lat waist, flank, chest, fat transfer to face
	Scott	10.01.10	chest, axilla
	Trent	10.02.10	chest
	Elizabeth	10.04.10	abd, lat waist flank.
	Joanna	10.5.10	abd, flank, chest, fat transfer to butt, breastt
	Linda	10.14.10	lat waist touch up
	Bette	10.15.10	ant ab touch up
	Larraine	10.15.10	abd, flank
	Jini	10.15.10	arm, breast fat transfer
	Elizabeth	10.19.10	thighs, fat transfer breast
	Patricia	10.20.10	inner, outer thighs
	Janet	10.21.10	abs,flanks
	Jennifer	10.22.10	abd touch up
	Kim	10.22.10	abd, flank, inner, outer, fat to breasts
	Misty	10.25.10	abd, breasts, neck
	Christine	10.26.10	abd, flank, breast
	Mimi	10.28.10	lat waist, luv, flank touch up
	Vicky	10.28.10	arms
	Theresa	10.29.10	ankle, inner thigh
	Misty	11.2.10	flanks, butt fat
	Debra	11.3.10	flanks, fat transfer to hands
	Kelly	11.15.10	touch up ab
	Melissa	11.15.10	outer, inner thigh
	Holly	11.17.10	abd, flank, ftransfer breast
	Kathie	11.18.10	ab, waist, fat transfer
	Tracy	11.23.10	ab, breast fat transfer
	Nancy	11.29.10	chin, ab
	Sara	11.29.10	flanks, fat transfer to butt
	Cindy	11.30.10	flanks
	Amy	12.1.10	abd, flank
	Erica	12.2.10	abd, bra fat
	Todd	12.3.10	abd, flank
	Melody	12.08.10	abd, flank, fat transfer breast
	Tony	12.09.10	abd, flank
	Kristin	12.10.10	waist, breast fat trans
	Amy	12.20.10	inner outer thigh
	Heather	12.20.10	abd, flanks
	Theresa	12.22.10	upper ab, thighs
	Gene	12.23.10	abd, flanks
DR. KERR DID APPROX 4 LIPOS A WEEK . 44 WEEKS (8 WEEKS OF VACATION)			

EXHIBIT A

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE; Defendants.	Case No. CV OC 1204792

VIDEOTAPED DEPOSITION OF THOMAS J. COFFMAN, M.D.

August 20, 2013

VOLUME 1
Pages 1-108

Reported by
Patricia J. Terry
Certified Shorthand Reporter No. 653
Registered Diplomate Reporter
Certified Realtime Reporter

but do you know any of the solutions that were used by Dr. Kerr as part of his cleaning and disinfecting the materials?

A. No.

Q. You have listed private practice infectious disease. I take it the bulk of your practice is probably being called in on a consult in a hospital setting?

A. Correct.

Q. Okay. Your private practice, does that simply involve follow-up to patients that you might have consulted with in the hospital that need outpatient assessment and treatment?

A. Yeah. We do -- we see patients, you know, outpatient consults in the office, too, for different kinds of things, fevers or swollen glands, things like that. And we have a pretty big HIV practice that we take care of.

Q. Now, Doctor, among the materials that you brought with you, Mr. Quane kind of explained it to me off the record, but I want to explain it, make sure I have an understanding on the record. There appears to be as part of the packet of materials that you brought with you comprising your file is various sheets that contain the first

name of patients, dates of treatment, and then the procedures performed at Silk Touch. Is that your understanding?

A. That is.

Q. Do you have an understanding as to how these sheets were created?

A. I believe that the people at Silk Touch pulled up the names of -- and procedures of people they worked on the last several years and compiled them.

Q. Is there anything else other than getting this list that had the patient name, the date of treatment, and procedure, is there anything else you were given or shown regarding patient outcomes in any of these patients?

A. No.

Q. There is -- Mr. Quane has it for you. He indicated that it might contain certain tabs to it, which is the defendants' answers to the third set of discovery requests. And you understand part of this incorporates anticipated opinions that you may hold in this case. Do you understand that?

A. Yes.

Q. Okay. Had you been sent by e-mail or

EXHIBIT B

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NO. 20

Defendants hereby provide supplemental answer to Plaintiff's Interrogatory No. 20 as follows:

INTERROGATORY NO. 20: Identify each witness known to you to have information and relevant materials to the claims presented in this action or to any defense asserted thereto, and for each person please give a brief summary of each such witness's expected trial testimony.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 20: In addition to the individuals named in the Defendants' Answer to Plaintiff's Interrogatory No. 20 dated September 24, 2012, the following:

1. Dr. Howard Schaff – Expected trial testimony relates to the CT examination of Krystal Ballard on July 25, 2010 at Saint Alphonsus Regional Medical Center.

2. Cody Murphy – Expected trial testimony relates to the events, issues and matters described in the records of Elmore Ambulance Service for July 25, 2010.

3. Wendy Vanderburgh – Expected trial testimony relates to the events, issues and matters described in the records of Elmore Ambulance Service for July 25, 2010.

4. Dr. Billy Morgan – Expected trial testimony relates to his evaluation of Krystal Ballard on July 25, 2010 at Saint Alphonsus Regional Medical Center and the matters described in his Consultation Report.

5. Melisa Fellows – Expected trial testimony unknown since defense counsel has not spoken with her, although attempted. Charles Ballard mentioned her in his second deposition and said he spoke with her about her involvement with Krystal Ballard.

6. Susie Kerr – In addition to the matters and testimony in her deposition, her expected testimony will relate to records of Silk Touch, records and data she compiled of Silk Touch for infections, patients, drawings of Krystal Ballard, photos of Krystal Ballard and experience in training and cosmetic procedures.

7. Briana Kerr – Expected trial testimony is the testimony in her deposition and the events of the procedure performed by Dr. Kerr on Krystal Ballard.

8. Donna Berg – Expected trial testimony is the testimony in her deposition and her interactions with and observations of Krystal Ballard.

DATED this 16th day of September, 2013.

QUANE JONES McCOLL, PLLC

By /s/
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2013, I served a true and correct copy of the foregoing DEFENDANTS' SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NO. 20 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (205) 733-4896

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Jeremiah A. Quane

EXHIBIT C

Quane Jones McColl, PLLC
Attorneys at Law

Jeremiah A. Quane jaq@quanelaw.com

US Bank Plaza
101 S. Capitol Boulevard
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September 26, 2013

VIA FACSIMILE (304) 594-9709
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

The records and data compiled by Susie Kerr regarding infections and patients which you erroneously claim was untimely supplemented in my Answer to your Interrogatory Number 20 was produced for you at your deposition of Dr. Coffman on August 20, 2013. You have had this data for one month before you ever brought up the subject of deposing Susie Kerr. If anything, you are the one who is untimely and you seem to always cast blame on me for your dilatory conduct. The records and data under discussion was prepared shortly before August 20, 2013 for the purpose of being a trial exhibit and it did not exist before and therefor it was not available for production or reference in supplementation to answers to written discovery. In fact, since it will be used only as a trial exhibit, the court Order governing further proceedings does not require its identification and disclosure until either 14 days or 7 days before trial. The Order also provides that the last day to take discovery depositions shall be no later than sixty (60) days prior to trial. Your request to depose Susie Kerr (September 20, 2013) was not made within the time frame of the Court Order.

I must have you provide me with legal authority and support for your claimed right to depose Susie Kerr. I did you a favor by producing the data at the deposition of Dr. Coffman on August 20, 2013.

You also contend that Dr. Garrison untimely disclosed his opinion on fat emboli at his deposition for the first time. I agree that his opinion was first disclosed at his deposition but I do not agree it was untimely. It was formed by Dr. Garrison a few days before his deposition and therefor it was not subject to disclosure in his two prior expert disclosures or at any time before it was formulated by him. He did not tell me about his opinion until the day before the deposition. I am always amazed when lawyers take depositions of opposing experts and ask about opinions of the expert not previously disclosed. It makes no sense or logic why lawyers want to know of opinions of experts that have not been previously disclosed when such undisclosed opinions are not admissible in evidence. Why ask? You are the one who caused the new opinion of Dr. Garrison on fat embolism to be brought out and as a result, you must now live with the opinion. But for you, it would not even exist. The deposition of an opposing expert taken after the expert has given a disclosure of opinions constitutes a valid disclosure of opinions elicited at the deposition, even if new. You did the same thing at the deposition of Dr. Coffman and I objected but you persisted and got an opinion of sorts on an issue not previously described in the disclosure of Dr. Coffman. You also went into details about fat embolism and the basis for the opinions of Dr. Garrison at the deposition. This included references to the chest x-ray at Elmore Medical Center and the report of Dr. Morgan, both of which made reference to fat embolism. You now claim that you could not adequately prepare for his deposition because you did not have notice of his opinion in advance. This is an absurd position because you would not be prepared when you brought up the matter of fat embolism which you should not have done, but you did. You must live with your contention that you were not prepared and I know of no legal authority that gives you the right to take another deposition of Dr. Garrison. You have put yourself in an awkward position and if you will provide me legal authority and support for taking another deposition of Dr. Garrison I will consider your request.

Very truly yours,

/s/

Jeremiah A. Quane

JAQ/cf

EXHIBIT D

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

FACSIMILE TRANSMITTAL SHEET

TO:
Jeremiah A. Quane, Esq. 208-780-3930
Terrence Jones, Esq.

Scott McKay, Esq. 208-345-8274
J.B. Perrine, Esq. 205-733-4896

FROM:
P. Gregory Haddad

COMPANY:

DATE:
SEPTEMBER 27, 2013

FAX NUMBER:

TOTAL NO. OF PAGES INCLUDING COVER:
2

PHONE NUMBER:

SENDER'S REFERENCE NUMBER:

RE:
Ballard v. Kerr

YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Attached Notice to Take Video Conference Deposition of Susie Kerr

BAILEY&GLASSER LLP

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Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508
ghaddad@baileyglasser.com

September 27, 2013

Clerk of the District Court
c/o Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

Re: *Ballard v. Kerr, et al.*
Case No. CV OC 1204792

Dear Clerk:

Enclosed please find for filing with the Court the NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR in regard to the above-referenced matter. Copies have been mailed to counsel of record. Thank you for your attention to this matter.

Sincerely,

/s/ P. Gregory Haddad

P. Gregory Haddad, Esq.

PGH/flc

Enclosure

cc: Jeremiah Quane/Terrence Jones (via facsimile)
Scott McKay, Esq. (via facsimile)
J. B. Perrine, Esq. (via facsimile)

650730

David Nevin (ISB #2280) dnevin@nbmlaw.com
Scott McKay (ISB #4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR**

To: Susan Kerr
c/o Jeremiah A. Quane, Esquire
P.O. Box 1576
Boise, ID 83701

Please take notice that the Plaintiff, Charles Ballard, will, by his counsel, take the video conference deposition duces tecum of Susan Kerr, on **Wednesday, October 2, 2013, at 12:00 p.m.**, mountain time, at Regus, 950 West Bannock Street, #1100, Boise, Idaho 83702, at which place and time you are invited to appear and take part in such deposition as you deem proper.

The Deponent is requested to bring all of the following:

1. A copy of all documents and data that comprise or relate to the "records of Silk touch, records and data she compiled of Silk Touch for infections, patients, drawings of Krystal Ballard, photos of Krystal Ballard and experience in training and cosmetic procedures" as referenced in Defendants' Supplemental Answer to Plaintiff's Interrogatory No. 20 dated September 16, 2013 concerning Susie Kerr.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

Dated this 27th day of September, 2013.

Respectfully Submitted,
BAILEY & GLASSER, LLP

By: _____
P. Gregory Haddad
James B. Perrine

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2013, I served a true and correct copy of the foregoing **NOTICE TO TAKE VIDEO CONFERENCE DEPOSITION DUCES TECUM OF SUSAN KERR** by Facsimile upon the following:

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701

P. Gregory Haddad

EXHIBIT E

Terry Jones

From: Terry Jones
Sent: Tuesday, October 01, 2013 12:45 PM
To: Philip G. Haddad; 'smckay@nbmlaw.com'
Cc: Corina Ferris
Subject: RE: Ballard v. Kerr

Greg:

I have been out of state on other matters. I see you sent out a notice of depo for Ms. Kerr for tomorrow. In addition to your notice being untimely, please be advised she will not be attending. Neither the witness nor Jerry are available in addition to which this witness has already been deposed and we object to producing her again. I am covering the depo of Dr. Laurence tomorrow while Jerry is out of state on other matters. You will need to take up the issue of obtaining a further depo of Ms. Kerr with the court consistent with Jerry's correspondence to you on this issue. I am working on getting the file for Dr. Laurence emailed to you later today so you will have it in advance of tomorrow. Please note that we also object to the breadth of your depo notice for Dr. Laurence and the limited time we have had to try and respond. We will do our best to have the requested information.

Terry.

Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 S. Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, Idaho 83701
(208)780-3939 Telephone
(208)780-3930 Facsimile
tsj@quanelaw.com

Time	Speaker	Note
8:46:10 AM		**CVOC12-11264 Ballard v Kerr Jury Trial - Day 10**
8:47:20 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
8:47:27 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:36:34 AM		Calls case
9:36:46 AM		the jury is present
9:36:55 AM	J. Quane	continues direct examination of the witness - Brian Kerr
9:39:56 AM	G. Haddad	Objection - relevance
9:41:50 AM	Judge	Objection is sustained
9:42:46 AM		side-bar
9:47:43 AM	G. Haddad	Objection - asked and answered
9:47:44 AM	Judge	Objection is sustained
9:48:41 AM	G. Haddad	Objection - improper use of a transcript
9:48:54 AM	Judge	Objection is sustained
9:49:22 AM	Judge	Jury is excused
9:50:04 AM	J. Quane	Makes an offer of proof
9:52:37 AM	Judge	Objection is sustained
10:02:06 AM	J. Quane	Makes an offer of proof re: prior experience of Dr. Kerr
10:02:43 AM	J. Quane	Makes an offer of proof re: redacted material in exhibit # 5
10:05:57 AM	Judge	comments re: prior rulings
10:12:36 AM	G. Haddad	Responds
10:15:38 AM	J. Quane	Responds
10:18:36 AM		Court recesses
10:37:01 AM		Court resumes
10:37:04 AM		the jury is present
10:37:15 AM	J. Quane	continues direct examination of the witness - Brian Kerr
10:39:26 AM	G. Haddad	Objection - based on Court's prior ruling
10:39:42 AM	Judge	Objection is overruled
10:52:54 AM	G. Haddad	Objection
10:52:57 AM	Judge	Objection is sustained
10:54:16 AM	G. Haddad	Objection - hearsay
10:56:24 AM	G. Haddad	Objection - asked and answered
10:56:30 AM	Judge	Objection is overruled
10:56:44 AM	G. Haddad	Objection - leading
10:56:49 AM	Judge	Objection is overruled
11:01:30 AM	G. Haddad	Objection - asked and answered & cumulative
11:01:40 AM	Judge	Objection is overruled
11:04:29 AM	G. Haddad	Objection - asked and answered
11:04:36 AM	Judge	Objection is overruled
11:31:27 AM	G. Haddad	Objection - relevance

11:31:55 AM	Judge	Objection is sustained
11:37:54 AM	G. Haddad	Objection
11:38:18 AM	Judge	Objection is sustained
11:41:45 AM	G. Haddad	Objection
11:41:47 AM	Judge	Objection is overruled
11:45:15 AM	G. Haddad	Objection - asked and answered
11:45:18 AM	Judge	Objection is overruled
11:47:47 AM	G. Haddad	Objection - beyond the scope
11:47:54 AM	Judge	admonishes and excuses the jury
11:53:42 AM	G. Haddad	Argues objection - cumulative & non-disclosure
11:54:04 AM	J. Quane	Responds
11:57:53 AM	Judge	will allow limited responses
11:59:58 AM		Court recesses
1:37:02 PM		Court resumes
1:37:08 PM		the jury is present
1:37:23 PM	J. Quane	continues direct examination of the witness - Brian Kerr
1:41:45 PM	G. Haddad	Objection - relevance
1:41:48 PM	Judge	Objection is sustained
1:44:43 PM	G. Haddad	Objection - leading
1:44:45 PM	Judge	Objection is sustained
1:44:49 PM	Judge	The answer is stricken
1:46:52 PM	G. Haddad	Objection - relevance
1:46:57 PM	J. Quane	Responds
1:47:28 PM	Judge	Jury is excused
1:47:39 PM	J. Quane	Makes an offer of proof
1:49:24 PM	Judge	Objection is sustained
1:54:12 PM		the jury is present
1:54:15 PM	J. Quane	continues direct examination of the witness - Brian Kerr
1:54:22 PM	G. Haddad	Objection - relevance
1:54:26 PM	Judge	Objection is sustained
1:54:48 PM	G. Haddad	Objection - relevance
1:54:50 PM	Judge	Objection is sustained
1:56:09 PM	G. Haddad	Cross-examination of the witness - Brian Kerr
1:58:12 PM	J. Quane	Objection
1:58:16 PM	Judge	Objection is overruled
2:06:06 PM		Deposition of Brian Kerr is published - first
2:13:22 PM	G. Haddad	Objection
2:13:25 PM	Judge	Objection is overruled
2:20:28 PM	J. Quane	Objection
2:20:30 PM	Judge	Objection is overruled
2:20:58 PM	J. Quane	Objection
2:21:13 PM	Judge	Objection is overruled

2:22:16 PM	J. Quane	Objection - argumentative
2:22:17 PM	Judge	Objection is overruled
2:22:34 PM	J. Quane	Objection - redundant
2:22:35 PM	Judge	Objection is overruled
2:22:58 PM	J. Quane	Objection - redundant
2:23:05 PM	Judge	Objection is sustained
2:28:09 PM	J. Quane	Objection
2:28:14 PM	G. Haddad	asks questions to lay foundation
2:31:31 PM	J. Quane	Objection - relevance
2:31:37 PM	Judge	Objection is overruled
2:32:06 PM	J. Quane	Objection
2:32:12 PM	Judge	Objection is overruled
2:33:04 PM	J. Quane	Objection - argumentative
2:33:07 PM	Judge	Objection is overruled
2:35:10 PM	J. Quane	Objection - relevance
2:35:35 PM	Judge	Objection is overruled
2:35:41 PM	J. Quane	Objection - relevance
2:35:45 PM	Judge	Objection is overruled
2:36:08 PM	J. Quane	Objection - relevance
2:36:10 PM	Judge	Objection is overruled
2:36:25 PM	J. Quane	Objection - argumentative
2:36:26 PM	Judge	Objection is overruled
2:36:56 PM	J. Quane	Objection - argumentative
2:36:57 PM	Judge	Objection is overruled
2:38:43 PM	J. Quane	Objection - relevance
2:38:44 PM	Judge	Objection is overruled
2:40:20 PM	J. Quane	Objection - relevance
2:40:23 PM	Judge	Objection is overruled
2:44:01 PM	J. Quane	Objection - repetitious
2:44:10 PM	Judge	Objection is overruled
2:45:12 PM	J. Quane	Objection - redundant
2:45:13 PM	Judge	Objection is overruled
2:47:16 PM	J. Quane	Objection - relevance & asked and answered
2:47:25 PM	Judge	Objection is overruled
2:48:13 PM	J. Quane	Objection - improper use of a deposition
2:48:24 PM	Judge	Objection is overruled
2:48:57 PM	J. Quane	Objection - improper use of a deposition
2:49:01 PM	Judge	Objection is overruled
2:59:29 PM		Deposition of Brian Kerr is published - second
3:02:36 PM	J. Quane	Objection
3:02:46 PM	Judge	Objection is overruled
3:04:56 PM	J. Quane	Objection

3:05:02 PM	Judge	Re-phrase question
3:08:22 PM	Judge	admonishes the jury
3:08:29 PM		Court recesses
3:37:32 PM		Court resumes
3:37:36 PM		the jury is present
3:37:38 PM	G. Haddad	continues cross-examination of the witness - Brian Kerr
3:38:33 PM	J. Quane	Objection
3:38:57 PM	Judge	Objection is overruled
3:43:23 PM	J. Quane	Objection
3:43:25 PM	Judge	Objection is overruled
3:47:29 PM	J. Quane	Objection - relevance
3:47:30 PM	Judge	Objection is overruled
3:47:53 PM	J. Quane	Objection
3:47:55 PM	Judge	Objection is overruled
3:49:51 PM	J. Quane	Objection - hearsay
3:49:56 PM	Judge	Objection is overruled
3:51:00 PM	J. Quane	Moves to strike
3:51:05 PM	Judge	denies the request
4:03:27 PM	J. Quane	Objection - hearsay
4:04:29 PM	Judge	Re-phrase the question
4:05:38 PM		Quane: Objection - hearsay - Judge:Objection is sustained
4:05:41 PM	J. Quane	Re-direct examination of the witness - Brian Kerr
4:20:56 PM	G. Haddad	Objection - argumentative
4:20:58 PM	Judge	Objection is overruled
4:24:04 PM	G. Haddad	Objection - leading
4:24:05 PM	Judge	Objection is overruled
4:25:04 PM	G. Haddad	Objection
4:25:06 PM	Judge	Re-phrase the question
4:29:54 PM	G. Haddad	Objection - leading
4:30:00 PM	Judge	Objection is sustained
4:31:56 PM	G. Haddad	Objection - leading
4:31:59 PM	Judge	Objection is sustained
4:32:27 PM	G. Haddad	Objection - relevance
4:32:54 PM	Judge	Re-phrase the question
4:33:20 PM	G. Haddad	Objection - time-frame
4:33:36 PM	Judge	Objection is sustained
4:34:11 PM	G. Haddad	Objection - relevance
4:34:13 PM	Judge	Objection is sustained
4:37:09 PM		jury questions are handed to the Court
4:37:17 PM		side-bar
4:47:47 PM	Judge	Inquires of the witness - Brian Kerr

4:56:37 PM	Judge	excuses the witness - Brian Kerr
4:56:44 PM	Judge	admonishes the jury
4:56:52 PM		Court recesses

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF TERRENCE S. JONES IN RESPONSE TO THE COURT'S ORDER RE: UNAUTHORIZED RECORDING AND USE OF UNOFFICIAL TRANSCRIPTS

STATE OF IDAHO)
: Ss.
County of Ada)

Terrence S. Jones, having been first duly sworn upon oath, deposes and

says:

1). I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2). That on September 30, 2014 I came to court to commence the 9th day of trial in this matter and received from the court an order questioning whether I created a document and constructed it to look like a page from a trial transcript of Dr. Groben who testified earlier in this case. This order was withdrawn and a revised order was issued the afternoon of September 30, 2014, a copy of which is attached hereto as Exhibit A .

3). That during this trial the defense has requested from the court reporter, Susan Gambee, copies of transcripts for various witnesses. Following Dr. Groben's testimony last week I similarly requested a copy of the cross examination for Dr. Groben.

4). That attached hereto as Exhibit B is a true and correct copy of the email I received from the court reporter, Susan Gambee, along with the one page attachment reflecting the cross examination testimony of Dr. Groben. The document at issue came directly from the court reporter and was not generated in any way by defense counsel. It was not relayed to me that this one page cross examination testimony of Dr. Groben was "rough notes."

5). Had I known the authenticity of this document was ever in question, I would have gladly shared that I received it from the official court reporter for this trial who has been present each and every day of this trial and who emailed the document to me on

September 19th.

FURTHER your Affiant saith not.

Terrence S. Jones

SUBSCRIBED AND SWORN to before me this 1st day of October, 2014.

(SEAL)

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October, 2014, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S OFFER OF PROOF by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [X] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709

Terrence S. Jones

EXHIBIT A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No.: CV OC 2012-04792 REVISED ORDER RE: UNAUTHORIZED RECORDING/TRANSCRIBING AND USE OF UNOFFICIAL TRANSCRIPTS *The prior order is withdrawn*

On September 26, 2014, late in the afternoon session in this trial, defendants' counsel, Terrence Jones, attempted to place before the jury in this case an unofficial transcript of the testimony of Dr. Groben, a witness who had testified in the first week of the trial for the plaintiff. Mr. Jones represented to the court and the jury that it was a transcript of Dr. Groben's trial testimony. Plaintiff's counsel made a timely objection which was sustained since it was not proper to show the purported transcript in any event. The court's official reporter almost immediately advised the court that she had not been asked to prepare Dr. Groben's full trial testimony and had not prepared any official transcript of Dr. Groben's trial testimony. She later advised the court that she had given a small portion of unedited, rough notes to counsel but cautioned counsel that it was not an official transcript and could not be used in that fashion.

It is a fundamental duty of every court to preserve the integrity of all trials and trial records. There are strict rules adopted by the Idaho Supreme Court which govern the

qualifications and training of district court reporters. The Supreme Court's rules are designed to ensure the integrity of the record. Court reporters are sworn officers of the court who are bound by their oath to honestly and accurately prepare transcripts of court proceedings and make a verbatim record of all oral communications. A court reporter certified in accordance with ICAR 21 is required to report all civil trials. Standards of accuracy are required for official transcripts. ICAR 27 (e) provides:

> (e) **Use of official transcripts of district court proceedings.** In all cases where a party desires to place in evidence a transcript or partial transcript of a district court proceeding, or disclose the contents of a transcript during the examination of a witness, the transcript must be an official transcript as provided in subsection (d) of this rule.

In order to ensure that the record is accurate and meets the requirements of Idaho law:

1. No document purporting to be a trial transcript of this trial or the previous trial which ended in a mistrial as a result of the defense violation of an order in limine may be shown in any manner whatsoever in open court without first advising the court of the intention to do so and the legitimate legal basis for doing so outside the presence of the jury with sufficient time for the court to confirm that it is indeed an official transcript.

2. No counsel may engage in any recording of these proceedings by any device whatsoever for the recording or transmission of sounds or images from this trial. No electronic device capable of recording or transmitting sounds or images shall be activated while the electronic device is in the courtroom.

3. The bailiff will be directed to confiscate any devices used in violation of this Order and they will not be returned until the jury

has rendered its verdict. The bailiff is authorized to inspect for recording devices being used in violation of this Order.

It is so ordered.

Dated this 30th day of September, 2014.

Deborah A. Bail
District Judge

EXHIBIT B

Terry Jones

From: SUSAN GAMBEE <susangg@cableone.net>
Sent: Friday, September 19, 2014 4:29 PM
To: Terry Jones
Subject: Dr. Groben Questions on Cross
Attachments: QuaneCross9-19-14.PDF

This is gratis...

I'll see what I can get done on Monday...will do as much as time permits. I have two other transcripts that I need to get out before I can get to this.
!SIG:541cae1b38952118318252!

AFTERNOON PROCEEDINGS

Friday, September 19, 2014

(Jury present.)

EXAMINATION

BY MR. QUANE:

Q. I only have one or two questions, Dr. Groben.

A. That's good.

Q. Good? That make you happy?

A. Sure.

Q. Okay. You said just moments ago you had no idea how bugs got into the tissue in the right buttocks. Correct?

A. That's right.

Q. Okay. When you say that as the pathologist conducting the autopsy, are you saying that you cannot determine or conclude that the bugs got into the right buttocks from instruments used by Dr. Kerr?

A. That's right.

MR. QUANE: That's all I have, Judge.

THE COURT: Okay.

Time	Speaker	Note
8:30:50 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 11**
9:04:10 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
9:04:17 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
9:37:01 AM		Calls case
9:37:05 AM		the jury is present
9:37:17 AM	J. Quane	has a few matters to take up outside of the jury
9:39:14 AM	Judge	Jury is excused
9:39:52 AM	J. Quane	comments re: redacted information in exhibit # 5
9:42:25 AM	S. McKay	Responds
9:43:39 AM	Judge	will not allow the certification to be removed from exhibit # 5
9:44:30 AM	J. Quane	Makes an offer of proof re: redacted information in exhibit # 35
9:46:44 AM	Judge	Exhibit # 35 will remain how it is
9:51:05 AM		the jury is present
9:51:08 AM	J. Quane	The Defense rests
9:51:18 AM	Judge	instructs the jury re: redacted information in exhibit # 5
9:52:07 AM	S. McKay	Re-calls Charles Ballard, previously sworn, direct examination
9:52:46 AM	Judge	excuses the witness - Charles Ballard
9:56:59 AM	Judge	admonishes and excuses the jury for the day
9:59:16 AM	Judge	instructs counsel re: jury instructions and closing arguments
10:04:13 AM		Court recesses
1:55:10 PM		Court resumes
1:55:18 PM	Judge	Reviews jury instructions with counsel
3:24:35 PM		Court recesses

Bail/Tava mpr 10/31/14

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NO. _____
A.M. 11:22 FILED P.M. _____

OCT 0 2 2014

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 TRIAL BRIEF

Defendants, by and through their counsel of record, Quane Jones McColl, PLLC, hereby submit the following Trial Brief:

I. The IDJI 2d Instructions Do Not Reflect The Law In Idaho And Should Not Be Used

It is well settled that the jury instructions as a whole must properly and

adequately instruct the jury on the applicable law. ***State v. Row***, 131 Idaho 303, 310, 955 P.2d 1082, 1089 (1998); ***State v. Rozajewski***, 130 Idaho 644, 646, 945 P.2d 1390, 1392 (Ct. App.1997). Reversible error occurs where jury instructions mislead the jury or prejudice the complaining party. ***Row***, 131 Idaho at 310, 955 P.2d at 1089. The Court is required to provide instructions on all matters of law necessary for the jury's information. ***State v. Patterson***, 126 Idaho 227, 230, 880 P.2d 257, 260 (Ct. App.1994). The Court should not use a jury instruction which misleads the jury or misstates the law. ***See State v. Humphreys***, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000); ***State v. Merwin***, 131 Idaho 642, 647, 962 P.2d 1026, 1031 (1998). The defense contends that IDJI 2.10.1 and 2.10.3 misstate Idaho law and should not be given.

Idaho Code §_6-1012 provides the exclusive vehicle for Plaintiffs to prove standard of health care practice violations of Dr. Kerr. Further, Idaho Code §_6-1013 sets forth the foundation requirements governing the admissibility of expert testimony on the standard of health care practice. The Idaho Supreme Court has held that the language of these statutes should be strictly followed in instructing juries. In addition, the Idaho Supreme Court has given strong guidance as to the foundational requirements for admission of expert opinion testimony under these statutes. Idaho Code § 6-1012 provides in pertinent part:

> 6-1012. Proof of community standard of health care practice in malpractice case. -- In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including without limitation, . . . on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such

> defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided. (Emphasis added.)

Idaho Code § 6-1012 thus provides the exclusive vehicle for recovery in a wrongful death case against a physician and the jury must be instructed based on the language used in the statute.

In addition, Idaho Code § 6-1013 requires:

> 6-1013. Testimony of expert witness on community standard. -- The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and prac-

> tices of (a particular) such area and thereafter giving opinion testimony in such a trial.
>
> (Emphasis added.)

The case of ***Morris v. Thomson***, 130 Idaho 138, 937 P.2d 1212 (1997), reiterated the opinion of the Idaho Supreme Court that jury instructions in lawsuits for alleged medical malpractice should closely follow the language of Idaho Code §§_6-1012 and 6-1013. There, the plaintiffs in a medical malpractice suit appealed a jury verdict in favor of the defendant-physician. On appeal, the Idaho Supreme Court considered whether the district court had committed error in instructing the jury regarding the standard of health care practice. The district court gave the following instruction:

> The Idaho statute governing the proof of community standard of health care practice in a malpractice case provides, in relevant part, as follows: In any claim for damages against any physician such plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such physician then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and as such standard then and there existed with respect to the class of physician that such physician then and there belonged to and in which capacity he or she was functioning.
>
> Such physician shall be judged in such cases in comparison with similarly trained and qualified physicians of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like physician in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. The term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was provided.

Id., 130 Idaho at 144-145, 937 P.2d at 1218-1219. The Idaho Supreme Court

approvingly noted that this instruction mirrored the language of Idaho Code §_6-1012. The Court then stated "that it has consistently upheld instructions based upon §_6-1012" as they correctly explain the applicable standard of health care practice to the jury. ***Id.***, 130 Idaho at 145, 937 P.2d at 1219. ***See also Leazer v. Kiefer***, 120 Idaho 902, 905, 821 P.2d 957, 960 (1991); ***Robertson v. Richards***, 115 Idaho 628, 633, 769 P.2d 505, 510 (1987) (on rehearing, 1989). The ***Morris*** Court noted that the following instructions were given in ***Robertson***:

> INSTRUCTION NO. 12
>
> The plaintiffs in a medical malpractice case have the burden of proving, by direct expert testimony and by a preponderance of all competent evidence, that at the time and place of the alleged incident in question, the defendant negligently failed to meet the applicable standard of health care practiced in the community in which such care allegedly was or should have been provided as such standard then existed with respect to the class of health care provider to which the defendant belonged and in which he was functioning.
>
> * * *
>
> INSTRUCTION NO. 13
>
> An individual provider of health care, such as the defendant in this case, shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and field of specialization.

Morris v. Thomson, ***supra***, 130 Idaho at 148 n. 2, 937 P.2d at 1222 n. 2.

Following the ***Morris*** case, the Idaho Supreme Court more recently interpreted Idaho Code §6-1012 in the case of ***Shane v. Blair***, 139 Idaho 126, 130, 75 P.3d 180 (2003), wherein the court noted that "the standard of care is simply **the care typically provided** under similar circumstances by the relevant type of health care

provider in the community at the time and place of the alleged negligent act." ***See also McDaniel v. Inland Northwest Renal Care Group - Idaho, LLC***, 159 P.3d 856 (2007). The Idaho Supreme Court also further confirmed Idaho Code § 6-1012's definition of the term "community" in ***Ramos v. Dixon***, ____ Idaho ____, 156 P.3d 533 (2007) by affirming summary judgment for the defendant physician where plaintiff's expert failed to lay a proper foundation showing that he was familiar with the local Blackfoot community standard of health care practice. The ***Ramos*** court further stated that "Idaho Code §_6-1012 precludes assuming that the standard of care is uniform throughout Idaho." ***Id.*** at 539. Using the foregoing as the foundational background, the IDJI 2d medical malpractice instructions fail to comply with the statutory requirements of Idaho Code § 6-1012 and 6-1013 and should not be given. The two new pattern instructions to which the Defendants object provide as follows:

> IDJI 2.10.1 Standard of care: health care professionals as specialists
>
> INSTRUCTION NO. ___
>
> A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers of the same or similar speciality practicing in the community in which such care is provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.
>
> The defendants Name and Name are health care providers within the meaning of this instruction.
>
> IDJI 2.10.3 Charging elements of medical negligence
>
> INSTRUCTION NO. ___
>
> On the claim of medical negligence against the defendant for

failure to meet the standard of care, the plaintiff has the burden of proof on each of the following propositions:

1. That the defendant failed to meet the applicable standard of care as defined in these instructions;
2. That the plaintiff was injured;
3. That the acts of the defendant which failed to meet the applicable standard of care were a proximate cause of the injuries of the plaintiff; and
4. The elements of damage and the amount thereof.

Addressing IDJI 2.10.1 first, it not only fails to track the requirements of Idaho's malpractice statutes outlined above, but it goes even further by actually purporting to define a new standard of care applicable to the defendant. The pattern instruction states that it is the duty of "health care providers to use reasonable care and diligence in the exercise of their skill and application of their learning." This is not even a requirement specified by Idaho Code § 6-1012. Further, this jury instruction fails to specify that Defendant's conduct should be judged in comparison with similarly trained and qualified providers of the same class in the same community as the statute requires. The pattern instruction creates a legal standard which is totally repugnant to provisions of Idaho Code 6-1012.

Consistent with Idaho Code § 6-1012, the standard of health care practice is defined solely by the expert witnesses who testify at trial. IDJI 2.10.1 fails to state that plaintiff has the burden of proving, by direct expert testimony and by a preponderance of evidence that defendant failed to meet the applicable standard of health care practice as required by the statute. The expert witnesses define the standard applicable to the defendant and whether or not that standard was violated consistent with the foundational requirements of Idaho Code § 6-1013. This is why the Court should instruct the jury as outlined in the Defendants' proposed instructions which parrot Idaho Code.

Similarly, IDJI 2.10.3 improperly refers to the phrase "standard of care." This term has no application in Idaho and cannot be found in either Idaho Code §§ 6-1012 or 6-1013. The correct term as outlined in these statutes is "standard of health care practice" which is significantly different. The term standard of care will be confusing and misleading to the jury because by law the Defendants can only be found liable if the experts testify that Dr. Kerr's conduct fell below the standard of practice within the community applicable to him. This instruction fails to indicate that the plaintiffs must prove that a defendant failed to meet the community standard of health care practice in order to find the physician liable. The new IDJI 2d instructions fail to tract the requirements of Idaho's malpractice statutes and the case authority interpreting them and should not be employed by this Court.

Defendants, therefore, object to the use of any of the revised Idaho Jury Instructions (IDJI2d) and requests the Court to use those instructions proposed by the defense which have been tested and approved by the Idaho Supreme Court. Such a proposition is consistent with Idaho R. Civ. P. 51(a)(2) which states, that the Court should use the IDJI instructions "unless the judge finds that a different instruction would more adequately, accurately or clearly state the law." The defense contends that because the new pattern instructions do not adequately and accurately state the requirements of Idaho Code §§ 6-1012 and 6-1013 that they should not be used and the Defendants' instructions should be given instead.

II. Testimony Properly Admissible to a Party's Case-In-chief Cannot be Admitted in Rebuttal

The general rule is that testimony properly admissible in a party's case-in-chief cannot be admitted in rebuttal. ***Skogen v. Dow Chemical Co.***, 375 F.2d

692 (8th Cir. 1967); ***Page v. Barko Hydraulics***, 673 F.2d 134 (5th Cir. 1982); ***United States v. McCollum***, 732 F.2d 1419 (9th Cir. 1984); ***United States v. Clark***, 617 F.2d 180 (9th Cir. 1980); ***LaRo Corp. v. Big D Oil Co.***, 824 F.2d 689 (8th Cir. 1987); and ***Gossett v. Weyerhauser Co.***, 856 F.2d 1154 (8th Cir. 1988). The fact that the proposed rebuttal testimony is important or necessary to remedy a perceived defect in plaintiffs' case-in-chief is no excuse. If the proffered testimony relates to plaintiffs' case-in-chief, it is subject to exclusion. ***Page***, ***supra***.

For instance, in 75 Am.Jur.2d *Trials* § 157, the author states:

> As a general rule, the party upon whom the affirmative of an issue devolves is bound to give all his evidence in support of the issue in the first instance, and will not be permitted to hold back part of his evidence confirmatory of his case and then offer it on rebuttal. Rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and should consist of nothing which could have been offered in chief.

The trial court's right to exclude rebuttal testimony arises out of the Court's inherent power to control the mode and order or proof under Rule 611(a) of the Idaho Rules of Evidence. ***Smith v. Conley***, 584 F.2d 844 (8th Cir. 1978). This Rule reads in pertinent part:

> Rule 611. Mode and Order of interrogation and presentation. - (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The following discussion of analogous federal case authorities amply illustrates that a trial court has broad discretion to exclude rebuttal testimony which relates to the subject matter of the party's case-in-chief. For example, in ***Page v. Bark***

Hydraulics, 673 F.2d 134 (5th Cir. 1982), the plaintiff sought recovery for the wrongful death of her son, who was killed in a fire allegedly caused by a limb lifter manufactured by the defendant. One of the allegations was that the defendant failed to warn of the danger of attempting to repair rather than replace a certain part of the lifter. The defendant offered evidence that the person who repaired the part in question on the day before the fire had not consulted defendant's repair manual and, therefore, any failure to warn was irrelevant. In rebuttal, the plaintiff sought to introduce testimony of the repairman's supervisor that the supervisor had read defendant's manual, which contained no such warning. The trial court excluded the supervisor's testimony, which was affirmed on appeal. The appellate court stated:

> The district judge acknowledged the relevance and importance of this testimony. However, he declined to permit plaintiff's lawyers to remedy what he perceived to be a defect in their case-in-chief through rebuttal testimony. The conduct of a fair trial is a matter within the trial judge's discretion. ***Excel Handbag Co. v. Edison Brothers Stores, Inc.***, 630 F.2d 379, 388 (5th Cir. 1980). The judge had forewarned all counsel that he intended to be strict in his rulings on rebuttal testimony. We find no abuse of discretion here.

673 F.2d at 140.

Moreover, in ***Skogen v. Dow Chemical Co.***, 375 F.2d 692 (8th Cir. 1967), the trial court's decision excluding rebuttal testimony was affirmed on appeal. One of the issues in ***Skogen*** was whether the use of an insecticide caused the severe and permanent injuries suffered by the plaintiffs. After the defendants submitted testimony regarding the lack of a causal connection, plaintiffs sought to call expert witness Dr. Quinby on rebuttal to establish that the symptoms of insecticide poisoning were similar to the injuries experienced by the plaintiffs. However, the trial court properly denied such

testimony on the grounds that the evidence should have been offered by the plaintiffs during their case-in-chief.

After a defense verdict, the plaintiffs appealed, arguing that the rebuttal testimony should have been permitted. However, the Eighth Circuit Court of Appeals reversed, stating that the case below was complicated and, therefore, the trial court had broad discretion to exclude rebuttal testimony in order to keep the issues clearly delineated. In support of this holding, the Eighth Circuit Court of Appeals writes:

> Normally, parties are expected to present all of their evidence in their case-in-chief . . . At the time of the rebuttal request, we see that this was a complex case, covering many days of trial and many witnesses, producing volumes of complex scientific and medical exhibits, charts, and other data. In this situation, it is most difficult to keep the issues clearly delineated. An orderly presentation of evidence is essential.

Id., 375 F.2d at 705.

The Eighth Circuit Court of Appeals also pointed to plaintiff's lack of surprise as further support in affirming the lower Court:

> The issues were known to plaintiffs when they presented their case-in-chief. In fact, proof that the Skogen boys suffered from insect poisoning was a necessary element in their prima facie case. Likewise, the defense that the Skogen boys did not suffer from insect poisoning was certainly anticipated by plaintiffs. They did not demonstrate to the trial court's satisfaction, nor have they to ours, why Dr. Quinby was not called in plaintiffs' case-in-chief. <u>It is altogether possible that plaintiffs kept Dr. Quinby in reserve, hoping to achieve some tactical advantage by a dramatic final statement on the issue.</u> We think under all of the enumerated circumstances the trial court did not abuse its discretion in preventing plaintiffs from presenting rebuttal testimony.

Id., 375 F.2d at 706 (emphasis added).

The rationale behind the exclusion on rebuttal of expert testimony is based

on policies of fairness and efficiency in the presentation of evidence. Rebuttal testimony is permissible to address an entirely new matter raised in the defense case-in-chief. The most obvious example of rebuttal is evidence produced to meet the burden of proof of an affirmative defense, on which the defendant has the burden. However, rebuttal is not designed to allow the plaintiff to withhold part of his case-in-chief and submit it in rebuttal. Parties are expected to present all of their evidence in their cases-in-chief rather than holding evidence back under the guise of rebuttal for the purpose of sand-bagging the opponent.

Even when the defense presents unanticipated evidence on completely new issues, the trial court nevertheless has the discretion to exclude rebuttal testimony on such matters in order to fairly and effectively control the mode and order of proof. For instance, rebuttal testimony is subject to exclusion if it is needlessly cumulative, of modest impeachment value, confusing, or would unduly delay an already lengthy trial consistent with I.R.E. 403. ***See also, Goldberg v. National Life Insurance Co. of Vermont***, 774 F.2d 559 (2d Cir. 1985); ***VanDyke v. Coburn Enterprises, Inc.***, 873 F.2d 1094 (8th Cir. 1989); and ***Skogen***, ***supra***.

DATED this 1st day of October, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2014, I served a true and correct copy of the foregoing TRIAL BRIEF by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Jeremiah A. Quane

Time	Speaker	Note
08:45:26 AM		**CVOC12-4792 Ballard v Kerr Jury Trial - Day 12**
08:46:31 AM	Plaintiff's attorney	Scott McKay & Greg Haddad
08:46:35 AM	Defendant's attorney	Jeremiah Quane & Terry Jones
09:34:00 AM	Judge	Calls case
09:34:19 AM		the jury is present
09:34:52 AM	Judge	Reads jury instructions
09:57:15 AM	S. McKay	Closing argument
10:32:39 AM	J. Quane	Objection
10:32:42 AM	Judge	Objection is overruled
10:49:41 AM	Judge	admonishes the jury
10:49:56 AM		Court recesses
11:15:06 AM		Court resumes
11:15:29 AM		the jury is present
11:15:35 AM	J. Quane	Closing argument
12:34:35 PM	Judge	admonishes the jury
12:34:40 PM		Court recesses
01:36:05 PM		Court resumes
01:36:11 PM		the jury is present
01:36:20 PM	S. McKay	Final argument
01:46:59 PM	Clerk	Swears in the Bailiff
01:47:33 PM	Judge	draws alternate jurors
01:48:56 PM		Jury goes out for deliberation
08:59:00 PM		Court resumes
08:59:05 PM		the jury is present
08:59:14 PM		The jury has reached a verdit
08:59:23 PM	Judge	Reads the Verdict
08:59:36 PM		Answer to Question No. 1 - Yes
09:00:08 PM		Answer to Question No. 2 - Yes
09:00:24 PM		Answer to Question No. 3 - Yes
09:00:37 PM		Answer to Question No. 4 - $2,540,036.00
09:00:52 PM		Anser to Question No. 5 - $1,250,000.00
09:01:26 PM	Judge	polls the jury
09:03:39 PM	Judge	Thanks and excuses the jury
09:04:52 PM		Court recesses

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No.: CV OC 2012-04792

JURY INSTRUCTIONS
THE HONORABLE. DEBORAH A. BAIL
DISTRICT JUDGE
PRESIDING

INSTRUCTION NO. 1

These instructions define your duties as members of the jury and the law that applies to this case. Your duties are to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. In doing so, you must follow these instructions. You must consider them as a whole, not picking out one and disregarding others. You will have copies of these instructions in the jury room. If you do not understand an instruction, you may send a note to me through the bailiff and I will clarify the instruction or explain it more fully.

You are the judges of the facts. Your decision in this case should be based upon a rational and objective assessment of the evidence. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by the rule of law. Except as explained in this instruction, none of my rulings were intended by me to indicate any opinion concerning the evidence in this case.

The arguments and remarks of the attorneys involved in this case are intended to help you in understanding the evidence and applying the instructions, but they are not themselves evidence. If any argument or remark has no basis in the evidence, then you should disregard it. However, there are two exceptions to this rule: (1) An admission of fact by one attorney is binding on his or her party; and (2) Stipulations of fact by all attorneys are binding on all parties.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience

and background of you lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In evaluating the testimony, you should consider such things as: the interest, bias or prejudice of any witness in the outcome of this case; the age and appearance of the witness and the manner in which he or she gives his or her testimony; the opportunity that the witness had to observe the facts about which he or she testified; the contradiction, if any, of a witness's testimony by other evidence.

In evaluating the exhibits, you should consider such items as: the circumstances under which the exhibit was prepared; and the probability that the exhibit accurately reflects what it is intended to show in the light of the other evidence in the case.

INSTRUCTION NO. 2

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason, please do not alter them or mark on them in any way.

INSTRUCTION NO. 3

As members of the jury is your duty to decide what the facts are and apply those facts to the law that I have given you. You are to decide the facts from all the evidence presented in the case.

The evidence you are to consider consists of:

1. Sworn testimony of witnesses;

2. Exhibits which have been admitted into evidence; and

Certain things you have heard or seen are not evidence, including:

1. Arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, follow your memory;

2. Testimony that has been excluded or stricken, or which you have been instructed to disregard; and

3. Anything you may have seen or heard when the court was not in session.

INSTRUCTION NO. 4

The key part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

As you weigh the testimony, you can ask yourselves questions:

(A) Was the witness able to clearly see or hear the events? Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) How good was the witness's memory?

(C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events?

(D) How did the witness act while testifying? Did the witness appear honest or not?

(E) Did the witness have any relationship either party or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias or prejudice for or against either side?

(F) How believable was the witness's testimony ~~was~~ in light of all the other evidence? Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability.

Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred. For example, if you see it snowing, you have direct evidence that it has snowed. If you don't see it snowing but wake up and find the ground is covered in snow, then you have circumstantial evidence that it snowed.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry

INSTRUCTION NO. 6

An "agent" is a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the scope of the agent's scope of authority.

There is no dispute in this case that, at all relevant times, Dr. Brian Calder Kerr, Brianna Kerr Dumais and other staff were acting within the scope of their authority as agents of the principal, Silk Touch Laser, LLP, which was doing business as Silk Touch Med Spa, Silk Touch Med Spa and Laser Center, and Silk Touch Med Spa, Laser and Lipo of Boise. Therefore, Silk Touch Laser, LLP is responsible for their conduct at all relevant times.

INSTRUCTION NO. 7

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. 8

On his claim of medical negligence against Dr. Brian Calder Kerr for failure to meet the standard of care, the plaintiff has the burden of proof on each of the following propositions:

1. That Dr. Kerr failed to meet the applicable standard of care as defined in these instructions;

2. That the acts of Dr. Kerr, which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;

3. That the plaintiff was injured by the death of Krystal Ballard; and

4. The elements of damage and the amount thereof.

INSTRUCTION NO. 9

On his claim of medical negligence against Silk Touch Laser, LLP for failure to meet the standard of care, the plaintiff has the burden of proof on each of the following propositions:

1. That an agent of Silk Touch Laser, LLP, failed to meet the applicable standard of care as defined in these instructions;

2. That the acts of the agent, which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;

3. That the plaintiff was injured by the death of Krystal Ballard; and

4. The elements of damage and the amount thereof.

INSTRUCTION NO. 10

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence.

INSTRUCTION NO. 11

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers who are trained and qualified in the same or a similar field of care who practice in the same community. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

Dr. Brian Kerr and the defendants are health care providers within the meaning of this instruction.

INSTRUCTION NO. 12

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, the loss, or the damage complained of. It is sufficient if it is a substantial factor in bringing about the injury, loss, or damage. It is not a proximate cause if the injury, loss, or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the death regardless of the extent to which each contributes to the injury.

INSTRUCTION NO. 13

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

INSTRUCTION NO. 14

If the jury decides Charles Ballard is entitled to recover from the defendants, the jury must determine the amount of money that will reasonably and fairly compensate Mr. Ballard for any damages proved to be proximately caused by defendants' negligence.

The elements of damage the jury may consider are:

1. The reasonable cost of Krystal Ballard's funeral.

2. The reasonable value of necessary medical care and expenses incurred prior to Krystal Ballard's death.

3. The reasonable value to Charles Ballard of the loss of Krystal Ballard's services, training, comfort, conjugal relationship, and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of Mr. Ballard, Krystal Ballard's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.

4. Charles Ballard's loss of financial support from Krystal Ballard, and the present cash value of financial support Krystal Ballard would have provided to Charles Ballard in the future, but for Krystal Ballard's death, taking into account Mr. Ballard's life expectancy, Krystal Ballard's age and normal life expectancy, Krystal Ballard's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

INSTRUCTION NO. 15

When I use the phrase "present cash value" as to any damages that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

INSTRUCTION NO. 16

Under a standard table of mortality, the life expectancy of a thirty-one year old man is 46.4 more years. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy of Charles Ballard, including his occupation, health, habits, and other activities.

Krystal Ballard was twenty-seven years old at the time of her death. Her life expectancy was 54.5 more years. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy of Krystal Ballard, including her occupation, health, habits, and other activities.

INSTRUCTION NO. 17

Whether a party has insurance is not relevant to any of the questions you are to decide. You must avoid any inference, speculation or discussion about insurance.

INSTRUCTION NO. 18

Willful or reckless misconduct, when used in these instructions and when applied to the allegations in this case, means more than ordinary negligence. Willful or reckless misconduct means intentional or reckless actions, taken under circumstances where the actor knew or should have known not only that his actions created an unreasonable risk of harm to another, but also that his actions involved a high degree of probability that such harm would actually result.

INSTRUCTION NO. 19

There was a reference to a prior proceeding or trial in November, 2013. This trial was not completed and was never presented to a jury for its determination.

INSTRUCTION NO. 20

In instructing you on the subject of damages, I do not express any opinion as to whether plaintiff is or is not entitled to damages.

INSTRUCTION NO. 21

The law forbids you to determine any issue in this case by chance. Thus, if you determine that a party is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take the independent estimate of each juror of the amount to be awarded and then to average such estimates to set forth the amount of your award.

INSTRUCTION NO. 22

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for your deliberations. The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make and emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused; there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 23

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are never to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. 24

Upon retiring to the jury room, you will select one of you as a presiding juror, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question. Nothing is more important than jurors approaching deliberations in a careful, respectful way. Listen to each other. Share your views with each other. You and you alone are the judges of the facts.

An appropriate verdict form is submitted to you with these instructions. A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon a verdict, you should fill out the verdict form, if necessary, and have it signed. If your verdict is unanimous, your foreperson alone will sign it; but if nine or more, but less that the entire jury agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict, you will notify the bailiff, who will then return you into open court.

DATED This 3rd day of October, 2014.

Deborah A. Bail

DEBORAH A. BAIL
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No.: CV OC 2012-04792 SPECIAL VERDICT

We, the jury, answer the questions submitted to us in the Special Verdict, as follows:

QUESTION NO. 1: Did Brian Calder Kerr, M.D. breach the applicable standard of health care in his treatment of Krystal Ballard and if so, was that breach a proximate cause of Krystal Ballard's death?

ANSWER: Yes [X] No [___]

QUESTION NO. 2: Did Silk Touch Laser LLP breach the applicable standard of health care for health care professionals in its treatment of Krystal Ballard and if so, was that breach a proximate cause of Krystal Ballard's death?

ANSWER: Yes [X] No [___]

If you answered Questions 1 and 2 "No," you are done. Sign the verdict as instructed and advise the Bailiff. If you answered either Question 1 or 2 "Yes," continue to the next question.

QUESTION NO. 3: If you answered "yes" to Question No. 1 or 2, were the actions of the defendant(s) which breached the standard of care and were the proximate cause of Krystal Ballard's death, reckless?

ANSWER: Yes [X] No [___]

QUESTION NO. 4: What is the total amount of economic damages sustained by Plaintiff, Charles Ballard?

ANSWER: $ 2,540,436

QUESTION NO. 5: What is the total amount of non-economic damages sustained by Plaintiff, Charles Ballard?

ANSWER: $ 1,250,000

Please sign the verdict form and notify the bailiff that you have finished your deliberations.

DATED this 3rd day of October, 2014.

Presiding Juror

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

(a) the Plaintiff Charles Ballard shall recover from the Defendants Brian Calder Kerr, M.D., and Silk Touch Laser LLP the sum of Three Million Seven Hundred Ninety Thousand Four Hundred Thirty Six Dollars ($3,790,436.00); and

(b) interest shall accrue on the foregoing amount at the applicable statutory rate from this date forward until paid in full.

DATED this 14th day of October, 2014.

Honorable Deborah A. Bail
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of October, 2014, I mailed (served) a true and correct copy of the within instrument to:

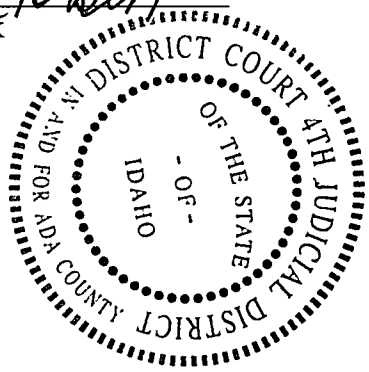
Scott S McKay
Attorney at Law
P.O. Box 2772
Boise ID 83701

Jeremiah A Quane
Attorney at Law
PO Box 1576
Boise ID 83701

P Gregory Haddad
Attorney at Law
6 Canyon Road Suite 200
Morgantown WV 26508

CHRISTOPHER D. RICH
Clerk of the District Court

By: Janine Hansen
Deputy Court Clerk



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Attorneys for Defendants/Appellants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff/Respondent,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants/Appellants.

Case No. CV OC 1204792

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, CHARLES BALLARD, AND THE PARTY'S ATTORNEYS, DAVID Z. NEVIN, SCOTT MCKAY, NEVIN, BENJAMIN, MCKAY & BARTLETT LLP, P.O. BOX 2772, BOISE, IDAHO 83701, P. GREGORY

HADDAD, BAILEY & GLASSER LLP, 2855 CRANBERRY SQUARE, MORGANTOWN, WEST VIRGINIA 26508, JAMES B. PERRINE, BAILEY & GLASSER LLP, 3000 RIVERCHASE GALLERIA, SUITE 905, BIRMINGHAM, ALABAMA 35244, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, Brian Calder Kerr, M.D., Silk Touch Laser, LLP, an Idaho limited liability partnership; and Silk Touch Laser, LLP, an Idaho limited liability partnership, dba Silk Touch Med Spa and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser and Lipo of Boise, appeal against the above named Respondent to the Idaho Supreme Court from the October 15, 2014 Judgment of the District Judge and from all interlocutory Orders entered prior to the Judgment including but not limited to the following Orders of the District Judge, both of which were verbally rendered from the bench by the District Judge, without written Orders:

a. Order of the District Court for a mistrial and the award of witness costs, expert witness fees, travel expenses and costs of the Plaintiff, travel expenses and attorney fees of Plaintiffs' attorney and jury fees of Ada County against Appellants as a result of the mistrial ordered by the District Court on November 14, 2013, entered in the above-entitled action on February 12, 2014, honorable Judge Deborah A. Bail presiding.

b. Order of the District Court for the award of expenses and costs against Appellants in the sum of $64,324.54 that must be paid by noon, March 21, 2014, Mountain Daylight Time as a result of the

mistrial ordered by the District Court on November 14, 2013, entered in the above entitled action on March 12, 2014, Honorable Judge Deborah A. Bail presiding.

2. That the party has a right to appeal to the Idaho Supreme Court and the Judgment described in paragraph 1 above are appealable under and pursuant to Rule 11(1), I.A.R.

3. A preliminary statement of the issues on appeal which the Appellants then intend to assert in the appeal are as follows:

a. Did the District Court error in its Order of March 12, 2014 awarding costs and expenses for Respondent against Appellants that must be paid by March 21, 2014 in the sum of $64,324.54.

b. Whether the provisions of Rule 37(e), I.R.C.P., for the assessment of attorney fees, costs or expenses against a party or the party's attorney control, or apply to the violation of a Court Order on a Motion in Limine entered during trial.

c. Whether the provisions of Rule 47(u) for the payment of expenses and attorney fees is the controlling basis and authority for an Order of the District Court for payment of expenses and attorney fees.

d. Whether the District Court erred by failing to make a determination that an occurrence at trial prevented a fair trial for the Respondent in ordering a mistrial on November 14, 2013 that resulted in the Orders of the District Court of February 12, 2014 and March 12, 2014 for the award of costs, expenses and attorney fees

against the Appellants.

e. Whether the District Court erred by failing to make a determination that the mistrial was caused by the deliberate misconduct of the Appellants and their attorneys that resulted in the orders of the District Court of February 12, 2014 and March 12, 2014 for the award of costs, expenses and attorney fees against Appellants.

f. After the jury was impaneled on November 5, 2013, the District Court granted Respondent's Motion in Limine to exclude evidence pertaining to the lack of post-surgical infections of other patients of Appellants. Whether the testimony of Dr. Geoffrey Stiller on November 14, 2013 constituted a violation of this Order of the District Court on the Respondent's Motion in Limine that justified a mistrial that resulted in the Orders of the District Court of February 12, 2014 and March 12, 2014 for awards of costs, expenses and attorney fees.

g. Whether the District Court erred in its Order of February 12, 2014 for payment of jury fees of Ada County by Appellants.

h. Error of the District Judge in giving jury instructions 5, 8, 9, 10, 11, 12, 13, 16 and 18 and special verdict.

i. Refusal of the District Judge to give all of the Appellants' proposed jury instructions and special verdict.

j. Refusal of the District Judge to admit into evidence Appellants' Exhibits AA, H, II and KK.

k. Refusal of the District Judge to allow proof and testimony of the absence of infections and complications with other patient's surgically treated by Appellants.

l. Failure of the District Judge to give a jury instruction that embodied the requirements of Idaho Code 6-1012.

m. Refusal of the district Judge to allow Dr. Kerr to testify on the source of gram negative rods found in the right buttocks of Krystal Ballard at autopsy.

n. Refusal of the District court to allow impeachment evidence of Plaintiff's expert witness Dr. Sorensen that documented bias on his part.

4. No order has been entered sealing all or any portion of the record.

5. (a) Reporter's transcripts have been requested.

(b) The appellants request the preparation of the following reporter's transcripts in hard copy and electronic format for:

(1) Portions of the November 5, 2013 trial transcript;

(2) Entire November 14, 2013 trial transcript;

(3) Entire February 12, 2014 hearing transcript; and

(4) Entire March 12, 2014 hearing transcript.

(5) Entire transcript for trial which occurred beginning September 16, 2014 and ending October 3, 2014.

6. The Clerk's entire standard record not just that authorized by Rule 28, I.A.R.

7. The Appellants request all documents, charts, pictures and exhibits

offered or admitted as exhibits to be copied and sent to the Supreme Court.

8. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

(1) Tiffany Fisher, Boise, Idaho;

(2) Roxanne Patchell, Boise, Idaho; and

(3) Susan Gambee, Boise, Idaho.

(b) The clerk of the district court has been paid the estimated fees for preparation of the reporter's transcripts.

(c) The requested $100.00 deposit for the preparation of the clerk's record has been paid.

(d) The appellate filing fee has been paid.

(e) Service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 16th day of October, 2014.

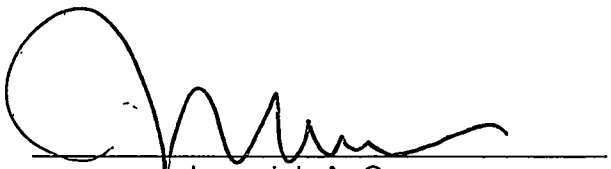
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2014, I served a true and correct copy of the foregoing NOTICE OF APPEAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 **PLAINTIFF'S VERIFIED MEMORANDUM OF COSTS AS A MATTER OF RIGHT, DISCRETIONARY COSTS AND ADJUSTED PREVIOUS AWARD OF SANCTIONS**

COMES NOW, Plaintiff Charles Ballard, through his counsel of record, P. Gregory Haddad and the law firm of Bailey & Glasser LLP and Scott McKay of Nevin, Benjamin, McKay & Bartlett LLP, pursuant to Rule 54(d)(1) of the Idaho Rules of Civil Procedure,

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following the entry of judgment in this matter on October 15, 2014, as well as the Court's previous award of sanctions related to the mistrial caused by the Defendants in November 2013.

STATEMENT OF ENTITLEMENT TO AWARD OF COSTS

Under the Idaho Rules of Civil Procedure, parties are entitled to recover costs if they are the "prevailing party." See I.R.C.P. 54(b)(1)(A). In this case, the Plaintiff was the prevailing party. The Defendants did not make an offer at any time. Ultimately, the Defendants were found negligent, reckless, and judgment was entered for $3,790,436.00. Plaintiff submits that there should not be any dispute that he was the prevailing party in this case. The Plaintiff also seeks adjustment of the sanction award ordered as a consequence of the mistrial occasioned by the Defendants to avoid duplication for application of costs as a matter of right covering the same monetary sanction.

COSTS AS A MATTER OF RIGHT

Pursuant to Idaho Rule of Civil Procedure 54(b)(1)(C), Plaintiff submits the following as his costs as a matter of right:

1. Court Filing Fees – 54(d)(1)(C)(1)

   Filing Fee – $88.00

   Total – $88.00

2. Service Fees – 54 (d)(1)(C)(1)

   Service of Summons and Complaint and Subpoenas – $2,453.90

   Total – $2,453.90

3. Expert Witness Fees – 54(d)(1)(C)(8)

   George Nichols, M.D. – $2,000.00

   Dean Sorensen, M.D. – $2,000.00

GEC Group (Cornelius Hofman) – $1,960.00

Total – $5,960.00

4. Travel Costs for Witness George Nichols, M.D. – 54(d)(1)(C)(4)

Total – $567.00 (1890 miles x 30 cents/mile)

5. Charges for Deposition Reporting/Transcribing – 54(d)(1)(C)(9) and (10)

M&M Reporting – $459.97

Associated Reporting & Video – $3,232.65

Bushman Court Reporting – $602.45

M&M Reporting – $167.50

Associated Reporting – $356.25

M&M Reporting – $840.11

M&M Reporting – $145.00

CDA Reporting – $632.25

M&M Reporting – $332.78

Bonnie Hamada – $300.00

CDA Reporting – $719.80

T&T Reporting – $327.40

Associated Reporting – $818.50

T&T Reporting – $515.35

Total – $9,450.01

6. Costs of Preparation of Trial Exhibits

M&M Reporting (Cost of collecting records, printing and electronically presenting exhibits at trial) – $500.00

Summary of Costs as a Matter of Right

1. Court Filing Fees – $88.00
2. Service Fees – $2,453.90
3. Expert Witness Fees – $5,960.00
4. Travel Costs for Witness George Nichols, M.D. – $567.00
5. Charges for Deposition Reporting/Transcribing – $9,450.01
6. Costs of Preparation of Trial Exhibits – $500.00

Grand Total – $19,018.91

*Court reporting fees identified above are for deposition transcripts themselves. It does not take into account video services or recording of the depositions which will be set forth as a discretionary cost.

DISCRETIONARY COSTS

Pursuant to Rule 54(d)(1)(D) of the Idaho Rules of Civil Procedure, Plaintiff also requests an award of Discretionary Costs on the ground that the following lists of costs were necessary, reasonable and exceptional and incurred as a consequence of the retrial of this action and should in the interest of justice be assessed against the Defendants. As the Court is aware, this case was not defended as simple medical malpractice action. The Defendants identified three standard of care witnesses, all within the same specialty of cosmetic surgery, located both within and outside of the State of Idaho. Defendants did not call one of the experts, Dr. Gregory Laurence, yet a fee for deposition was incurred by Plaintiff for this cumulative expert. Further, despite an autopsy performed by an objective and non-retained pathologist, Dr. Glen Groben, Ada County Coroner, whose findings under Idaho law are deemed to be the prima facie cause of death, Defendants nonetheless identified a pathologist, Dr. Garrison, who ironically worked part-

time at the Ada County Coroner's office, to rebut the cause of death identified in the autopsy report. The deposition of the pathologist occurred on two occasions after it was determined at his first deposition that he had additional opinions that had not been supplemented. Defendants did not call Dr. Garrison at trial. Further, because of the unique characteristics of the case, the Plaintiff was forced to present expert witnesses whose education, training and experience went far beyond that of a typical expert witness. Dr. Dean Sorensen had the unique experience of being an inspector of various cosmetic surgery facilities, which then brought to bear his experience of being able to identify the standard of care applicable to the entire Treasure Valley area and not simply testifying as to what his individual practice was. Dr. Nichols is a nationally-recognized expert who has authored a number of different articles, on issues directly relevant to the case. Also, this case is exceptional simply by virtue of the fact that the initial case ended in a mistrial occasioned by the Defendants' actions at a point in the original trial where Defendants had the benefit of hearing all of the Plaintiff's case; a second trial had to be continued due to injury to one of the Defendants, and ultimately a retrial which lasted three weeks, although a vast majority of trial time was consumed by defense counsel examining witnesses which further increased the costs of Plaintiff's experts, who were forced to undergo many, many hours of cross-examination. The Plaintiff's expert charges are in line on an hourly basis for what the Defendants' experts charged on an hourly basis, and therefore, were reasonable in cost. It is in the interest of justice that these discretionary costs should be awarded, especially in a situation where Defendants made no offer and forced Plaintiff to incur extraordinary costs in prosecuting the case, despite fairly clear and straightforward issues which should not have been in dispute. These costs are significant and justice requires the Plaintiff not be penalized by incurring such costs as the prevailing party.

The discretionary costs claimed in this matter are as follows:

A. Expert Witness Costs Above $2,000.00

George Nichols, M.D. – $10,000.00

AMFS (Dean Sorensen, M.D.) – $11,812.37

Total – $21,812.37

B. Expert witness fees of defense experts

Gregory Laurence, M.D. – $2,000.00 (Deposition Fee for Cumulative Defense expert not called at trial)

Charles Garrison, M.D. – $1,295.00 (Deposition Fee)

Total – $3,295.00

C. The travel costs, lodging and transportation for Plaintiff's counsel and paralegal

P. Gregory Haddad

Air Fare – $269.28

Hotel – $3,857.17

Farrah Caruthers

Air Fare – $457.28

Rental Car – $1,217.18

Hotel – $2,659.80

Total – $8,460.71

D. Videoconferencing/Video Deposition Charges

John Glenn Hall Company – $181.90

Associated Reporting & Video – $1,168.00

Bushman Court Reporting – Videographer – $510.00

Bushman Court Reporting – Videographer – $250.00

Bonnie Hamada – Video Deposition – $400.00

Nuvision Productions – $480.25

Streski Reporting & Video-Videoconference – $450.00

ACT Teleconferencing Services with Conference Room Rental – $1,175.00

Streski Reporting & Video-Videoconference – $175.00

M&M Court Reporting Services, Inc. – Videographer – $447.00

Susan Gambee – $120.00

Total – $5,357.15

E. Expert Witness Travel Expenses for George Nichols Above $.30 per mile rate

Airfare – $1,298.20

Hotel – $381.94

Meals – $93.23

Parking – $39.00

Total – $1,812.37 minus $567.00 for one-way travel at $.30 per mile as part of costs as a matter of right = $1,245.37

F. M & M Court Reporting for trial support/electronic display of exhibits

Total – $5,192.72 ($5,692.72 minus $500 for costs above for trial exhibits)

G. Preparation of Trial/Hearing Transcripts:

Tiffany Fisher – $90.00

Nevin Benjamin for reimbursement of trial transcripts – $166.00

Tiffany Fisher for Trial/Hearing transcripts – $270.00

Tucker & Associates for Trial/Hearing transcripts – $342.25

Tucker & Associates for Trial/Hearing Transcripts – $274.00

Nevin Benjamin for reimbursement of trial/hearing transcripts – $80.50

Christie Valchich – $442.00

Total – $1,664.75

Summary of Discretionary Costs

A. Expert Witness Costs Above $2,000.00 – $21,812.37

B. Defense Expert Deposition Fees – $3,295.00

C. Travel Costs – Plaintiff counsel and paralegal airfare, hotel and rental car for trial – $8,460.71

D. Videoconferencing/Video Deposition Charges – $5,357.15

E. Expert Witness Travel Expenses for George Nichols Above $.30 per mile rate – $1,245.37

F. Cost for Electronic Preparation and Display of Exhibits – $5,192.72

G. Preparation of Trial/Hearing Transcripts – $1,664.75

Grand Total – $47,028.07

Cost for Previously-Awarded Sanctions

The Plaintiff hereby incorporates by reference Plaintiff's Memorandum of Attorney Fees and Costs previously submitted to the Court.

Because service of subpoenas is incorporated into the costs as a matter of right above, the costs incurred as a result of the mistrial occasioned by Defendants' conduct should be adjusted downward by $551.90, and, therefore, the Bailey & Glasser LLP incurred costs and expenses associated with the sanction previously imposed would change from $48,673.41 to $48,121.51. While the Court has not specifically ruled on the attorney's fees occasioned by the mistrial,

Plaintiff's counsel would point out that a mistrial resulted in one month of lost work by the undersigned, P. Gregory Haddad, as well as Scott McKay and Farrah Caruthers, the undersigned's paralegal. A majority of the legal work of these attorneys and paralegal is hourly, not contingent, and therefore, a lost month because of the mistrial has actual and substantial impact on Plaintiff's counsel. Further, even if it is a contingency case, it would be unjust to cause counsel to lose one month of dedicated time that it could have devoted to either hourly work or contingency work occasioned solely and exclusively by the mistrial declared.

VERIFICATION

The undersigned, P. Gregory Haddad, hereby verifies and confirms, to the best of my personal knowledge and belief, that each of the above listed and described costs are correct, were actually incurred by our law firm on behalf of the Plaintiff in this litigation, and that all said costs are in compliance with Rule 54 of the Idaho Rules of Civil Procedure and its various subparts. As further verification and confirmation of these costs being correct and actually incurred, attached as Exhibit A hereto, a copy of a cost ledger generated by our firm in this litigation, listing all the costs actually incurred. This is a record of what is kept by our law firm in the regular course of business.

Dated this 28th day of October, 2014.

Respectfully Submitted,

By: _____

P. Gregory Haddad, Attorney for Plaintiff
BAILEY & GLASSER LLP

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

STATE OF WEST VIRGINIA;
COUNTY OF MONONGALIA, to-wit:

Taken, subscribed and sworn to before me this 28th day of October, 2014.

My Commission expires: 11/22/15

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Melissa Dennis
209 Capitol Street
Charleston, WV 25301
My Commission Expires Nov. 22, 2015

_____
Notary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2014, I served a true and correct copy of the foregoing **PLAINTIFF'S VERIFIED MEMORANDUM OF COSTS AS A MATTER OF RIGHT, DISCRETIONARY COSTS AND ADJUSTED PREVIOUS AWARD OF SANCTIONS** delivering the same to the following via hand delivery:

Jeremiah A. Quane, Esq.
Terrence S. Jones, Esq.
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P. O. Box 1578
Boise, Idaho 83701

Scott McKay

[redacted]

03/13/2012 88.00 Clerk of Court; Filing of Complaint.

[redacted]

03/20/2012 94.00 Tri-County Process Serving; Service of Summons, Complaint, and Motions.
03/20/2012 36.00 Tri-County Process Serving; Service of Summons, Complaint, and Motions.

[redacted]

[redacted]

02/13/2013	669.97	M & M Court Reporting Service, Inc.; Deposition Transcripts and Exhibits.
[redacted]		
02/14/2013	181.90	John Glenn Hall Company; Video Deposition.
02/19/2013	60.25	Photocopies (241 x.25)
02/20/2013	4,400.65	Associated Reporting & Video, Inc.; Video Depositions.
[redacted]		
04/10/2013	510.00	Bushman Court Reporting; Videographer.
04/10/2013	250.00	Bushman Court Reporting; Video Conference.
[redacted]		
05/15/2013	602.45	Bushman Court Reporting; Transcripts.

[redacted]

07/18/2013 167.50 M & M Court Reporting Service, Inc.; Deposition transcripts.
07/18/2013 356.25 Associated Reporting & Video, Inc.; Transcripts.

[redacted]

[redacted]

08/08/2013	840.11	M & M Court Reporting Service, Inc.; Transcripts.
[redacted]		
08/13/2013	363.00	Tri-County Process Serving; Service of Subpoenas.
[redacted]		
08/14/2013	145.00	M & M Court Reporting Service, Inc.;Transcripts.
08/14/2013	400.00	Bonnie Hamada; Video Deposition.
08/14/2013	632.25	CDA Reporting Court Reporters; Deposition transcripts.
[redacted]		
08/19/2013	286.00	Tri-County Process Serving; Service of Subpoenas.
08/19/2013	120.00	Susan Gambee; Transcript.
[redacted]		
08/30/2013	53.00	Tri-County Process Serving; Service of Subpoenas.
[redacted]		
09/05/2013	45.00	Tri-County Process Serving; Service of Subpoena.
09/05/2013	840.79	M & M Court Reporting Service, Inc.; Deposition Transcripts and Exhibits.
09/05/2013	2,250.00	Geoffrey Stiller, MD; Professional Services.
[redacted]		
09/10/2013	480.25	NuVision Productions; Video Deposition of Dr. Coffman.
[redacted]		
09/13/2013	300.00	Bonnie Hamada; Deposition transcripts.

09/17/2013 719.80 CDA Reporting Court Reporters; Deposition Transcripts from 8/20/13.

10/07/2013 450.00 Streski Reporting & Video; Video Conference.

10/09/2013 722.40 T&T Reporting; Deposition transcripts.

10/16/2013 1,175.00 ACT Teleconferencing Services, Inc.; Conference Room Rental for 10/2/13.

10/21/2013 (45.00) Tri-County Process Serving; Service of Subpoena.

10/22/2013 818.50 Associated Reporting & Video, Inc.; Deposition transcripts.

10/23/2013 835.35 T&T Reporting; Videographer Fees and Deposition Transcripts.

10/28/2013 61.00 Tri-County Process Serving; Service of Process.

10/28/2013 58.00 Tri-County Process Serving; Service of Process.

10/28/2013 58.00 Tri-County Process Serving; Service of Process.

[redacted]

11/05/2013	125.00	Tri-County Process Serving; Service of Subpoena.
11/05/2013	58.00	Tri-County Process Serving; Service of Subpoena.
11/05/2013	58.00	Tri-County Process Serving; Service of Subpoena.
11/05/2013	75.00	Associated Reporting & Video, Inc.; Deposition transcripts.
[redacted]		
11/06/2013	103.00	Tri-County Process Serving; Service of Process.
[redacted]		
11/13/2013	2,217.52	Katz Consulting [redacted]
[redacted]		
11/14/2013	175.00	Streski Reporting & Video; Video Conference.
11/14/2013	447.50	M & M Court Reporting Service, Inc.; Videographer.
[redacted]		
11/19/2013	3,541.25	M & M Court Reporting Service, Inc.; Trial Presentation Support.
[redacted]		

[redacted]

12/09/2013 207.90 Tri-County Process Serving; Service of Process.

[redacted]

02/12/2014 1,295.00 Dr. Garrison; Expert Services.
02/12/2014 3,250.00 Dr. Coffman; Expert Services.
02/12/2014 2,000.00 Dr. Laurence;Expert Services.

[redacted]

02/17/2014 274.00 Tucker & Associates; Transcripts.

[redacted]

03/13/2014 80.50 Nevin, Benjamin, McKay & Bartlett; Reimbursement for payment of transcripts.

[redacted]

03/24/2014 442.00 Christie Valcich; Trial Transcripts.
03/24/2014 90.00 Tiffany Fisher; Trial Transcripts.

[redacted]

03/25/2014 58.00 Tri-County Process Serving; Service of Process.

03/25/2014	58.00	Tri-County Process Serving; Service of Process.
03/25/2014	58.00	Tri-County Process Serving; Service of Process.
03/25/2014	58.00	Tri-County Process Serving; Service of Process.
03/25/2014	103.00	Tri-County Process Serving; Service of Process.
[redacted]		
03/31/2014	200.00	Kim Madsen; Transcripts.
[redacted]		
04/09/2014	125.00	Tri-County Process Serving; Service of Subpoena.
[redacted]		
08/11/2014	9,250.00	American Medical Forensic Specialists; Trial Deposit.
08/12/2014	60.00	Tri-County Process Serving; Service of Subpoena.
08/12/2014	133.00	Tri-County Process Serving; Service of Subpoena.
08/13/2014	60.00	Tri-County Process Serving; Service of Subpoena.
08/13/2014	60.00	Tri-County Process Serving; Service of Subpoena.
08/13/2014	60.00	Tri-County Process Serving; Service of Subpoena.
08/13/2014	60.00	Tri-County Process Serving; Service of Subpoena.
[redacted]		
08/27/2014	166.00	Nevin, Benjamin, McKay & Bartlett; Trial Transcripts.
[redacted]		
09/08/2014	457.28	Airfare for Farrah Caruthers on 9/10/14.
[redacted]		
09/17/2014	270.00	Tiffany Fisher; Transcripts.
09/17/2014	342.25	Tucker & Associates; Transcripts.
[redacted]		
09/29/2014	13,812.37	Commonwealth Medical Legal Services, Inc; Professional Services and Travel Expenses for Trial for 9/17/14-9/19/14.
[redacted]		
10/08/2014	269.28	Airfare for Greg Haddad on 9/12/14.
[redacted]		
10/10/2014	3,857.17	P. Gregory Haddad; Lodging for 9/12/14-10/3/14.
[redacted]		

10/10/2014	5,692.72	M & M Court Reporting Service, Inc.; Trial Presentation Support.
10/13/2014	2,659.80	Lodging for Farrah Caruthers during trial.
10/13/2014	1,217.18	Rental car for Farrah Caruthers during trial.
[redacted]		

March 19, 2012

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #116647

3768
14200-000
BALL0001/1003362
24980

Attn: David Z. Nevin
NEVIN, BENJAMIN, MCKAY & BARTLETT, LLP
303 W. BANNOCK
BOISE ID 83702
*82 343-1000 Business
345-8274 Fax

Reference Job #116647 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 1204792
Documents: Summons; Complaint and Demand for Jury Trial; Motion for Limited Admission of P. Gregory Haddad; Motion for Limited Admission of James B. Perrine

Service Upon: Brian Calder Kerr, M.D.

Completed on March 16, 2012 at 4:28 PM,
at: 3210 E. Chinden Blvd., Ste. 113, Eagle, ID 83616
by Antonio Roque

Mileage Fee $18.0(
Service Fee $41.0(
Rush $35.0(

Total: $94.0(

DUE ON RECEIPT: $94.0(

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March 19, 2012

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID. 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #116646

3768
14200-003
BALL0001/1033362
24981

Attn: David Z. Nevin
NEVIN, BENJAMIN, MCKAY & BARTLETT, LLP
303 W. BANNOCK
BOISE ID 83702
*82 343-1000 Business
345-8274 Fax

Reference Job #**116646** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 1204792
Documents: Summons; Complaint and Demand for Jury Trial; Motion for Limited Admission of P. Gregory Haddad; Motion for Limited Admission of James B. Perrino

Service Upon: Silk Touch Laser, LLP

Completed on March 16, 2012 at 4:25 PM,
at: Silk Touch Laser, LLP, 3210 E. Chinden Blvd., Ste. 113, Eagle, ID 83616
by Antonio Roque

Additional Affidavit $36.0(

Total: $36.0(

DUE ON RECEIPT: $36.0(

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Boise, ID 83702-2772

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Job # (32391B4) **Invoice # 46640B5** **Claim #**

Case: Ballard v. Kerr
Witness: Charles Kellen Ballard
Date: 2/1/2013 9:00:00 AM

Charges:

Copy of Deposition	$1.95	214	$417.30
Rough Draft to Mr. Haddad per his request	$1.00	210	$210.00
B&W Exhibits Attached to Transcript	$0.25	19	$4.75
McKay to Obtain Signature			
6% sales tax	$37.92	1	$37.92
Sub Total			**$669.97**
Payments			**$0.00**
Balance Due			**$669.97**

We appreciate your business!

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Billed to: Scott McKay
Invoice # 46640B5
Billed: 2/12/2013
Amount Due: $669.97

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208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

Remit Payment

NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

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John Glenn Hall Company

Litigation Technology

PO Box 2683
Boise ID 83701-2683

(208) 345-4120 voice · (208) 345-5629 fax · www.jghco.com
Federal Tax ID: 92-6007976 · Form W-9 at www.jghco.com/formW9.pdf

00015898

Invoice

2/1/13

Jeffrey Brownson
Nevin Benjamin McKay & Bartlett LLP
PO Box 2772
Boise, ID 83701

Customer Fax
208-345-8274

Description		Taxable
DVD of video deposition of Charles Ballard 02/01/13	$171.60	X

Thank you for letting me serve you!

For customers outside of Idaho this document may arrive by US Mail and by fax. Please report errors and omis ions right away. Thanks.

Ballard Depo.tr

Invoice
00015898

Ship Via: Delivered by John
Your Order #: Ballard Depo

My shipping address: 1017 N 23rd St · Boise ID 83702

Freight:	$0.00
Sales Tax:	$10.30
Total Amount:	$181.90
Amount Applied:	$0.00

Balance Due. Please Pay This Amount > $181.90

Associated Reporting & Video, Inc.

1618 W. Jefferson Street
Boise, ID 83702

Phone # 208.343.4004 **info@associatedreportinginc.com**
Fax # 208.343.4002 **www.associatedreportinginc.com**

[redacted]

P. Gregory Haddad
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Federal ID# 82-0436903

[redacted]

2/13/2013 201300106

Your business is greatly appreciated!

[redacted]

Case: Ballard vs. Kerr, M.D., et al.
Case No: CV OC 1204792
Dates Taken: 01/30/2013 and 01/31/2013
Location: Boise, Idaho
Deponents: Brian Calder Kerr, M.D. (01/30?2013)
30 (b)(6) Silk Touch Laser, LLP, and Donna Berg (01/31/2013)
Reporter: Andrea J. Wecker, CSR No. 716, RPR, CRR, CBC

Reporting services rendered in the above-entitled matter:

Appearance - 01/30/2013	145.00
Appearance - 01/31/2013	145.00
Transcript - Original + Realtime - Kerr, M.D. (260 pgs)	1,365.00
Transcript - Original + Realtime - Silk Touch Laser, LLP (210 pgs)	1,102.50
Transcript - Original + Realtime - Donna Berg (83 pgs)	435.75
Exhibits (all depos) 57 pgs	39.90

****See page 2****

[redacted]

[redacted]

Associated Reporting & Video, Inc.
1618 W. Jefferson Street
Boise, ID 83702

Phone # 208.343.4004 info@associatedreportinginc.com
Fax # 208.343.4002 www.associatedreportinginc.com

Federal ID# 82-0436903

[redacted]

2/13/2013 201300106

[redacted]

P. Gregory Haddad
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Your business is greatly appreciated!

[redacted]

Videography services rendered in the above-entitled matter:

Appearance - First hour with setup	150.00
Appearance - 5.5 hours	412.50
Video Sync to Transcript	455.00
Original +1 Video taken at deposition (5 DVDs)	50.00
Shipping and Handling	100.00
State Sales Tax	0.00

[redacted] $4,400.65

[redacted]

INVOICE

BUSHMAN COURT REPORTING
620 W. Third Street, Suite 302
P.O. Box 2734
LITTLE ROCK, AR 72203-2734
Phone:501-372-5115 Fax:501-378-0077

Invoice No.	Invoice Date	Job No.
125192	4/4/2013	69813
Job Date	**Case No.**	
4/2/2013	CVOC1204792	
Case Name		
Charles Ballard Vs. Brian Calder Kerr, M.D.		
Payment Terms		
Due upon receipt		

James B. Perrine
Bailey & Glasser, LLP
201 Monroe Street
Suite 2170
Montgomery, AL 36104

Jonelle Buchanan				0.00
Videographer Setup			125.00	125.00
Videographer Hourly Appearance (includes tape)	3.00 Hours	@	125.00	375.00
UPS			0.00	10.00
	TOTAL DUE >>>			**$510.00**

Thank you. We appreciate your business.

Tax ID: 71-0687373 Phone: 334-262-6485 Fax:334-262-0657

Please detach bottom portion and return with payment.

James B. Perrine
Bailey & Glasser, LLP
201 Monroe Street
Suite 2170
Montgomery, AL 36104

Invoice No. : 125192
Invoice Date : 4/4/2013
Total Due : $ 510.00

Remit To: **BUSHMAN COURT REPORTING**
620 W. Third Street, Suite 302
P.O. Box 2734
LITTLE ROCK, AR 72203-2734

Job No. : 69813
BU ID : 1-MAIN
Case No. : CVOC1204792
Case Name : Charles Ballard Vs. Brian Calder Kerr, M.D.

INVOICE

BUSHMAN COURT REPORTING
620 W. Third Street, Suite 302
P.O. Box 2734
LITTLE ROCK, AR 72203-2734
Phone:501-372-5115 Fax:501-378-0077

Invoice No.	Invoice Date	Job No.
125183	4/4/2013	69812
Job Date	**Case No.**	
4/2/2013	CVOC1204792	
Case Name		
Charles Ballard Vs. Brian Calder Kerr, M.D.		
Payment Terms		
Due upon receipt		

James B. Perrine
Bailey & Glasser, LLP
201 Monroe Street
Suite 2170
Montgomery, AL 36104

Jonelle Buchanan				0.00
Video Conference (Legal)	2.50	@	100.00	250.00
		TOTAL DUE >>>		**$250.00**

Thank you. We appreciate your business.

Tax ID: 71-0687373 Phone: 334-262-6485 Fax:334-262-0657

Please detach bottom portion and return with payment.

James B. Perrine
Bailey & Glasser, LLP
201 Monroe Street
Suite 2170
Montgomery, AL 36104

Invoice No. : 125183
Invoice Date : 4/4/2013
Total Due : $ 250.00

Remit To: **BUSHMAN COURT REPORTING**
620 W. Third Street, Suite 302
P.O. Box 2734
LITTLE ROCK, AR 72203-2734

Job No. : 69812
BU ID : 1-MAIN
Case No. : CVOC1204792
Case Name : Charles Ballard Vs. Brian Calder Kerr, M.D.

INVOICE

BUSHMAN COURT REPORTING
620 W. Third Street, Suite 302
P.O. Box 2734
LITTLE ROCK, AR 72203-2734
Phone:501-372-5115 Fax:501-378-0077

Invoice No.	Invoice Date	Job No.
125499	5/2/2013	69811
Job Date	**Case No.**	
4/2/2013	CVOC1204792	
Case Name		
Charles Ballard Vs. Brian Calder Kerr, M.D.		
Payment Terms		
Due upon receipt		

James B. Perrine
Bailey & Glasser, LLP
201 Monroe Street
Suite 2170
Montgomery, AL 36104

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:				
Jonelle Buchanan				509.60
Exhibit	5.00 Pages	@	0.25	1.25
Appearance Fee (Minimum)			75.00	75.00
Postage			0.00	16.60
		TOTAL DUE >>>		**$602.45**

Thank you. We appreciate your business.

Tax ID: 71-0687373 Phone: 334-262-6485 Fax:334-262-0657

Please detach bottom portion and return with payment.

James B. Perrine
Bailey & Glasser, LLP
201 Monroe Street
Suite 2170
Montgomery, AL 36104

Invoice No. : 125499
Invoice Date : 5/2/2013
Total Due : $ 602.45

Remit To: **BUSHMAN COURT REPORTING**
620 W. Third Street, Suite 302
P.O. Box 2734
LITTLE ROCK, AR 72203-2734

Job No. : 69811
BU ID : 1-MAIN
Case No. : CVOC1204792
Case Name : Charles Ballard Vs. Brian Calder Kerr, M.D.

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P. Gregory Haddad
Bailey & Glasser LLP
2855 Cranberry Square
Morgantown, WV 26508

Billed: 7/11/2013

Job # (33570B4) **Invoice # 6700B1** **Claim #**

Case: Ballard v. Kerr
Witness: Charles Ballard
Date: 5/23/2013 1:30:00 PM

Charges:

VOLUME II			
Copy of Deposition	$2.50	63	$157.50
Shipping & Handling	$10.00	1	$10.00
Sub Total			**$167.50**
Payments			**$0.00**
Balance Due			**$167.50**

REBILLING 06/27/2013

(Return this section with check)

Billed to: P. Gregory Haddad
Invoice # 6700B1
Billed: 7/11/2013
Amount Due: $167.50

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208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

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NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]

Associated Reporting & Video, Inc.
1618 W. Jefferson Street
Boise, ID 83702

Phone # 208.343.4004 info@associatedreportinginc.com
Fax # 208.343.4002 www.associatedreportinginc.com

Federal ID# 82-0436903

DATE	INVOICE#
7/12/2013	201300407

BILL TO:

Scott McKay, Esq.
Nevin, Banjamin, McKay & Bartlett, LLP
303 West Bannock
Post Office Box 2772
Boise, ID 83701

Your business is greatly appreciated!

ITEM - DESCRIPTION	AMOUNT

Case: Ballard vs. Kerr, M.D., et al.
Case No: CV OC 1204792
Date Taken: 06/25/2013
Location: Boise, Idaho
Deponent: Briana Kerr
Reporter: Andrea J. Wecker, CSR No. 716, RMR, CRR, CBC

Reporting services rendered in the above-entitled matter:

Appearance	55.00
Transcript - Original	300.00
Exhibits	1.25
State Sales Tax	0.00

PLEASE REFERENCE THIS INVOICE NUMBER ON YOUR CHECK
TERMS ARE NET 30 - LATE CHARGES WILL BE ASSESSED
ON ALL PAST DUE ACCOUNTS

TOTAL: $356.25

Quane Jones McColl, PLLC
Attorneys at Law

Terrence S. Jones tsj@quanelaw.com

US Bank Plaza
101 S. Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, ID 83701
(208) 780-3939 Telephone
(208) 780-3930 Facsimile
www.quanelaw.com

August 2, 2013

VIA FACSIMILE (304) 594-9709
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

Enclosed please find the invoice from Dr. Lundeby for his time spent in deposition. Please forward payment for $1100 made payable to John Lundeby, M.D. to my attention and I will see to it that the funds are delivered to him. Please call with any questions.

Very truly yours,

Terrence S. Jones

TSJ/cf
Enclosure
Cc: Dr. Lundeby

Invoice for Professional Services

Date of Service	Item	Amount
07/26/13	Deposition	$1100
Total		$1100

Due and payable on receipt.

John P. Lundeby, MD, FACS, FAACS

Tax ID to use- 518-64-0589

John P. Lundeby, MD

3741 West Fairway Drive

Coeur d'Alene, ID 83815

M & M COURT REPORTING SERVICE, INC.
FED ID. NO. 82-0298125

"Excellence In Court Reporting Since 1970"

Billed to:

Scott McKay
Nevin Benjamin McKay & Bartlett
303 W. Bannock Street
P.O. Box 2772
Boise, ID 83702-2772

Billed: 7/31/2013

Job # **(7145C2)** **Invoice #** **12503C1** **Claim #**

Case: Ballard v. Kerr
Witness: Geoffrey Stiller, M.D.
Date: 7/19/2013 9:09:00 AM

Charges:

Transcript Fee O&1 Expert/Technical	$4.50	150	$675.00
Hourly Appearance Fee	$40.00	3.5	$140.00
B&W Exhibits Attached to Transcript	$0.25	57	$14.25
6% sales tax	$0.86	1	$0.86
Shipping & Handling	$10.00	1	$10.00
Videography to be invoiced separately	$0.00	1	$0.00
Sub Total			**$840.11**
Payments			**$0.00**
Balance Due			**$840.11**

We accept Visa and MasterCard

(Return this section with check)

Billed to: Scott McKay
Invoice # 12503C1
Billed: 7/31/2013
Amount Due: $840.11

SOUTHERN OFFICE

421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

Remit Payment [ ]

NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]

Rebekah Parsons

From: Farrah Caruthers
Sent: Tuesday, August 13, 2013 12:52 PM
To: Rebekah Parsons; Roger Shealy
Subject: FW: Service Fees for Boise, ID area

Importance: High

Rebekah, can you issue a check made payable to Tri-County Process Serving LLC in the amount of $363.00? This is for the Charles Ballard case. Also, once you do that, can you scan a copy and email it to me so I can send to them? They require pre-payment, but they said if I send them a copy of the check that is going to be mailed, they can go ahead and serve the Subpoenas.

Let me know if you need additional information to process this request. Thanks!

Farrah

Farrah Caruthers :: Paralegal :: Bailey & Glasser LLP :: 304.345.6555

From: trico [mailto:trico@qwestoffice.net]
Sent: Tuesday, August 13, 2013 11:55 AM
To: Farrah Caruthers
Subject: Service Fees for Boise, ID area

Farrah,

The itemized service fees for each service are listed below.

Karl Olson, Mountain Home, ID - $125.00
Matthew B. Campbell, Meridian, ID - $61.00
E.J. Kim, Eagle, ID - $61.00
Erwin L. Sonnenberg, Boise, ID - $58.00
Glen R. Groben, Boise, ID - $58.00

Thanks,

Shannon Roesbery
Tri-County Process Serving LLC
PO Box 1224
Boise, ID 83701
Ph: 208-344-4132
Fax: 208-338-1530

LVS PRODUCTIONS
Legal Video Services
603 North Oak Street
Spokane, WA 99201-1836
509.328.0591
legalvideopro@comcast.net

INVOICE #13128

Attention: Bookkeeper
Mr. P. Gregory Haddad, Esq.
Bailey & Glasser, LLP
Attorneys at Law
2855 Cranberry Square
Morgantown, WV 26508

08/08/13
Rebill: __/__/13

Videotaped Deposition of John P. Lundeby, M.D.

Remote Recording:	
Travel to Coeur d'Alene and Return - no charge	$
1st hour	$195.00
Additional 2 hours	$160.00
3 Mini DV Tapes	$ 15.00
Complimentary Sealed Original Unedited DVDs 1 and 2, Original Certificate of Video Operator and Video Event Log	$
Complimentary DVD Copy of Original Unedited DVDs 1 and 2, Copy of Certificate and Log	$
3-hr transfer from Master Mini DV tapes to DVDs and Copying 4 DVDs/Labeling	
Shipping and handling - Fed Ex	$ 30.00
Total	$400.00

Please return yellow copy with your remittance to LVS.
A charge of one percent per month (twelve percent per annum) will be made on the unpaid balance thirty days from the statement date.
Thank you.

Charles Ballard vs. Brian Calder Kerr, M.D.; Silk Touch Laser, et al.
Ada County No. CV OC 1204792 - Trial Date: _____
Taken 07/26/13 By Bonnie Hamada, CLVS

LVS ID #91-1791629 - See attached W-9

#13128B59 WV Bailey & Glasser 400

INVOICE

CDA Reporting Court Reporters
401 Front Avenue, Suite 215
Coeur d'Alene, Idaho 83814
Phone 208-765-3666 Fax 208-676-8903

Invoice No.	Invoice Date	Job No.
6045	8/9/2013	1725
Job Date	**Case No.**	
7/26/2013	CV OC 1204792	
Case Name		
CHARLES BALLARD VS. BRIAN KERR, M.D.;SILK TOUCH LASER, LLP		
Payment Terms		
Due upon receipt		

P. Gregory Haddad
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508

ORIGINAL TRANSCRIPT OF:					
John P. Lundeby, MD	109.00	Pages	@	3.95	430.55
Hourly	2.75	Hours	@	50.00	137.50
eTranscript No Charge				0.00	0.00
B & W Exhibits	123.00		@	0.40	49.20
FedEx				15.00	15.00
			TOTAL DUE >>>		**$632.25**

We appreciate your business! Thank you!
DB

Tax ID: 80-0157666 Phone: 304-594-0087 Fax:304-594-9709

Please detach bottom portion and return with payment.

P. Gregory Haddad
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508

Job No. : 1725 BU ID :1-MAIN
Case No. : CV OC 1204792
Case Name : CHARLES BALLARD VS. BRIAN KERR, M.D.;SILK TOUCH LASER, LLP
Invoice No. : 6045 Invoice Date :8/9/2013
Total Due : $ 632.25

PAYMENT WITH CREDIT CARD

Cardholder's Name:
Card Number:
Exp. Date: Phone#:
Billing Address:
Zip: Card Security Code:
Amount to Charge:
Cardholder's Signature:

Remit To: **CDA Reporting Court Reporters**
401 Front Avenue, Suite 215
Coeur d'Alene, ID 83814

M & M COURT REPORTING SERVICE, INC.
FED ID. NO. 82-0298125

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M&M

Billed to:

P. Gregory Haddad
Bailey & Glasser LLP
2855 Cranberry Square
Morgantown, WV 26508

Billed: 8/8/2013

Job # (7145C2) **Invoice #** 6768B1 **Claim #**

Case: Ballard v. Kerr
Witness: Geoffrey Stiller, M.D.
Date: 7/19/2013 9:09:00 AM

Charges:

Sync MPEG1 to transcript (per video hr.)	$45.00	3	$135.00
Shipping & Handling	$10.00	1	$10.00

Sub Total	**$145.00**
Payments	**$0.00**
Balance Due	**$145.00**

YOUR BUSINESS IS GREATLY APPECIATED!!

(Return this section with check)

Billed to: P. Gregory Haddad
Invoice # 6768B1
Billed: 8/8/2013
Amount Due: $145.00

SOUTHERN OFFICE

421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

Remit Payment [ ]

NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]

Rebekah Parsons

From: Farrah Caruthers
Sent: Sunday, August 18, 2013 11:58 PM
To: Rebekah Parsons; Roger Shealy
Subject: FW: Ballard v. Kerr; CVOC12-4792

Rebekah,

Can you issue a check in the amount of $120.00 made payable to

Susan G. Gambee
200 W. Front Street
Boise, Idaho 83702

And can you mail it to the attention of

Debi Presher
Nevin, Benjamin, McKay & Bartlett, LLP
P.O. Box 2772
Boise, Idaho 83701

Thanks so much! Let me know if you have any questions.

Farrah

Farrah Caruthers :: Paralegal :: Bailey & Glasser LLP :: 304.345.6555

From: Debi Presher [mailto:dpresher@nbmlaw.com]
Sent: Saturday, August 17, 2013 10:20 AM
To: Farrah Caruthers
Subject: Re: Ballard v. Kerr; CVOC12-4792

Her address will be the same as the clerks office which I think you have. But will you send it to me so that I can swap it for the transcript? Thanks.

Sent from my iPhone

On Aug 16, 2013, at 8:37 PM, "Farrah Caruthers" <FCaruthers@baileyglasser.com> wrote:

> Yes, I will need her address to process the request. If you can get that to me Monday morning, I should be able to have the check mailed out Monday afternoon. Thanks!
>
> Farrah Caruthers :: Paralegal :: Bailey & Glasser LLP :: 304.345.6555

From: Debi Presher [mailto:dpresher@nbmlaw.com]
Sent: Friday, August 16, 2013 5:02 PM
To: Farrah Caruthers
Subject: FW: Ballard v. Kerr; CVOC12-4792

Could you have a check written to Susan G. Gambee for $120 and mail it to me? I'll get it over to the courthouse and pick up this transcript. Thanks. Debi

Debi Presher
Legal Assistant
Nevin Benjamin McKay & Bartlett LLP
208.343.1000

From: Susan Gambee [mailto:sgambee@adaweb.net]
Sent: Friday, August 16, 2013 2:37 PM
To: Debi Presher
Subject: RE: Ballard v. Kerr; CVOC12-4792

Debi, good timing! I just finished the transcript...it is ready for pickup on the 4th floor in the Transcripts Department. That office can be found in the Trial Court Administrator's wing. The cost is $120, and the check should be made out to me, Susan G. Gambee.

Rebekah Parsons

From: Farrah Caruthers
Sent: Friday, August 16, 2013 10:54 AM
To: Rebekah Parsons; Roger Shealy
Subject: Ballard check request

Rebekah,

Can you issue a check made payable to Tri-County Process Serving LLC in the amount of $286.00? Their address is below.

Thanks!

Farrah

From: trico [mailto:trico@qwestoffice.net]
Sent: Friday, August 16, 2013 10:48 AM
To: Farrah Caruthers
Subject: RE: Request invoice for pre-payment

Susan Kerr, Eagle, ID - $61.00
Donna Berg, Pocatello, ID - $95.00
Briana Dumas, Rexburg, ID - $130.00

Thanks,

Shannon Roesbery
Tri-County Process Serving LLC
PO Box 1224
Boise, ID 83701
Ph: 208-344-4132
Fax: 208-338-1530

From: Farrah Caruthers [mailto:FCaruthers@baileyglasser.com]
Sent: Thursday, August 15, 2013 10:22 PM
To: trico (trico@qwestoffice.net)
Cc: Farrah Caruthers
Subject: Request invoice for pre-payment

Shannon,

Can you provide me with the itemized service fees for service of the attached subpoenas? I will send a check for pre-payment when I mail the subpoenas.

Thanks!

Farrah

Rebekah Parsons

From: Ted <ted@tri-countyps.com>
Sent: Friday, August 30, 2013 12:26 PM
To: Rebekah Parsons
Subject: invoices

3768
BALL0081/100336

Hi Rebecca,

Thank you for speaking with me today. We have received your check number 42869 in the amount of $363.00 and 42947 in the amount of $286.00 and we will apply the funds as follows:

Check 42869
Invoice 130823 $125.00
Invoice 130824 $61.00
Invoice 130825 $61.00
Invoice 130826 $58.00
Invoice 130827 $58.00

Check 42947
Invoice 130993 $61.00
Invoice 130994 $58.00
Invoice 130995 $130.00
Invoice 130823 $37.00

Invoice 130823 and 130824 had incurred location fees of $45.00 each and the fee for invoice 130994 was less than anticipated. Once we apply the fees to the jobs, there will be $8.00 due on invoice 130823 and $45.00 on invoice 130824. I apologize for any confusion.

Thanks

Total Due: $53.00

Ted Teninty
Tri-County Process Serving LLC
208-344-4132
PO Box 1224
Boise ID 83702

Quane Jones McColl, PLLC
Attorneys at Law

Terrence S. Jones tsj@quanelaw.com

US Bank Plaza
101 S. Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, ID 83701
(208) 780-3939 Telephone
(208) 780-3930 Facsimile
www.quanelaw.com

September 4, 2013

VIA FACSIMILE (304) 594-9709
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

Enclosed please find the invoice from Dr. Stiller for his time spent in deposition. Please forward payment for $2250.00 made payable to Geoffrey D. Stiller, M.D. to my attention and I will see to it that the funds are delivered to him. Please call with any questions.

Very truly yours,

Terrence S. Jones

TSJ/cf
Enclosure
Cc: Dr. Stiller

Palouse Surgeons

John S. Visger, MD, FACS ~ Derrick A. Walker D.O., FACS ~ Juan D. Parra, MD
Board Certified Surgeon Board Certified Surgeon Board Certified Surgeon
Jeffrey D. Jones, MD ~ Geoffrey Stiller, MD
Board Certified Surgeon Board Certified Surgeon

Date: 9/3/13

Terrence S. Jones
Quane Jones McColl, PLLC
US Bank Plaza
101 S Capitol Boulevard
Suite 1601
PO Box 1576
Boise, Idaho 83701

Re: Ballard vs. Kerr Invoice

On July 19, 2013 I was deposed in Moscow, Idaho for 3 hours at a rate of $750 an hour.
Respectfully,

Geoffrey D. Stiller, MD, FACS, FAACS
1224 E Rockwood Pines Rd
Spokane, WA 99203

M & M COURT REPORTING SERVICE, INC.
FED ID. NO. 82-0298125

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M&M

Billed to:

Scott McKay
Nevin Benjamin McKay & Bartlett
303 W. Bannock Street
P.O. Box 2772
Boise, ID 83702-2772

Billed: 9/4/2013

Job # (34230B4) **Invoice # 49393B5** **Claim #**

Case: Ballard v. Kerr
Witness: Dean E. Sorensen, MD, FACS
Date: 8/21/2013 10:00:00 AM

Charges:

Copy of Deposition	$1.95	161	$313.95
Exhibit Production split w/counsel see attached document McKay to Obtain Signature	$508.00	1	$508.00
6% sales tax	$18.84	1	$18.84
Sub Total			**$840.79**
Payments			**$0.00**
Balance Due			**$840.79**

We appreciate your business!

(Return this section with check)

Billed to: Scott McKay
Invoice # 49393B5
Billed: 9/4/2013
Amount Due: $840.79

SOUTHERN OFFICE

421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

Remit Payment [ ]

NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]

Invoice

NuVision Productions
5178 S. Sweetgrass Way
Boise, Idaho 83716

NUVISION PRODUCTIONS
DIGITAL VIDEO & PHOTOGRAPHY

Christopher R. Ennis

NuVision Productions
Digital Video & Photography

5178 S. Sweetgrass Way
Boise, Idaho 83716

208-890-0068
shootfilm@hotmail.com

Bill To:
Ball and Glasser, LLP Attn: P. Gregory Haddid 2855 Cranberry Square Morgantown, WV 26508

Date	Invoice No.
08/29/13	13-989

Project	Terms
Coffman	Due on receipt

Item	Description	Quantity	Rate	Amount
video Depo 1st	First hour of video recording	1	175.00	175.00
Video Depo Add.	Additional hours	2.75	75.00	206.25
Tape Stock	Mini DV tape stock	3	8.00	24.00
Conversion	Digital conversion of media files	1.5	50.00	75.00

Sync transcripts are being delivered to you by CDA Court Reporters.

Tax ID #82-0482784 Thank you for your business.	Total	$480.25

LVS PRODUCTIONS
Legal Video Services
603 North Oak Street
Spokane, WA 99201-1836
509.328.0591
legalvideopro@comcast.net

INVOICE #13138

Attention: Bookkeeper
Mr. P. Gregory Haddad, Esq.
Bailey & Glasser, LLP
Attorneys at Law
2855 Cranberry Square
Morgantown, WV 26508

09/10/13
Rebill: __/__/13

ghaddad@baileyglasser.com
304.594.0087

Videotaped Deposition of Thomas J. Coffman, M.D.

Digital Video Transcript MPEG1 DVD of Original Unedited:	$270.00
3-hr transfer from Master DVDs/Sync Transcript with Video/	
Export to MPEG1	
1 DVD/Labeling	
Shipping and handling - Fed Ex	$ 30.00
Total	$300.00

Please return yellow copy with your remittance to LVS.
A charge of one percent per month (twelve percent per annum) will be made on the unpaid balance thirty days from the statement date.

Thank you.

Charles Ballard vs. Brian Calder Kerr, M.D.; Silk Touch Laser, et al.
Ada County No. CV OC 1204792 - Trial Date: _____
Taken 08/20/13 by Christopher R. Ennis
and Reporter Patricia J. Terry
Synched by LVS 9/10/13

LVS ID #91-1791629

#13138L073WV Bailey & Glasser 300

Streski Reporting & Video Service

a division of MDStreski, LLC
75 12th Street
Wheeling, WV 26003
Phone: (304) 232-9292 Fax: (304) 232-9375

Job #: 130923VC-M2
Job Date: 09/23/2013
Order Date: 09/23/2013
DB Ref.#:
Date of Loss: / /
Your File #:
Your Client:

Invoice

Invoice #: 17600
Inv.Date: 10/01/2013
Balance: $450.00

Bill To:
P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Action: Ballard, Charles
VS
Kerr, MD., Brian Calder
Action #: CVOC1204792
Rep: VC-M
Cert:

Item	Proceeding/Witness	Description	
1	Charles Garrison, MD	Video Conference (After Hours Rate)	

Comments:

*** Your Referral is our Highest Compliment ***
Check Payable to MDStreski, LLC - Visa~Mastercard~Discover

Sub Total	$450.00
Shipping	$0.00
Tax	N/A
Total Invoice	$450.00
Payment	$0.00
Balance Due	$450.00

Federal Tax I.D.: 92-0194603 Terms: Net 30 Days @ 1.5%

Please KEEP THIS PART for YOUR RECORDS.
Please FOLD then TEAR HERE and RETURN THIS PART with PAYMENT.

Bill To:
P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Deliver To:
P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Invoice

Phone: (304) 232-9292
Fax: (304) 232-9375

Streski Reporting & Video Service
a division of MDStreski, LLC
75 12th Street
Wheeling, WV 26003

Invoice #: 17600
Inv.Date: 10/01/2013
Balance: $450.00
Job #: 130923VC-M2
Job Date: 09/23/2013
DB Ref.#:
Date of Loss: / /
Your File #:
Your Client:

T&T Reporting
Depositions - Videography - Video Conferencing
P.O. Box 51020
Idaho Falls, Idaho 83405-1020
208.529.5491

TO:

P. Gregory Haddad, Esq.
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508

October 1, 2013

Invoice# 11484

Balance: $722.40

Re: Ballard vs. Kerr, MD, et al.
Garrison, MD, Charles
on 09/23/13 *Billed* 09/30/13
by DiAnn E. Prock / John Terrill

Invoicing Information

Charge Description	Amount
WITNESS: Charles Garrison, M.D.	
<<<<<<<<<< Videographer >>>>>>>>>>	
1st Hour Appearance Fee/Setup/Media	150.00
Additional Hours: 1.5	120.00
Cameo Video Conference	125.00
<<<<<<<<<< Court Reporter >>>>>>>>>>	
Appearance Fee	50.00
Original Plus Certified Copy	245.00
Create New Original Exhibits	2.25
Exhibits	3.25
Min-U-Script PDF -- Complimentary with order	
S&H to Return Witness's Exhibits via Certified Mai	9.95
Shipping & Handling	16.95

2.00% per month on unpaid balance

P l e a s e R e m i t - - - > Total Due: $722.40

Visa - MasterCard - Discover - American Express
****** EIN 72-1526406 ******

Please place invoice number on payment to ensure proper credit
2.0% per month charged on accounts not paid within 45 days

ACT Teleconferencing, Services
1526 Cole Boulevard
Suite 300
Lakewood CO 80401
Email: globalcustomerservice@acttel.com

Phone: (866) 231-2682
Fax: (303) 238-0096

45-2353678

Account No	27545
Invoice	00006821
Invoice Date	10/2/2013
Due Date	11/16/2013
Page	1

Bill To:

Bailey & Glasser, LLP
Farrah Caruthers
2855 Cranberry Square
Morgantown WV 26508

USA

Ship To:

Bailey & Glasser, LLP
Farrah Caruthers
2855 Cranberry Square
Morgantown WV 26508

USA

Purchase Order No.	Reservation No	Conference Date	Conf Start Time	Conf Stop Time	Salesperson ID	Payment Terms
INVOICE	70328	10/2/2013	11:00:00 AM ET	4:00:00 PM ET	LH	NET 45

Description of Proximity Services	Ordered	Unit Price	Ext. Price
Room Rental	5.0000	US$225.00	US$1,125.00
Scheduling Fee	1.0000	US$50.00	US$50.00
Location: Boise Lead Participant: TBD	1.0000	US$0.00	US$0.00
Location: Morgantown Lead Participant: TBD	1.0000	US$0.00	US$0.00

Tax	US$0.00
Total	US$1,175.00

Remittance Address:

ACT Teleconferencing Services, Inc
PO Box 975312
Dallas, TX 75397-5312

Wire Instructions:

ABA No: 021000021
SWIFT Code: CHASUS33
Beneficiary: ACT Teleconferencing Services Inc.
Account No: 193539432
Bank Details: JPMorgan Chase
1125 17th Street
Denver, CO 80202

Associated Reporting & Video, Inc.
1618 W. Jefferson Street
Boise, ID 83702

Phone # 208.343.4004 info@associatedreportinginc.com
Fax # 208.343.4002 www.associatedreportinginc.com

Federal ID# 82-0436903

DATE	INVOICE #
10/14/2013	201300611

BILL TO:

P. Gregory Haddad
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Your business is greatly appreciated!

ITEM / DESCRIPTION	AMOUNT

Case: Ballard vs. Kerr, Silk Touch
Case No: CV OC 1204792
Date Taken: 10/2/2013
Location: Boise, Idaho
Deponent: Gregory N. Laurence, M.D.
Reporter: Andrea J. Wecker, CSR No. 716, RMR, CRR, CBC

Reporting services rendered in the above-entitled matter:

Appearance	105.00
Transcript - Original	688.00
Exhibits	25.50
State Sales Tax	0.00

PLEASE REFERENCE THIS INVOICE NUMBER ON YOUR CHECK
TERMS ARE NET 30 - LATE CHARGES WILL BE ASSESSED
ON ALL PAST DUE ACCOUNTS

TOTAL: $818.50

T&T Reporting
Depositions - Videography - Video Conferencing
P.O. Box 51020
Idaho Falls, Idaho 83405-1020
208.529.5491

TO:

P. Gregory Haddad, Esq.
BAILEY & GLASSER, LLP
2855 Cranberry Square
Morgantown, WV 26508

October 18, 2013

Invoice# 11512

Balance: $835.35

Re: Ballard vs. Kerr, MD, et al.
Garrison, MD, Charles (Vol. II)
on 10/16/13 *Billed* 10/18/13
by DiAnn E. Prock / John Terrill

Invoicing Information

Charge Description	Amount
>>>>>>>>>>>>>>>>>> EXPEDITE <<<<<<<<<<<<<<<<<<	
WITNESS: Charles Garrison, M.D.	
<<<<<<<<<< Videographer >>>>>>>>>>	
1st Hour Appearance Fee/Setup/Media	150.00
Additional Hours: .5 hr	45.00
Cameo - Mobile Video Conferencing	125.00
<<<<<<<<<< Court Reporter >>>>>>>>>>	
Appearance Fee	90.00
Original Plus Certified Copy	351.90
Exhibits	3.50
Min-U-Script PDF -- Complimentary with order	
Shipping & Handling	14.95
FedEx - Video	55.00
Tracking No. 7969 4894 9309	

2.00% per month on unpaid balance

P l e a s e R e m i t - - - > Total Due: $835.35

Visa - MasterCard - Discover - American Express
***** *EIN 72-1526406* *****

Please place invoice number on payment to ensure proper credit
2.0% per month charged on accounts not paid within 45 days

October 21, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132467

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132467 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Service Upon: Edward Jong Wook Kim, M.D.

Personal Service to Edward Jong Wook Kim, M.D. on October 19, 2013 at 10:45 AM,
at: 1353 W. Overlake Ct., Eagle, ID 83616
by Kasey L. Vink

Service Fee $61.00

Total: $61.00

DUE ON RECEIPT: $61.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

October 21, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132470

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132470 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Service Upon: Glen R. Groben, M.D.

Personal Service to Glen R. Groben, M.D. on October 21, 2013 at 9:21 AM,
at: Ada County Coroner, 5550 Morris Hill Road, Boise, ID 83706
by Kasey L. Vink

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

October 21, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132469

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132469 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Service Upon: Erwin L. Sonnenberg

Personal Service to Erwin L. Sonnenberg on October 21, 2013 at 9:20 AM,
at: 5550 Morris Hill Road, Boise, ID 83706
by Kasey L. Vink

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

Associated Reporting & Video, Inc.
1618 W. Jefferson Street
Boise, ID 83702

Phone # 208.343.4004 info@associatedreportinginc.com
Fax # 208.343.4002 www.associatedreportinginc.com

Federal ID# 82-0436903

DATE	INVOICE #
11/4/2013	201300650

BILL TO:

P. Gregory Haddad
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Your business is greatly appreciated!

ITEM - DESCRIPTION	AMOUNT

Case: Ballard vs. Kerr, Silk Touch
Case No: CV OC 1204792
Date Taken: 10/2/2013
Location: Boise, Idaho
Deponent: Gregory N. Laurence, M.D.
Reporter: Andrea J. Wecker, CSR No. 716, RMR, CRR, CBC

Reporting services rendered in the above-entitled matter:

Rebinding and Resealing three (3) Original Transcripts:	
Brian Calder Kerr, M.D.	25.00
Donna Berg	25.00
30 (b)(6) Silk Touch Laser	25.00
State Sales Tax	0.00

PLEASE REFERENCE THIS INVOICE NUMBER ON YOUR CHECK
TERMS ARE NET 30 - LATE CHARGES WILL BE ASSESSED
ON ALL PAST DUE ACCOUNTS

TOTAL: $75.00

October 28, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132468

Attn: >
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132468 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792
Documents: Subpoena and Letter

Service Upon: Karl H. Olson, M.D.

Personal Service to Karl H. Olson, M.D. on October 22, 2013 at 8:27 AM,
at: 465 McKenna Dr., Mountain Home, ID 83647

Service Fee $125.00

Total: $125.00

DUE ON RECEIPT: $125.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

October 28, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132657

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132657 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena Duces Tecum, Letter

Service Upon: Saint Alphonsus Regional Medical Center

Personal Service to Carol Christopherson, Site Coordinator, on October 25, 2013 at 4:35 PM,
at: Saint Alphonsus Regional Medical Center, 1055 N. Curtis Rd., Boise, ID 83706
by Antonio Roque

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

October 28, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132466

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132466 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Service Upon: Matthew B. Campbell, M.D.

Personal Service to Matthew B. Campbell, M.D. on October 23, 2013 at 6:44 PM,
at: 3803 W. Deerpath Dr., Boise, ID 83714
by Mic L. Kreft

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

October 30, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #132656

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #132656 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena Duces Tecum, Letter

Service Upon: Life Flight Network, LLC

Personal Service to Logan Meyer, of CT Corporation System, Registered Agent for National Registered Agents Inc., Registered Agent for Life Flight Network, LLC, on October 29, 2013 at 8:24 AM,
at: Life Flight Network, LLC, 921 S. Orchard St., Ste. G, Boise, ID 83705
by Shannon Roesbery

Service Fee $58.00
Location of Agent for Service and Attempt Service at Multiple Addresses $45.00

Total: $103.00

DUE ON RECEIPT: $103.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

Case Invoice

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M&M Court Reporting Service, Inc.

Scott McKay
Nevin Benjamin McKay & Bartlett
303 W. Bannock Street
P.O. Box 2772
Boise, ID 83702-2772

Phone (208) 343-1000
Fax (208) 345-8274

Date
11/13/2013

Ballard v. Kerr CV OC 1204792

Invoice #	Claim No.	File No.	Billed	Paid	Witness		Job Date	
12503C1			7/31/2013	9/3/2013	Geoffrey Stiller, M.D.		7/19/2013	
OE	Transcript Fee O&1 Expert/Technical					$4.50	150	$675.00
CD2T	Hourly Appearance Fee					$40.00	3.5	$140.00
EA	B&W Exhibits Attached to Transcript					$0.25	57	$14.25
SalesTax	6% sales tax					$0.86	1	$0.86
SH	Shipping & Handling					$10.00	1	$10.00
	Videography to be invoiced separately					$0.00	1	$0.00
							Amount Paid	**$840.11**
							Amount Due	**$0.00**
12525C1			8/7/2013		Geoffrey Stiller, M.D.		7/19/2013	
V	Videographer - 1st hour - Minimum Charge					$200.00	1	$200.00
V1	Videographer - Additional Hours					$95.00	2.5	$237.50
V2	Original Video on DVD - 2 disks					$0.00	1	$0.00
SH	Shipping & Handling					$10.00	1	$10.00
							Amount Paid	**$0.00**
							Amount Due	**$447.50**
46640B5			2/12/2013	3/11/2013	Charles Ballard		2/1/2013	
C	Copy of Deposition					$1.95	214	$417.30
R	Rough Draft to Mr. Haddad per his request					$1.00	210	$210.00
EA	B&W Exhibits Attached to Transcript					$0.25	19	$4.75
SR	McKay to Obtain Signature							
SalesTax	6% sales tax					$37.92	1	$37.92
							Amount Paid	**$669.97**
							Amount Due	**$0.00**
49393B5			9/4/2013	10/4/2013	Dean E. Sorensen, MD, FACS		8/21/2013	
C	Copy of Deposition					$1.95	161	$313.95
MISC	Exhibit Production split w/counsel see attached document					$508.00	1	$508.00
SR	McKay to Obtain Signature							
SalesTax	6% sales tax					$18.84	1	$18.84
							Amount Paid	**$840.79**
							Amount Due	**$0.00**

Ballard v. Kerr CV OC 1204792

Invoice #	Claim No.	File No.	Billed	Paid	Witness	Job Date

Case Balance $447.50

SOUTHERN OFFICE

421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

Remit Payment [ ]

NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1800 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]

Streski Reporting & Video Service

Morgantown Area, WV 26003

Phone: (304) 232-9292 Fax: (304) 232-9375

Job #: 131016VC-M2
Job Date: 10/16/13
Order Date: 10/16/13
DB Ref.#:
Date of Loss: / /
Your File #:
Your Client:

Invoice

Invoice #: 17699
Inv.Date: 10/22/13
Balance: $175.00

Bill To:
P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Action: Ballard, Charles
VS
Kerr, MD., Brian Calder
Action #: CVOC1204792
Rep: VC-M
Cert:

Item	Proceeding/Witness	Description	
1	Charles Garrison	Video Conference	

Comments:

*** Your Referral is our Highest Compliment ***
Check Payable to MDStreski, LLC - Visa~Mastercard~Discover

Sub Total	$175.00
Shipping	$0.00
Tax	N/A
Total Invoice	$175.00
Payment	$0.00
Balance Due	$175.00

Federal Tax I.D.: 92-0194603

Terms: Net 30 Days @ 1.5%

Please KEEP THIS PART for YOUR RECORDS.
Please FOLD then TEAR HERE and RETURN THIS PART with PAYMENT.

Bill To:
P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Deliver To:
P. Gregory Haddad, Esquire
Bailey & Glasser, LLP
2855 Cranberry Square
Morgantown, WV 26508

Invoice

Invoice #: 17699
Inv.Date: 10/22/13
Balance: $175.00
Job #: 131016VC-M2
Job Date: 10/16/13
DB Ref.#:
Date of Loss: / /
Your File #:
Your Client:

Phone: (304) 232-9292
Fax: (304) 232-9375

Streski Reporting & Video Service

Morgantown Area, WV 26003

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Billed to:

Scott McKay
Nevin Benjamin McKay & Bartlett
303 W. Bannock Street
P.O. Box 2772
Boise, ID 83702-2772

Billed: 11/15/2013

Job # (34867B4) Invoice # 50492B5 Claim #

Case: Ballard v. Kerr
Witness: Trial Presentation Support
Date: 11/15/2013 11:00:00 AM

Charges:

Training 10/23/13 (2:00 - 3:30)	$75.00	1.5	$112.50
Trial Prep 11/1/13 (10:00 - 11:30)	$65.00	1.5	$97.50
Trial Prep 11/4/13 (1:00 - 3:30)	$65.00	2.5	$162.50
Setup & Prep 11/5/13 (7:45 11:00)	$65.00	2	$130.00
Trial 11/6/13 (8:00 - 5:15)	$85.00	7.75	$658.75
Trial 11/7/13 (8:30 - 5:00)	$85.00	6.75	$573.75
Trial 11/8/13 (9:00 - 3:00)	$85.00	5	$425.00
Trial 11/12/13 (8:45 - 4:15)	$85.00	6	$510.00
Trial 11/13/13 (9:00 - 5:00)	$85.00	6.5	$552.50
Trial 11/14/13 (9:00 - 2:15)	$85.00	3.75	$318.75

Sub Total	**$3,541.25**
Payments	**$0.00**
Balance Due	**$3,541.25**

(Return this section with check)

Billed to: Scott McKay
Invoice # 50492B5
Billed: 11/15/2013
Amount Due: $3,541.25

SOUTHERN OFFICE

421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
email courtreporters@m-mservice.com

Remit Payment [ ]

NORTHERN OFFICE

816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]

October 31, 2013

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

3768
BALL001/1003562

Invoice #1326

Attn: >
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#132655** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792
Documents: Subpoena Duces Tecum, Letter

Service Upon: Elmore Medical Center

Personal Service to Carol Wilmes, Legal Department Administrative Assistant, on October 29, 2013 at 3:27 PM,
at: St. Luke's Regional Medical Center, 190 E. Bannock St., Boise, ID 83702
by Spencer K. Kent

Attempt Service at Address Given $125.0
Advanced Funds (witness fee) $32.9
Mileage Fee $9.0
Service Fee $41.0

Total: $207.9

DUE ON RECEIPT: $207.90

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

BAILEY&GLASSER LLP

Lawyers
Internet www.baileyglasser.com
Phone (304) 594-0087 Fax (304) 594-9709

2855 Cranberry Square
Morgantown, WV 26508

February 12, 2014

VIA FEDERAL EXPRESS

Jeremiah A. Quane, Esq.
Quane Jones McColl, PLLC
US Bank Plaza
101 South Capitol Boulevard, Suite 1601
PO Box 1576
Boise, Idaho 83701

Re: *Ballard v. Kerr, et al.*

Dear Mr. Quane:

Please find enclosed the following checks:

1. A check made payable to Dr. Laurence in the amount of $2,000.
2. A check made payable to Dr. Coffman in the amount of $3,250.
3. A check made payable to Dr. Garrison in the amount of $1,295.

If you have any questions in this regard, please feel free to contact us.

Sincerely,

/s/ Farrah Caruthers

Farrah Caruthers
Paralegal

FC/

Enclosures

684230

Quane Jones McColl, PLLC
Attorneys at Law

Jeremiah A. Quane jaq@quanelaw.com

US Bank Plaza
101 S. Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, ID 83701
(208) 780-3939 Telephone
(208) 780-3930 Facsimile
www.quanelaw.com

September 17, 2013

VIA FACSIMILE (304) 594-9709
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

Your deposition of Dr. Coffmann lasted 2 ½ hours at the rate of $1,500 per hour. You owe him $3,250 which you must pay. His deposition was taken August 20, 2013 and you still have not paid him. Send me your check for $3,250 for my delivery to Dr. Coffman.

Very truly yours,

Jeremiah A. Quane

JAQ/ms

Quane Jones McColl, PLLC
Attorneys at Law

Jeremiah A. Quane jaq@quanelaw.com

US Bank Plaza
101 S. Capitol Boulevard
Suite 1601
P.O. Box 1576
Boise, ID 83701
(208) 780-3939 Telephone
(208) 780-3930 Facsimile
www.quanelaw.com

October 15, 2013

VIA FACSIMILE (304) 594-9709
P. Gregory Haddad
BAILEY & GLASSER LLP
2855 Cranberry Square
Morgantown, West Virginia 26508

Re: ***Ballard v. Kerr***
Our File No. 1107/25-938

Dear Mr. Haddad:

I have enclosed the invoice of Dr. Laurence for his deposition. By court order you are only responsible for one half or $2,000.00. Send me your check payable to Dr. Laurence.

Very truly yours,

Jeremiah A. Quane

JAQ/cf
Enclosure

Gregory N Laurence, MD
7475 Poplar Pike
Germantown, TN 38138
901-624-5605
www.lasermemphis.com

Invoice

Invoice #: Kerr Inv 3
Invoice Date: 10/8/2013
Due Date: 10/8/2013
Project:
P.O. Number:

Bill To:
Quane Jones McColl, PLLC
P O Box 1576
Boise ID 83701

Description	Hours/Qty	Rate	Amount
Deposition Minimum eight hour fee 10/2/13 Ballard v Kerr	8	500.00	4,000.00
		Total	$4,000.00
		Payments/Credits	$0.00
		Balance Due	$4,000.00

INVOICE

Tucker & Associates
Post Office Box 1625
Boise, ID 83701
Phone:208-345-3704 Fax:208-345-3713

Invoice No.	Invoice Date	Job No.
121213	2/4/2014	28088
Job Date	**Case No.**	
1/26/2014		
Case Name		
Ballard v. Kerr		
Payment Terms		
Due upon receipt		

Scott McKay
Nevin Benjamin McKay Bartlett, LLP
P.O. Box 2772
Boise, ID 83701

1 CERTIFIED COPY OF TRANSCRIPT OF:				
Proceedings 11-8-2013 (partial)	83.00 Pages	@	1.85	153.55
ORIGINAL TRANSCRIPT OF:				
Proceedings 11-8-2013 (Partial 33 Pages)	33.00 Pages	@	3.65	120.45
	TOTAL DUE >>>			**$274.00**

Now accepting American Express, Discover, Visa and Master Cards.

Tax ID: 820440907

Please detach bottom portion and return with payment.

Scott McKay
Nevin Benjamin McKay Bartlett, LLP
P.O. Box 2772
Boise, ID 83701

Invoice No. : 121213
Invoice Date : 2/4/2014
Total Due : $ 274.00

Remit To: **Tucker & Associates**
Post Office Box 1625
Boise, ID 83701

Job No. : 28088
BU ID : 1-BOISE
Case No. :
Case Name : Ballard v. Kerr

I N V O I C E

Susan G. Gambee
Official Court Reporter, Judge Deborah Bail
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 18
Registered Merit Reporter
SSN [redacted]
200 West Front Street
Boise, Idaho 83702
(208) 287-7581

February 28, 2014

Nevin, Benjamin, McKay & Bartlett,
LLP
303 W. Bannock
Boise, Idaho 83702

CASE		CASE NO.	PAGES:
CHARLES BALLARD v. BRIAN CALDER KERR, M.D., et al		CV OC 12-4792	
2-12-14	Transcript of Proceedings @$1.75 per page		46

TOTAL DUE $ 80.50

Pd.
2/28/14
gb.

* * * * *

Rebekah Parsons

From: Farrah Caruthers
Sent: Monday, March 24, 2014 12:01 PM
To: Rebekah Parsons
Subject: check request

Importance: High

Rebekah,

I hate to do this to you because I know you a really busy, but is there any way I could get two checks today? This is for the upcoming Ballard trial in Idaho. These are checks to the Judge's court reporters to get the trial transcripts from the first trial so that our witnesses can review their testimony prior to the second trial. Our co-counsel asked for the checks to be sent via Fed Ex today to give to the court reporters.

1. Christie Valcich $442.00
   13333 N. 5th Avenue
   Boise, ID 83714
   SSN: [redacted]
2. Tiffany Fisher $90.00
   (getting her info)

If you will let me know when they are ready, I can come and get them.

Again, sorry for the rush request. Thanks!!

Farrah

Farrah Caruthers :: Paralegal
209 Capitol Street :: Charleston WV 25301
Office 304.345.6555 :: **Fax** 304.342.1110

BAILEY&GLASSER LLP

March 16, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #136187

Attn: P. Gregory Haddad
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#136187** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CVOC12-04792
Attn: P. Gregory Haddad
Documents: Subpoena and Letter

Service Upon: Glen R. Groben, M.D.

Personal Service to Glen R. Groben, M.D. on March 13, 2014 at 10:20 AM,
at: Ada County Coroner, 5550 Morris Hill Road, Boise, ID 83706
by Kasey L. Vink

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

March 16, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #136189

Attn: P. Gregory Haddad
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#136189** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CVOC12-04792
Attn: P. Gregory Haddad
Documents: Subpoena and Letter

Billy R. Morgan, M.D. Served by leaving with Jane Larson

on March 13, 2014
at 9:47 AM, at 999 N. Curtis, Ste. 515, Boise, ID 83706
by Kasey L. Vink

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

April 1, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #136191

Attn: > P. Gregory Haddad
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

----<

Reference Job **#136191** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CVOC12-04792
Documents: Subpoena and Letter

Service Upon: Karl H. Olson, M.D.

Personal Service to Karl H. Olson, M.D. on March 25, 2014 at 11:30 AM,
at: 465 McKenna Dr., Mountain Home, ID 83647

Service Fee $125.00

Total: $125.00

DUE ON RECEIPT: $125.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

March 19, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #136190

Attn: P. Gregory Haddad
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#136190** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CVOC12-04792
Attn: P. Gregory Haddad
Documents: Subpoena and Letter

Howard B. Schaff, M.D. Served by leaving with Hallie Carter

on March 17, 2014
at 3:47 PM, at 877 W. Main St., Suite 603, Boise, ID 83702
by Kasey L. Vink

Service Fee $58.00

Total: $58.00

DUE ON RECEIPT: $58.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC

March 19, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #136192

Attn: P. Gregory Haddad
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#136192** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CVOC12-04792
Attn: P. Gregory Haddad
Documents: Subpoena and Letter

Bertram Stemmler, M.D. Served by leaving with Vanessa Vega

on March 18, 2014
at 10:18 AM, at 1055 N. Curtis Rd., Boise, ID 83706
by Kasey L. Vink

Service Fee $58.00
Attempt service at multiple addresses $45.00

Total: $103.00

DUE ON RECEIPT: $103.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

KIM I. MADSEN
Certified Shorthand Reporter
Ada County Courthouse
200 W. Front Street
Boise, Idaho 83702
208-287-7583
kivey@hotmail.com

August 27, 2014

NEVIN, BENJAMIN, MCKAY & BARTLETT
P.O. Box 2772
Boise, Idaho 83701

BALLARD VS. KERR, Case No. CVOC-12-4792, transcript of hearing held November 8, 2013 (Dr. Sorensen)

83 pages @2.00/page.....$166.00

AMOUNT PAID.....$166.00

I certify that the above account is correct, that the services were rendered as stated and the above amount is PAID IN FULL

KIM I. MADSEN
Official Reporter/Transcriber

Rebekah Parsons

From: Farrah Caruthers
Sent: Monday, March 31, 2014 3:57 PM
To: Rebekah Parsons
Cc: Joyce A. Andruzis
Subject: Re: another check

Okay, thanks! And I forgot to say this is for Ballard. :)

On Mar 31, 2014, at 3:56 PM, "Rebekah Parsons" <RParsons@baileyglasser.com> wrote:

> I am out tomorrow so I will try to get it ready before EOB today. I just got a super rush request so someone may have to get it off my desk tomorrow morning,

---

Farrah Caruthers :: Paralegal :: Bailey & Glasser LLP :: 304.345.6555

Rebekah Parsons :: Accountant :: Bailey & Glasser LLP :: 304.345.6555

From: Farrah Caruthers
Sent: Monday, March 31, 2014 3:53 PM
To: Rebekah Parsons
Cc: Joyce A. Andruzis; Farrah Caruthers
Subject: Fwd: another check

Rebekah, can you get this check ready by tomorrow and give it to Joyce?

Joyce, I'll prepare a cover letter and send it to you.

Thanks, girls!!

Farrah

Begin forwarded message:

> **From:** Debi Presher <dpresher@nbmlaw.com>
> **Date:** March 31, 2014 at 3:17:27 PM EDT

To: Farrah Caruthers <FCaruthers@baileyglasser.com>
Subject: another check

Farrah: The transcript of Cory Hoffman's testimony is ready to pick up. Can you send me a check for $200 made payable to Kim Madsen, court reporter? Thank you. Her address is c/o Ada county courthouse, 200 West Front Street, Boise, ID 83702. Thanks! Debi

Debi Presher
Legal Assistant
Nevin Benjamin McKay & Bartlett LLP
208.343.1000

Farrah Caruthers :: Paralegal
209 Capitol Street :: Charleston WV 25301
Office 304.345.6555 :: **Fax** 304.342.1110

<image001.jpg>

April 1, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #136191

Attn: > P. Gregory Haddad
BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#136191** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CVOC12-04792
Documents: Subpoena and Letter

Service Upon: Karl H. Olson, M.D.

Personal Service to Karl H. Olson, M.D. on March 25, 2014 at 11:30 AM,
at: 465 McKenna Dr., Mountain Home, ID 83647

Service Fee $125.00

Total: $125.00

DUE ON RECEIPT: $125.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

July 28, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #139352

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#139352** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Service Upon: Matthew B. Campbell, M.D.

Personal Service to Matthew B. Campbell, M.D. on July 25, 2014 at 5:41 PM,
at: 3803 W. Deerpath Dr., Boise, ID 83714
by Kristopher Hunt

Service Fee $60.00

Total: $60.00

DUE ON RECEIPT: $60.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

July 29, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #139355

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#139355** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792
Documents: Subpoena and Letter

Service Upon: Karl H. Olson, M.D.

Personal Service to Karl H. Olson, M.D. on July 24, 2014 at 9:38 AM,
at: 465 McKenna Dr., Mountain Home, ID 83647

Service Fee $133.00

Total: $133.00

DUE ON RECEIPT: $133.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

July 22, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #139353

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#139353** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Billy R. Morgan, M.D. Served by leaving with Jane Larsen

on July 22, 2014
at 8:40 AM, at Risk Management, 999 S. Curtis, Ste. 302, Boise, ID 83706
by Kasey L. Vink

Service Fee $60.00

Total: $60.00

DUE ON RECEIPT: $60.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

July 22, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #139354

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job **#139354** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Howard B. Schaff, M.D. Served by leaving with Hallie Carter

on July 22, 2014
at 9:25 AM, at 877 W. Main St., Suite 603, Boise, ID 83702
by Kasey L. Vink

Service Fee $60.00

Total: $60.00

DUE ON RECEIPT: $60.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC

July 22, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #139356

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #**139356** when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Bertram Stemmler, M.D. Served by leaving with Vanessa Vega

on July 22, 2014
at 8:51 AM, at 1055 N. Curtis Rd., Boise, ID 83706
by Kasey L. Vink

Service Fee $60.00

Total: $60.00

DUE ON RECEIPT: $60.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

July 22, 2014

TRI-COUNTY PROCESS SERVING L.L.C.
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #139351

BAILEY & GLASSER LLP
2855 CRANBERRY SQUARE
MORGANTOWN WV 26508
304-594-0087 Business
304-594-9709 Fax

Reference Job #139351 when remitting.

Charles Ballard vs Brian Calder Kerr, M.D.
Case Number: CV OC 12-04792

Documents: Subpoena and Letter

Dr. Glen R. Groben Served by leaving with Cassie Henderson

on July 22, 2014
at 8:58 AM, at Ada County Coroner, 5550 Morris Hill Road, Boise, ID 83706
by Kasey L. Vink

Service Fee $60.00

Total: $60.00

Job Notations: The Recipient refused the witness fee check.

DUE ON RECEIPT: $60.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING LLC!

Rebekah Parsons

From: Farrah Caruthers
Sent: Wednesday, August 27, 2014 2:04 PM
To: Rebekah Parsons; J. Roger Shealy
Cc: Philip G. Haddad
Subject: Ballard - check request

Rebekah,

Our co-counsel paid an invoice for us and needs reimbursed. Can you mail a check made payable to Nevin Benjamin McKay & Bartlett, LLP in the amount of $166.00? This is for a copy of a trial transcript. I believe you have their Tax ID info, but let me know if you need anything else.

Thanks!

Greg, this is for the remainder of Sorensen's testimony. Debi should have it today or tomorrow and will forward when received.

Farrah

Farrah Caruthers
Paralegal

Bailey & Glasser LLP
209 Capitol Street
Charleston WV 25301
T: 304.345.6555
F: 304.342.1110
FCaruthers@baileyglasser.com
www.baileyglasser.com

Rebekah Parsons

From:	Lisa Kiser
Sent:	Tuesday, September 09, 2014 4:39 PM
To:	Farrah Caruthers
Subject:	FW: 10SEP TO BOISE IDAHO
Attachments:	UA Flight number 6083 CRW ORD Departs 600 AM (Local Time) FARRAH LYNN CARUTHERS_8d1803efa1e24aeTHQWCCa1.ics; UA Flight number 1549 ORD BOI Departs 945 AM (Local Time) FARRAH LYNN CARUTHERS_8d1803efa1e24aeTHQWCCa2.ics; Rental Car Confirmation Number G2904340223 FARRAH LYNN CARUTHERS_.ics; Hotel Confirmation Number 83164342 FARRAH LYNN CARUTHERS_.ics; THQWCC.txt; THQWCC.pdf

Lisa Kiser
Administrative Assistant
Bailey & Glasser LLP
T: 304.345.6555

From: traciw@nationaltravel.com [mailto:airs@nationaltravel.com]
Sent: Thursday, August 07, 2014 12:11 PM
To: Lisa Kiser
Subject: 10SEP TO BOISE IDAHO

Created 8/7/2014 12:10 PM EDT

BAILEY AND GLASSER*99042
209 CAPITOL STREET
CHARLESTON WV 25301

If email attachments are not compatible with your company calendar configuration, click on the links below to add to your calendar.
For a single calendar entry click here

Travel Itinerary
Agency Booking Confirmation Number: **THQWCC**

Passenger Names
CARUTHERS/FARRAH LYNN BALLARD

Thank You. Traci W

Your travel arrangements and your opinions on our service are important to us. Please take a moment to fill our Report Card
National Travel is open 24 hours/365 days to provide you with toll-free assistance while you travel.
We appreciate your business.

UNITED AIRLINES - Flight Number 6083

Confirmation: DM83PY

Departure: Wed, 09/10/2014 6:00 AM
Departure City: Charleston, WV (CRW)
Departing Terminal:
Status: Confirmed

Arrival: Wed, 09/10/2014 6:27 AM
Arrival City: Chicago/OHare, IL (ORD)
Arrival Terminal: 2
Class of Service: H - Economy
Fare Basis Code: HAA14AFN

Equipment: ERJ

Travel Time: 1 hour(s) 27 minute(s)
Add flight to Calendar
Baggage Info
Operating Carrier Baggage Info
Weather

Miles: 416

Operated By EXPRESSJET AIRLINES DBA UNITED EXPRESS

Seat Assignments:CARUTHERS/FARRAH LYNN - 10C

UNITED AIRLINES - Flight Number 1549

Confirmation: DM83PY

Departure: Wed, 09/10/2014 9:45 AM
Departure City: Chicago/OHare, IL (ORD)
Departing Terminal: 1
Status: Confirmed

Arrival: Wed, 09/10/2014 12:19 PM
Arrival City: Boise, ID (BOI)
Arrival Terminal:
Class of Service: H - Economy
Fare Basis Code: HAA14AFN

Equipment: 738
Meal: Food for Purchase
Travel Time: 3 hour(s) 34 minute(s)
Add flight to Calendar
Baggage Info
Weather

Miles: 1437

Seat Assignments:CARUTHERS/FARRAH LYNN - 27A

Hertz Rent A Car

Confirmation: G2904340223

Pick-up Date: Wed, 09/10/2014 12:19 PM
Pick-up City: Boise, ID
Car Type: Midsize Car
Extra Day Rate: 35.70 USD
Membership Number: XXXXXXX807
Status: Confirmed

Drop-off Date: Fri, 10/3/2014 12:00 PM
Cost: 249.99 USD (Weekly)
Extra Hour Rate: 0.00 USD

Approximate Total: 1005.00 USD
Mile Rate Amount: 0.00 USD
Extra Hour and Mile Rate: 0.00 USD
Add car to Calendar

Hotel

Confirmation: 83164342

COURTYARD BOISE DWTN
222 BROADWAY AVE
BOISE
ID
83702
208-331-2700

Check-In Date: Wed, 09/10/2014
Location: Boise, ID
Membership Number:
Status: MK

Check-Out Date: Fri, 10/3/2014
Number of Rooms: 1

Cost per night: 0
Length of stay: 23 nights(s)
Add hotel to Calendar

View Map

Per night rate may not include all taxes and/or additional fees

RATE PER NIGHT: $129.00 USD
HOTEL IS GUARANTEED FOR LATE ARRIVAL TO CREDIT CARD
TO AVOID NO-SHOW CHARGES... CANCEL HOTEL BY 6 PM ON DAY OF ARRIVAL
LONG TERM STAY RATE CONFIRMED

Invoice Detail

	Base	Us Taxes	XT Taxes	
Name: CARUTHERS/FARRAH				
United Airlines Ticket: 0167408942082 Invoice Number: 408075001	376.74	28.26	22.60	Amount: $427.60
Transaction Fee: 8900613029093				Amount: $29.68
				Total Fare:USD $457.28

Your total has been charged to Visa ending in 1948
Approximate cost per air mile 0.23

General Remarks

For 24 hour enroute assistance please call 800 557 0842
Ticket is nonrefundable. Fees may apply for change or reissue
Cancel prior to departure to avoid losing full ticket amount.
DOCUMENT NUMBER 8900613029093/ BILLED $29.68
NO FREQUENT FLYER AVAILABLE.
THIS IS AN ELECTRONIC TICKET TRANSACTION
AN ELECTRONIC TICKET CANNOT BE TRANSFERRED TO ANOTHER CARRIER
PLEASE ADVISE NATIONAL TRAVEL IF YOU DO NOT TRAVEL
FOR ASSISTANCE IN OBTAINING A REFUND
WHEN CHECKING IN FOR YOUR FLIGHTS PLEASE PROVIDE
THE FOLLOWING CONFIRMATION NUMBER: UA DM83PY
YOU MUST PRESENT POSITIVE IDENTIFICATION AT THE CHECK IN

Please review your itinerary carefully to verify that names are spelled correctly and dates and destinations are correct. Notify National Travel immediately with any corrections to avoid airline penalties.
National Travel cannot be held responsible in the event of bankruptcy of airlines or other suppliers.
Check-In times are 90 minutes prior for domestic flights or 120 minutes for international flights.
Please present frequent flyer ID at check-in to ensure proper credits.
Airport Security procedure requires that all travelers obtain a boarding pass from the carrier to clear security checkpoints. Travelers should check-in with the carrier at their counter, kiosk, or website to obtain their boarding pass.

Carriage and other services provided by the carrier are subject to conditions of carriage, which are hereby incorporated be reference. These conditions may be obtained from the issuing carrier.

Tiffany Fisher, RPR, CSR No. 979
Court Reporter to Honorable Melissa Moody
200 West Front Street
Boise, Idaho 83702
(208) 287-7528
tfisher@adaweb.net

INVOICE

TO: Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT
303 West Bannock Street
Boise, Idaho 83702

INV. NO. TF14-071
INV. DATE: 09-15-2014
TAX ID: 45-3995517

DUE UPON RECEIPT

BALLARD v. KERR, MD Case No. CVOC-2012-4792

Testimony of Brian Calder Kerr, MD, held on November 6, 2013, before Honorable Deborah Bail, District Court Judge.

One certified copy	135 pages @ 2.00	$ 270.00
	TOTAL DUE	**$ 270.00**

INVOICE

Tucker & Associates
Post Office Box 1625
Boise, ID 83701
Phone:208-345-3704 Fax:208-345-3713

Invoice No.	Invoice Date	Job No.
121891	9/15/2014	28088
Job Date	**Case No.**	
1/26/2014		
Case Name		
Ballard v. Kerr		
Payment Terms		
Due upon receipt		

Scott McKay
Nevin Benjamin McKay Bartlett, LLP
P.O. Box 2772
Boise, ID 83701

1 CERTIFIED COPY OF TRANSCRIPT OF:			
Proceedings 11-13-2013	185.00 Pages	@ 1.85	342.25
	TOTAL DUE >>>		**$342.25**

Please visit www.etucker.net for your transcript and exhibit repository.

Pay your bill online. Go to www.etucker.net and click PAY HERE.

Tax ID: 820440907

Please detach bottom portion and return with payment.

Scott McKay
Nevin Benjamin McKay Bartlett, LLP
P.O. Box 2772
Boise, ID 83701

Invoice No. : 121891
Invoice Date : 9/15/2014
Total Due : $342.25

Remit To: **Tucker & Associates**
Post Office Box 1625
Boise, ID 83701

Job No. : 28088
BU ID : 1-BOISE
Case No. :
Case Name : Ballard v. Kerr

Commonwealth Medical Legal Services, Inc.

Invoice

DATE	INVOICE #
9/22/2014	8587

George R. Nichols, II, M.D.
6013 Brownsboro Park Blvd., Suite D
Louisville, KY 40207
Phone: 502-899-9837 Fax: 502-899-9840

BILL TO
Philip G. Haddad Bailey & Glasser 2855 Cranberry Square Morgantown, WV 26508

TERMS	CONTRACT #
Net 30	CMLS11-035

DESCRIPTION	RE: CASE	HOURS	RATE	AMOUNT
Airfare to Boise 09/17/2014	Ballard		1,298.20	1,298.20
Hotel			381.94	381.94
Meals			93.23	93.23
Sept 17 - Sept 19 Full Day Trial Fee		3	4,000.00	12,000.00
Airport Parking			39.00	39.00

Tax I.D. # 61-1315341

Total $13,812.37

Rebekah Parsons

From: airs@nationaltravel.com
Sent: Thursday, October 09, 2014 2:04 PM
To: Rebekah Parsons
Subject: HADDAD/PHILIP GREGOR - TMV12G - -

If you are having trouble reading this email, please click here.

National Travel Service, Inc.
100 Chase Tower
Charleston, WV 25301

Original Invoice

Itinerary - 408254060
Issue Date: 8/25/2014
Reservation ID: TMV12G

Today's Date: 10/9/2014

Traveler
HADDAD/PHILIP GREGOR

Company
Bailey & Glasser
Laidley Tower Ste 200
500 Lee St
Charleston WV 25301

Airline/Rail Information - 7411350469 - UNITED AIRLINES - Non-refundable

Friday, September 12, 2014	**UA Flight/Rail No. 4061**	
Depart: 0626A	Morgantown Municipal - Morgantown , WV (MGW)	**Class:** V - Fare Basis: V9S14NR
Frequent Flyer Number:	**Miles Flown:** 140	
Friday, September 12, 2014	**UA Flight/Rail No. 4061**	
Arrive: 0725A	Washington Dulles Intl - Washington , DC (IAD)	
Friday, September 12, 2014	**UA Flight/Rail No. 0798**	
Depart: 0805A	Washington Dulles Intl - Washington , DC (IAD)	**Class:** E - Fare Basis: EAA00AFY
Frequent Flyer Number:	**Miles Flown:** 589	
Friday, September 12, 2014	**UA Flight/Rail No. 0798**	
Arrive: 0859A	O'Hare Intl Arpt - Chicago , IL (ORD)	
Friday, September 12, 2014	**UA Flight/Rail No. 1067**	
Depart: 0945A	O'Hare Intl Arpt - Chicago , IL (ORD)	**Class:** E - Fare Basis: EAA00AFY
Frequent Flyer Number:	**Miles Flown:** 1437	
Friday, September 12, 2014	**UA Flight/Rail No. 1067**	
Arrive: 1219P	Boise Municipal Arpt Gowen Field - Boise , ID (BOI)	

Base Fare:	$580.46
US Tax:	$43.54
XT Tax:	$26.60
This fare was charged to a Visa card ending with 1948 Total Cost:	$239.60

Exchanged Ticket Information - 7347415916 - Issued 3/21/2014
Old Ticket Cost $611.00 / Penalty $200.00
Transaction Fee - 0613181784

National Travel's Service Fee is charged at the time of ticketing and is non-refundable.
This fee is charged for performing the service of making your reservation and is independent of the completion of travel.
This fee is completely reimbursable by your company or government agency.

This transaction fee was charged to a Visa card ending with 1948 Total Cost: $29.68

Total charges billed by National Travel: $269.28

Agency Information
NATIONAL TRAVEL
100 Chase Tower, 707 Virginia St. E.
Charleston, WV 25301
800-557-0842

Report Card

National Travel would like your feedback. Please take a moment to fill out our Report Card.

Outlook Calendar

Click here to add your Outlook Calendar

Secure Flight and You

The Transportation Security Administration (TSA) requires you, when making a reservation, to provide your full name, date of birth and gender as it is shown on the identification document that you plan to present at airport security check-points. This information is not optional. The purpose of collecting this information is to allow TSA to perform terrorist watch list matching that is currently being done by each airline. Failure to provide the required elements in advance could: (1) inhibit your ability to get a boarding pass either at home or at the airport until the information has been provided; and, (2) require you to undergo additional airport security screening.

ALERT!

Checked Baggage policies vary by airline, destination, frequent flyer status, booking class, bag size and weight. Fees may apply if (1) you plan to check a bag or (2) you plan to carry sports equipment or an odd-shaped item or (3) your bag exceeds airline weight limits.
For more information please visit our website at WWW.NATIONALTRAVEL.COM

IMPORTANT INFORMATION FOR TRAVELERS WITH ELECTRONIC TICKETS-PLEASE READ!!

Airport Security procedure requires that all travelers obtain a boarding pass from the carrier to clear security checkpoints. Travelers should checkin with the carrier at their counter, kiosk, or website to obtain their boarding pass.

Carriage and other services provided by the carrier are subject to conditions of carriage, which are hereby incorporated by reference. These conditions may be obtained from the issuing carrier.

Please visit http://www.vtitin.com/vto/eticket/arc/ for Legal Notices.

UNITED

Baggage Receipt

Issue Date: 10 SEP 2014 CRW ATO

A STAR ALLIANCE MEMBER

Baggage Document
0162604473304

Ticket Number
0167408942082

Description	Qty	Fees
First Bag Fee	1	$25.00
Overweight Fees (51 - 70 lbs.)	1	$100.00

Method of Payment
MasterCard XXXXXXXXXXXX1051

Cardholder Name
FARRAH CARUTHERS

BAGGAGE FEES Total Fees **USD $125.00**

Confirmation: DM83PY

Excess Baggage Terms and Conditions:
- All excess baggage is subject to space availability.
- Receipt for payment must be presented at bag check.
- For refunds or adjustments, see a United representative.

Carrier	Routing
UA	CRW - ORD
UA	ORD - BOI

AGENT REFERENCE: GG ESC BAG

DELTA

CARUTHERS/FARRAHLYNN
NOT VALID FOR
TRANSPORTATION

BOI DL SLC DL ATL DL CRW
PIECE 25.00
EBC 25.00

USD 25.00

USD25.00

PASSENGER RECEIPT 01
04OCT14 0066 US
DL/KI BOI FTO

PSGR TICKET 0067414232051

CAXXXXXXXXXXXX1051/08815G

1 006 8252031637 5

EXCESS BAGGAGE TICKET

THIS IS YOUR RECEIPT

FOR CONDITIONS OF CONTRACT - SEE PASSENGER TICKET AND BAGGAGE CHECK

NOT VALID FOR TRAVEL

1 006 8252031637 5

The GEC Group
5555 N Star Ridge Way
Star, ID 83669

cory@thegecgroup.com

INVOICE

Date	Invoice No.
10/28/2014	3095

Terms	Due Date
Net 30	11/27/2014

Bill To

J.B. Perrine
Bailey & Glasser

Ballard - BALLARD v. kerr

Amount Due	Enclosed
$4,655.00	

Please detach top portion and return with your payment.

Description	Hours	Rate	Amount
• Economic Consulting Services Provided in September 2014			
• TESTIFYING/CONSULTING EXPERT (Hofman): Review file. Meet with Scott. Trial. Qs for cross of Frankie.	9.5	490.00	4,655.00

Trial time: 4 hours x 490.00 = $1,960.00

You can pay with a credit card or directly from your bank account by clicking on the Pay Now button when viewing this invoice online. If you choose to pay with a paper check, mail your check to my Idaho office. Make all payments payable to The GEC Group, Inc. (82-0477356). Past due amounts will be subject to interest charges at 1.5% per month. If you have any questions about this invoice, please call me at 312-890-6709. Thanks for your business. Cornelius

Total $4,655.00

Read/Approved
Mail 10/31/14

ORIGINAL

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Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF HEARING

TO: THE ABOVE ENTITLED PARTIES/PLAINTIFFS and their attorneys of record:

YOU WILL PLEASE TAKE NOTICE that on the 17th day of November, 2014, at 3:00 p.m. of said day, or as soon thereafter as counsel can

be heard, before the Honorable Deborah A. Bail, at the Ada County Courthouse, Boise, Idaho, the undersigned will call up for hearing before the Court Defendants' Application for Stay of Execution or Enforcement of the Judgment Entered October 15, 2014.

DATED this 30th day of October, 2014.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 2014, I served a true and correct copy of the foregoing NOTICE OF HEARING by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896

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tsj@quanelaw.com

Attorneys for Defendants/Appellants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff/Respondent,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants/Appellants.

Case No. CV OC 1204792

APPLICATION FOR STAY OF EXECUTION OR ENFORCEMENT OF THE JUDGMENT ENTERED OCTOBER 15, 2014

Defendants move the Court for its immediate Order staying execution on the Judgment of October 15, 2014 up to and through the decision of the Idaho Supreme Court on Defendants' Appeal and for the period of time set forth in Idaho Appellate Rule

13(15) following the decision of the Supreme Court. This application is supported by the attached Original Supersedeas Bond of National Liability and Fire Insurance Company and Rule 62(d), I.R.C.P.

Defendants request the Court to grant the application on an ex parte basis within fourteen (14) days of filing this application,

Otherwise Defendants request a hearing on the application per the accompanying notice of hearing.

The Supersedeas Bond complies with Idaho Law and the requirements of Idaho Appellate Rule 13(15).

DATED this 30th day of October, 2014.

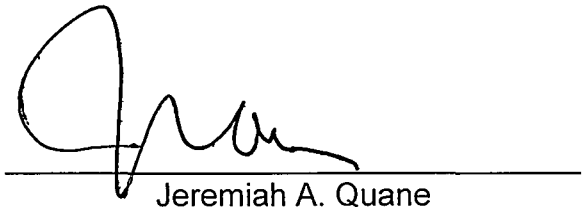
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2014, I served a true and correct copy of the foregoing APPLICATION FOR STAY OF EXECUTION OR ENFORCEMENT OF THE JUDGMENT ENTERED OCTOBER 15, 2014 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 2855 Cranberry Square Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709
James B. Perrine BAILEY & GLASSER LLP 3000 Riverchase Galleria, Suite 905 Birmingham, Alabama 35244 Telephone (205) 988-9253 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (205) 733-4896



Jeremiah A. Quane

ORIGINAL

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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 SUPERSEDEAS BOND FOR THE DEFENDANTS' APPEAL TO THE IDAHO SUPREME COURT

WHEREAS, the National Liability and Fire Insurance Company, Omaha, Nebraska, desires to give an undertaking for a stay of execution of the Judgment entered October 15, 2014 in favor of the Plaintiff against the Defendants, now,

THEREFOR, the undersigned surety and Insurance Company, does hereby obligate itself, to the Plaintiff Charles Ballard, under said statutory obligations in the sum of $3,790,436.00 plus 36% of said amount. National Liability and Fire Insurance Company is bound to the full obligation of Idaho Appellate Rule 13, (15), that requires this undertaking. National Liability and Fire Insurance Company agrees to pay on behalf of the defendants – Appellants, all sums found to be due and owing by the Appellants by reason of the outcome of the appeal within thirty (30) days of the filing of the remittitur from the Supreme Court, up to the full amount of the bond or undertaking.

Executed with our seal this 29th day of October, 2014.

NATIONAL LIABILITY AND FIRE INSURANCE COMPANY

By: Everett Anderson
Everett Anderson, Attorney-in-Fact

WITNESS By: Ted Lanham ISBA # 23426

POWER-OF-ATTORNEY

NATIONAL LIABILITY & FIRE INSURANCE COMPANY

3024 HARNEY STREET
OMAHA, NEBRASKA 68131
(402) 916-3000

73LF100070

KNOW ALL MEN BY THESE PRESENTS: That this Power-of-Attorney is not valid unless the bond, which this Power-of-Attorney authorizes, has been duly executed by the Principal(s) and the Attorney-in-Fact. This Power-of-Attorney specifies **THE AUTHORITY OF THE ATTORNEY-IN-FACT** and **THE LIABILITY OF THE COMPANY, WHICH SHALL NOT EXCEED:**

FIVE MILLION ONE HUNDRED FIFTY-FOUR THOUSAND NINE HUNDRED NINETY-TWO AND 96/100 DOLLARS ($5,154,992.96.00)

NATIONAL LIABILITY & FIRE INSURANCE COMPANY, a Connecticut corporation, having its principal office in the City of Omaha, state of Nebraska, does hereby make, constitute and appoint Everett Anderson in the City of Omaha, County of Douglas, State of Nebraska its true and lawful attorney-in-fact, at Omaha, in the State of Nebraska to make, execute, seal and deliver for and on its behalf, and as its act and deed, any and all undertakings, bonds, or other such writings obligatory in the nature thereof, provided that the liability of the Company as surety on any such bond executed under this authority shall not in any event exceed the sum shown above.

THIS POWER VOID IF ALTERED OR ERASED

The acknowledgement and execution of any such document by the said Attorney-In-Fact shall be as binding upon the Company as if such bond had been executed and acknowledged by the regularly-elected officers of this Company.

This Power of Attorney is granted, and is signed and sealed by original signature, under and by the authority of the following Resolution adopted by the Executive Committee, as duly authorized by the Board of Directors of NATIONAL LIABILITY & FIRE INSURANCE COMPANY, at a meeting duly called and held on the 6th day of August, 2014:

> Resolved, That the President, any Vice President or the Secretary, shall have the power and authority to (1) appoint Attorneys-in-fact, and to authorize them to execute on behalf of this Company bonds and other undertakings and (2) to remove at any time any such Attorney-in-fact and revoke the authority given him."

In Witness Whereof NATIONAL LIABILITY & FIRE INSURANCE COMPANY has caused its official seal to be hereunder affixed, and these presents to be signed by its Senior Vice President this 29th day of October, 2014.

NATIONAL LIABILITY & FIRE INSURANCE COMPANY

BY Philip M. Wolf
(Name) Philip M. Wolf
(Title) Senior Vice President

STATE OF NEBRASKA }
COUNTY OF DOUGLAS } ss.:

On this 29th day of October, 2014, before me, a Notary Public, personally appeared Philip M. Wolf who being by me duly sworn, acknowledged that he signed the above Power of Attorney as Senior Vice President of said NATIONAL LIABILITY & FIRE INSURANCE COMPANY and acknowledged said instrument to be the voluntary act and deed of said corporation.

GENERAL NOTARY STATE OF NEBRASKA
BARBARA A. DAHLHAUSER
MY COMMISSION EXPIRES
October 18, 2016

Barbara A Dahlhauser
Notary Public, Nebraska

1. THIS POWER DOES NOT AUTHORIZE EXECUTION OF BONDS OF NE EXEAT OR ANY GUARANTEE FOR FAILURE TO PROVIDE PAYMENTS OF ALIMONY SUPPORT OR WAGE LAW CLAIMS, OR BONDS FOR CRIMINAL APPEARANCE.
2. THIS POWER DOES NOT AUTHORIZE THE EXECUTION OF BONDS FOR LOAN GUARANTEES.

This Power Can Only Be Used in The State of IDAHO

This Power Can Only Be Used For The Following Obligee CHARLES BALLARD

Principal or case reference BRIAN CALDER KERR, MD, SILK TOUCH LASER, LLP ET AL.

Brad/Oppesn
pyle 11/5/14

NO. 1152 FILED
A.M. P.M.

NOV 04 2014

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

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Scott McKay (ISB #4309) smckay@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

NOTICE OF PLAINTIFF NON-OPPOSITION TO STAY OF EXECUTION OR ENFORCEMENT OF JUDGMENT

ORIGINAL

TR

Comes now the Plaintiff, Charles Ballard, by counsel, in response to APPLICATION FOR STAY OF EXECUTION OR ENFORCEMENT OF THE JUDGMENT ENTERED ON OCTOBER 15, 2014, filed by the Defendants. In light of the Application and supporting documentation supplied therein by the Defendants, the Plaintiff hereby advises the Court that he has no opposition to entry of an order staying execution or enforcement of judgment as applied for by the Defendants.

Respectfully Submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

And

BAILEY & GLASSER LLP

P. Gregory Haddad

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2014, I served a true and correct copy of the foregoing NOTICE OF PLAINTIFF NON-OPPOSITION TO STAY OF EXECUTION OR ENFORCEMENT OF JUDGMENT by delivering the same to the following via facsimile and first class U.S. Mail, postage prepaid:

Jeremiah A. Quane
Terrence Jones
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 1576
Boise, Idaho 83701-0519

P. Gregory Haddad

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 ORDER ON DEFENDANTS' APPLICATION FOR STAY OR ENFORCEMENT OF JUDGMENT ENTERED OCTOBER 15, 2014

Defendants' having filed Application for Stay or Enforcement of the Judgment entered October 15, 2014 supported by the Supersedeas Bond of National Liability and Fire Insurance Company and the Plaintiff having filed Notice of

non-opposition to the Application, in which the Plaintiff declares that he has no opposition to entry of an Order staying execution or enforcement of judgment as applied for by the Defendants, and the Court being fully advised, it is hereby ordered and decreed that execution or enforcement of the Judgment of October 15, 2014 is stayed up to and through the decision of the Idaho Supreme Court on Defendants appeal and for the period of time set forth in Idaho Appellate Rule 13(15) following the decision of the Supreme Court.

DATED this 5th day of November, 2014.

Deborah A. Bail

Honorable Deborah A. Bail

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2014 I served a true and correct copy of the foregoing ORDER ON DEFENDANTS' APPLICATION FOR STAY OR ENFORCEMENT OF JUDGMENT ENTERED OCTOBER 15, 2014 by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (304) 594-9709
Jeremiah A. Quane QUANE JONES McCOLL, PLLC US Bank Plaza 101 South Capitol Boulevard Suite 1601 P.O. Box 1576 Boise, Idaho 83701 Telephone (208) 780-3939 Attorneys for Defendants	[X] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile (208) 780-3930

Clerk of the Court

DISTRICT COURT 4TH JUDICIAL DISTRICT OF THE STATE - OF - IDAHO IN AND FOR ADA COUNTY

Date appeals

David Z. Nevin (ISB#2280) dnevin@nbmlaw.com
Scott McKay (ISB#4309) smckay@nbmlaw.com
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	CASE NO. CVOC12-04792 **NOTICE OF HEARING**

Plaintiff Charles Ballard, through his attorneys, hereby gives notice that he will call for hearing consideration of his Memorandum of Costs as a Matter of Right, Discretionary Costs and Adjusted Previous Award of Sanctions on December 3, 2014 at 2:30 p.m. before the Honorable

ORIGINAL

Deborah A. Bail.

DATED this 7th day of November, 2014.

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
David Z. Nevin
Scott McKay

BAILEY & GLASSER LLP

P. Gregory Haddad
James B. Perrine

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 7th, 2014, I served a true and correct copy of the foregoing ***Notice of Hearing*** by facsimile to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519

Scott McKay

Bail/Tara mtg 11/21/14

NO. _____
A.M. _____ FILED P.M. 3:38

NOV 10 2014

CHRISTOPHER D. RICH, Clerk
By NATRINA THIESSEN
DEPUTY

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 DEFENDANTS MOTION TO DISALLOW PLAINTIFF'S MEMORANDUM OF COSTS

Defendants move the Court to disallow a portion of the Plaintiff's costs as a matter of right and the Plaintiff's discretionary costs.

Costs as a Matter of Right

Defendants object to item number 2 in Plaintiff's Memorandum of Costs as a Matter of Right entitled Service of Summons and Complaint and Subpoenas in the

D

Amount of $2,453.90, except for the amount paid for service of the petitions of Plaintiff's two out-of-state attorneys for admission to practice and the Summons and Complaint in the sum of $94.00.

Rule 54(d)(1)(c)(2), I.R.C.P., provides "actual fees for service of any pleading or document in the action whether served by a public officer or other person." The Rule does not specify or refer to service of a subpoena, which it could have recited if service of subpoenas was intended as a recoverable cost. In the alternative, the sum of $2,453.90, less $94.00, is for service of subpoenas on witnesses for the trial in November of 2013, trial scheduled April 8, 2014 and the trial of September 2014. The costs of service of subpoenas for the trial of November 2013 were subsumed and included in the Plaintiff's Memorandum of Attorney Fees and Costs of February 18, 2014 and the verbal ruling of the Court at the hearing of March 12, 2014 for the award of $64,324.54 to the Plaintiff for costs associated with the mistrial.

Subpoenas were served on witnesses for the trial scheduled April 8, 2014, that was vacated on the emergency Motion of the Defendants. An award of costs for the postponement of a trial is governed by Rule 54(d)(3), I.R.C.P. It provides in pertinent part that the Court in its discretion may impose and tax costs and expenses occasioned thereby against the moving party as a condition to such postponement. The Defendant's Emergency Motion, Plaintiff's Response to the Motion and the certified original transcript of the court reporter, Susan Gambee for the court hearing on the Motion of April 2, 2014 do not specify or provide as a condition for granting the Motion the imposition of costs and expenses against the Defendants. Subpoenas were served by the Plaintiff for the trial of September 2014, on Dr. Campbell, Dr. Olson, Dr. Morgan, Dr. Schaff, Dr. Stemmler and

Dr. Groben. July Dr. Groben testified. The cost of service of these Subpoenas is $60.000 for all witnesses except the service on Dr. Olson of $133.00. Since only Dr. Groben testified the total for service of subpoenas for the trial of September 2014 is $60.00. In the alternative, the total cost of service of subpoenas for the September trial is $433.00, if the Court Rules that service of subpoenas is recoverable even though the witnesses served did not testify at trial.

Discretionary Costs

Defendants object to Plaintiff's Memorandum of Costs seeking an award for discretionary costs. There has been no showing by the Plaintiff that the requested costs were necessary and exception costs reasonably incurred *and* that the interest of justice demand that these costs should be assessed against the adverse party.

I.R.C.P. 54(d)(1)(D) sets out that discretionary costs "may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party."

If costs claimed to be exceptional are of the type commonly incurred in a personal injury or wrongful death action, the Supreme Court has affirmed the rejection of those costs by the trial court. ***Fish v. Smith***, 131 Idaho 492, 960 P.2d 175 (1998).

Plaintiff seeks discretionary costs for their experts, Drs. Nichols and Sorensen, stating, without empirical support, that Dr. Sorensen was unique and that "a vast majority of the trial was consumed" by the cross-examination of Plaintiff's experts.

The Court of appeals has held that claims for discretionary fees that are claimed as the "testimony of the witness was 'instrumental' and that the witness was examined 'at some length by both parties,'" is an insufficient basis for the award for costs

which are exceptional and reasonably incurred. ***Evans v. State***, 135 Idaho 422, 18 P.3d 227 (Ct. App. 2001).

Plaintiff seeks discretionary costs for the depositions of witnesses he elected to take, despite these witnesses having disclosures which Defendants consistently maintained were the sum total of their opinions. Plaintiff should not be awarded these rare and exceptional expenses, as the very nature of Drs. Laurence and Garrison's disclosures makes it clear that deposing them would not be necessary. The necessity of these at depositions is a requirement under Rule 54(d)(1)(D).

Plaintiff seeks discretionary costs for his lawyer and his lawyer's assistant's travel, room and board. It was Plaintiff who elected to retain out-of-state counsel. The interests of justice are not served by awarding discretionary costs to a party who selects counsel from another state. Mr. Haddad knew, when he took this case, that any trial would be in Boise and that the travel, room and board costs associated with that trial would be a cost of doing that business.

Plaintiff seeks discretionary costs for videoconferencing and video deposition charges, but makes no argument whatsoever that these expenses are necessary and exceptional. The Rule draftsman made clear in Rule 54(d)(1)(C)(9), that costs for reporting and transcribing could be recovered. There is no law or support for the exceptional charge of the video recording or video conferencing of these witnesses, which are charges over and above the costs for reporting and transcribing.

Plaintiff seeks discretionary costs for the exorbitant travel, lodging and meal expenses of his expert witness, Dr. Nichols. The rules set out the costs which are to be awarded for each expert. There is no exception carved out, nor would the interest of

justice be served, to make extraordinary payments to a witness for traveling from out of town.

The Idaho Supreme Court has approved, as the correct interpretation of the term "exceptional," a district court's denial of expert witness fees, travel and lodging expenses for expert witnesses and attorneys, and administrative costs on the ground that the use of such experts and the other expenses were commonly incurred in serious personal injury actions. The ***Fish*** court made clear that medical experts routinely testify in serious personal injury actions which are litigated: "This is the very 'nature' of these sorts of cases. Similarly, travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are not exceptional but, on the contrary, are common 'in a case of this nature." ***Fish***, 131 Idaho at 493-94, 960 P.2d at 176-177.

The Plaintiff put into evidence Exhibits 7 and 8 that contained the reports of Drs. Morgan, Stemmler and Schaff. The report of Dr. Morgan stated in part "she now has what appears to be a probable fat emboli syndrome."

The radiology reports of Drs. Stemmler and Schaff for the chest x-rays of Krystal Ballard taken at Elmore Medical Center and Saint Alphonsus Regional Medical Center both provided that similar findings may be seen in setting of fat embolism and findings may represent fat embolism. It was the Plaintiff who limited the issue on fat embolism that would become part of the proof at trial. Plaintiff's expert Dr. Nichols had read these reports and records before he testified at the first trial in November of 2013 and he was fully aware of the proof that Krystal Ballard may have fat embolism. As justification for additional expert fees of Dr. Nichols (discretionary costs) and in the narrative for discretionary costs it states in part that Dr. Garrison, a defense pathologist

was deposed two times after it was determined at his first deposition that he had additional opinions that had not been supplemented. Both depositions focused on opinions of Dr. Garrison that Krystal Ballard had fat embolism on the basis for the opinions. His opinions were in conformity with the reports of Drs. Morgan, Stemmler and Schaff that Dr. Nichols had evaluated before the trial in November of 2013. These factors and events demonstrate that the claim for additional expert fees of Dr. Nichols were not exceptional costs or necessary and reasonably incurred.

Item A for AMFS (Dean Sorensen, M.D.) of $11,812.37 for discretionary costs is absurd and was not necessary or an exceptional cost reasonably incurred.

Dr. Sorensen testified at the trial about AMFS which he said stood for American Medical Forensic Association. This testimony covered and included the following subjects:

1. AMF initially contacted him to review the case and he accepted.
2. AMF sent him a fee schedule.
3. AMF established the fees and not Mr. Haddad.
4. His fees were paid by AMF.
5. AMF takes a cut or percentage of the fees it is paid by Plaintiff's attorney.
6. AMF is the one that pays Dr. Sorensen.
7. AMF will pay for his trial testimony.

There was no proof that the fees charged by AMF and paid by Plaintiff's attorney were reasonable and in keeping with the fees ordinarily and customarily charged in Boise, Idaho. The engagement of a company by Plaintiff's attorney to locate and hire

an expert witness is not a necessary or exceptional cost reasonably incurred that allows for an award of discretionary costs. The charges of AMF are not expert witness fees even though paid by Plaintiff's attorney.

The Court had already entered a verbal ruling at the hearing of March 12, 2014 for an award of costs and expenses of the Plaintiff as a result of the mistrial on November 14, 2013. The fact of a mistrial does not create or cause the trial in September of 2014 to qualify for discretionary costs. At the trial in November of 2013, the Plaintiff called the following witnesses:

1. Dr. Kerr;
2. Dr. Sorensen;
3. Dr. Nichols;
4. Plaintiff;
5. Cornelius Hofman; and
6. Video of Janelle Buchanan.

Before the trial of November 2013, the Plaintiff had deposed Dr. Kerr, Susie Kerr, Briana Dumas, all of the Defendants disclosed and retained expert witnesses and Dr. Nichols had reviewed and evaluated the report of the Ada County Coroner and the autopsy report of Dr. Groben, and Dr. Sorensen had reviewed all of the medical records of the case. At the trial of September 2014, the Plaintiff called the same witnesses that were called in the first trial and additional witnesses Dr. Groben, Susie Kerr and Vincent Brooks. At the trial in September of 2014, the same exhibits were used by the Plaintiff that were used at the first trial.

The testimony of the Plaintiff, Hofman, Dr. Nichols, Dr. Sorensen and Dr.

Kerr, at the September 2014 trial was a repeat of an basically the same as their testimony at the first trial. Since their testimony at both trials was basically the same, the mistrial did not add anything that would result in their testimony at the second trial to be exceptional or necessary. As for Dr. Groben, his testimony basically followed his autopsy report in all respects and was essentially a repeat of the autopsy report, that the Plaintiff's experts Dr. Nichols and Sorensen were familiar with before and during the first trial. The same is true as respects the trial testimony of Susie Kerr whose deposition the Plaintiff had taken before the first trial. Using witness Vincent Brooks on the issues of damages was not exceptional or necessary that gave rise to discretionary costs. Such witnesses are common in personal injury and death cases.

Allowing discretionary costs for the September 2014 trial would constitute a repeat of the verbal cost award of $64,324.54 ordered by the Court at the hearing of March 12, 2014, or a doubling up of costs against the Defendants.

As mentioned several times in this document, there are limitations on the right to recover discretionary costs, and the mere fact they were incurred does not qualify them as legitimate discretionary costs. In trial all of medical malpractice cases, experts are required by the Plaintiff to establish a prima facia case and it is common and ordinary for their experts to change professional fees well in excess of the amount allowed as costs as a matter of right. It is also a common and usual practice of attorneys in medical malpractice cases to take the depositions of an opponents disclosed experts that is authorized by Rule 26(b)(4)(A)(1)(iii), I.R.C.P. In these matters, Rule of Civil Procedure 26(b)(4)(c), provides for the payment of the experts fees for the time spent testifying at a deposition. These Rules cover and relate to standard and ordinary procedures and are

not designed or meant to be exceptional. The combination of these Rules and the customary practices and procedures utilized in medical malpractice cases are applicable to paragraphs A and B of the Plaintiff's Memorandum of Costs for discretionary costs and should be denied by the Court.

Paragraph D of the Plaintiff's Memorandum of Discretionary costs, entitled videoconferencing/video deposition charges in the amount of $5,357.15. In many medical malpractice cases in Idaho, it is not uncommon for a party to take depositions by video means. Taking of depositions by video is frequently used and is not an exceptional cost or a necessary cost. When Plaintiff's attorney took the video depositions in this case, he was exercising an option authorized by the Rules of Civil Procedure, but taking the depositions by this means was not necessary or essential to the presentation of the Plaintiff's case.

The narrative of Plaintiff's attorney in support of the claim for these costs, item D, does not give a reason or justification for an award of these costs on a discretionary basis.

When Mr. Haddad initially took this case he knew he would have to travel to Boise, Idaho from West Virginia for trial and other pre-trial matters, and that travel costs, lodging and transportation would be incurred for himself and his paralegal Farrah Caruthers, if he elected to have her attend the trial as an option. The same is true as respects the travel expense of Plaintiff's expert Dr. Nichols, in addition to the travel expense covered by his travel expense allowed as a matter of right. Plaintiff's attorney knew that if Dr. Nichols was retained as an expert and used as a trial witness, the cost of his travel from Louisville, Kentucky to Boise would exceed the travel expense authorized

as costs as a matter of right. It is obvious the Plaintiff approved these costs and accepted them regardless of the outcome of the trial. It was not necessary to have Farrah Caruthers attend the trial and in most medical malpractice trials in Idaho, paralegals do not attend trials. The defense did not have a paralegal at the trial. The use of a paralegal is an option and luxury selected by Mr. Haddad but not necessary or exceptional. The hiring of Dr. Nichols from Louisville, Kentucky was also an option and luxury that was not necessary or exceptional because there are numerous other pathologists who could have been hired that would not have travel expenses like Dr. Nichols. This point is demonstrated by the trial testimony of Dr. Groben that basically duplicated the trial testimony of Dr. Nichols. In the narrative of Mr. Haddad, he extolls the qualifications and status of Dr. Groben.

Paragraph F of the claim for discretionary costs is an option that Plaintiff's attorney saw fit to employ but it was not necessary or required. It does not equate to an exceptional cost.

The narrative of Mr. Haddad for discretionary costs does not explain, justify or support the costs advanced in paragraph F, nor does it support, justify and explain the basis for the costs designated in paragraph G.

The cost of transcripts is not necessary or an exceptional cost, but one that is available as an option. The Court has access to the testimony and dialogue contained in the transcripts that Plaintiff's attorney can refer to without having possession of the transcripts. The use of these transcripts is simply a convenience for Plaintiff's attorney and nothing more and their cost does not rise to the level of exceptional and necessary.

The narrative of Mr. Haddad for an award of discretionary costs is void of specific facts, proof, foundation and justification for discretionary costs, except for the

following unsupported conclusory statements.

1. Costs were necessary, reasonable and exceptional and incurred as a consequence of the retrial.

2. The case was not defended as a simple medical malpractice action.

3. Because of the unique characteristics of the case, the Plaintiff was forced to present expert witnesses whose education, training and experience went far beyond that of a typical expert witness.

4. The case is exceptional simply by virtue of the fact that the initial case ended in a mistrial occasioned by the Defendants' actions at a point in the original trial where Defendants had the benefit of hearing all of the Plaintiff's case, a second trial had to be continued due to injury to one of the Defendants and ultimately a retrial which lasted three weeks, although a vast majority of trial time was consumed by Defense counsel examining witnesses which further increased the costs of Plaintiff's experts, who were forced to undergo many, many hours of cross-examination.

5. Discretionary costs should be awarded, especially in a situation where Defendants made no offer and forced Plaintiff to incur extraordinary costs in prosecuting the case, despite fairly clear and straightforward issues which should not have been in dispute.

None of these general and vague statements are supported by proof, evidence, events and explanations for awards of discretionary costs.

Specifically, the trial lasted 12 trial days that included jury selection, opening statements, recesses, jury instruction conference and closing arguments that was within the time scheduled by the Court. Taking these factors into account, a 12 day

malpractice jury trial is not exceptionally long, especially when the Plaintiffs prove and want a jury damage award in the range of 3.7 million dollars. In the experience of undersigned counsel, medical malpractice trials frequently exceed 12 trial days.

This case was routine, ordinary and standard medical malpractice case and it was defended as a routine medical malpractice action in which undersigned has participated many times. The case did not have unique characteristics. It basically involved the following:

1. Whether Dr. Kerr and Silk Touch adequately cleaned, disinfected and sterilized the equipment used in the operation on Krystal Ballard.

2. Whether the gram negative rods found in the right buttock of Krystal Ballard were introduced during the operation of Dr. Kerr and if so, whether they resulted in the death of Krystal Ballard.

3. Standard and usual issues of the standard of health care practice for Dr. Kerr and Silk Touch and proximate cause.

The Plaintiff's experts gave testimony that was not unusual and did not go far beyond that of a typical expert, taking into account the basic issues of the case. The Defense did not put on proof by the testimony of experts that Krystal Ballard had fat embolism and the Plaintiff had to rebut the evidence of this because it was contained in the records that the Plaintiff put in evidence, in the first place.

The cross examination of Plaintiff's experts did not take many, many hours.

There is no proof or support that a lack of an offer by the Defendants would have avoided a trial.

The matters described in paragraph 4 above, constitute conjecture and

speculation by Mr. Haddad. They lack proof, justification, and reasons why discretionary costs should be awarded.

In the narrative portion of Plaintiff's Memorandum for discretionary costs, it is asserted that Defendants made no offer and forced Plaintiff to incur extraordinary costs in prosecuting the case, despite fairly clear and straight forward issues which should not have been in dispute. This statement is totally irrelevant to the issue of discretionary costs and carries not probative worth for the Court's decision. Since the statement has been asserted by counsel for the Plaintiff, the Defendants would like the Court to know that the only actual offer of settlement of the Plaintiff was in an amount more than the combined jury award for damages, economic and non-economic.

Furthermore, the statement that Defendants made no offer does not establish or prove that an offer by the Defendants, even if made, would have resolved the case and not forced the Plaintiff to incur extraordinary costs in prosecuting the case. The issue of no offer by the Defendants should also be considered by the Court in light of the deposition and trial testimony of the Plaintiffs' only standard of health care practice expert Dr. Sorensen, and I quote:

> Q. I guess it's your opinion that gram negative rods were injected into the buttocks of Krystal Ballard during Dr. Kerr's procedure. Correct?
>
> A. Correct.
>
> Q. Isn't it true that's just an assumption on your part?
>
> A. Yes.
>
> Q. Isn't it true that there's no proof by any means of the fact that at the time of surgery these gram negative bacteria went into her body. Isn't that true?

A. Yes.

There is also the trial testimony of Dr. Groben who performed the autopsy of Krystal Ballard, and I quote:

> Q. Okay. You said just moments ago you had no idea how bugs got into the tissue in the right buttocks. Correct?
>
> A. That's right.
>
> Q. Okay. When you say that as the pathologist conducting the autopsy, are you saying that you cannot determine or conclude that the bugs got into the right buttocks from instruments used by Dr. Kerr?
>
> A. That's right.

Dr. Sorensen testified at trial that the guidelines of the Federal CDC (Centers for Disease Control) and the State of Idaho Department of Health and Welfare are authoritative and should be followed as a basis for his opinion that Dr. Kerr violated the standard of practice that was the cause of death of Krystal Ballard. Counsel for the Plaintiff asked Dr. Sorensen questions on these subjects and Dr. Sorensen expressly answered the questions, even though Idaho Code 6-1014 prohibits these questions and answers and provides that they are not admissible in any proceeding or action concerning a determination of liability of a health care practitioner. Both Plaintiff's attorney and Dr. Sorensen violated Idaho Code 6-1014. These are examples and reasons why Dr. Kerr and Silk Touch believed it was appropriate to go to trial, in addition to the favorable opinions and trial testimony of their expert witnesses Drs. Stiller and Lundeby, witness Briana Dumas and Dr. Kerr himself.

All of these factors weigh heavily against an award of discretionary costs to the Plaintiff.

Rule 37(e), I.R.C.P., only applies to an Order of the Court made pursuant to these Rules. The mistrial was ordered on the basis that Dr. Stiller testified on the subject of pertinent or persistent infections in the office in violation of the Court Order granting Plaintiff's Motion in Limine that prohibited proof and testimony on infections, or lack of infections, in other patient's treated surgically by Dr. Kerr. There are no Rules of Civil Procedure that relate to, cover or embrace Motions in Limine and Orders of the Court on Motions in Limine. The term Motions in Limine are not found in the Rules of Civil Procedure. Rule 37(e) only applies to Orders made pursuant to the Rules of Civil Procedure and therefore the basis and reason for the mistrial was not predicated on a violation of any Rule of Civil Procedure. Rule 47(u) provides for a mistrial if the Court determines an occurrence at trial has prevented a fair trial. The Rule goes on to provide if the Court determines that a mistrial was caused by the deliberate misconduct of a party or attorney, the Court may require the adverse party or the attorney or both, to pay the reasonable expenses including attorney fees incurred by the opposing party resulting from such misconduct. Rule 4(u) is the only Rule of Civil Procedure that pertains to a mistrial and the sanctions for causing a mistrial.

When the Court ordered the mistrial, no determination was made that the mistrial was caused by the deliberate misconduct of Dr. Kerr, Silk Touch and their counsel and there was absolutely no evidence or proof that the mistrial was caused by any Defendant and their counsel as required by Rule 47(u).

At the Court hearing of February 2, 2014 on Plaintiff's Motion for Sanctions due to the mistrial ordered November 14, 2013, the Court entered a verbal order of sanctions for the jury fees to be paid to Ada County by the Defendants. It is the

Defendants' position that this sanction is prohibited by the last sentence of Rule 48(a), I.R.C.P. that states "the cost of a jury shall not be taxed as costs to any party in any civil action."

Defendants respectfully request the Court to deny in full the Plaintiff's Memorandum for Discretionary Costs and the sum of $2,453.90, less the sum of $94.00, for costs as a matter of right.

DATED this 10th day of November, 2014.

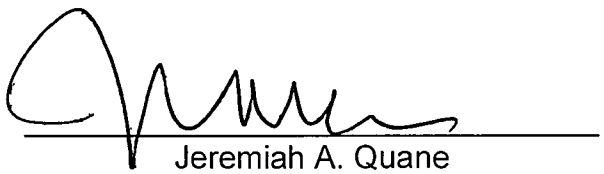
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2014, I served a true and correct copy of the foregoing DEFENDANTS MOTION TO DISALLOW PLAINTIFF'S MEMORANDUM OF COSTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709



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Attorneys for Plaintiff

Bail / Tary 11-28-14 JD

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISALLOW MEMORANDUM OF COSTS

Plaintiff Charles Ballard opposes Defendants' Motion to Disallow Costs. Under the Idaho Rules of Civil Procedure, the "prevailing party" is entitled to recover costs both as a matter of right and at the discretion of the Court. I. R. C. P. 54(d)(1)(C) and 54(d)(1)(D). In this case,

Plaintiff was unquestionably the prevailing party as the Defendants were found negligent, reckless, and judgment was entered for $3,790,436.00 in Plaintiff's favor. Furthermore, the circumstances of the trial, including a mistrial caused by Defendants, led Plaintiff to reasonably incur necessary and exceptional costs that Defendants should pay in the interests of justice. On October 28, 2014, pursuant to Idaho Rule of Civil Procedure 54, Plaintiff filed a verified memorandum of costs as a matter of right, discretionary costs and adjusted previous award of sanctions in which he set forth all costs he seeks to recover. Through their motion, Defendants now oppose certain costs listed by Plaintiff. In opposition to Defendants' motion and in further support of their memorandum of costs, Plaintiff states the following:

I. **Costs to Plaintiff as a Matter of Right**

Pursuant to Idaho Rule of Civil Procedure 54, Plaintiff filed a verified memorandum of costs as a matter of right, discretionary costs and adjusted previous award of sanctions ("Memorandum of Costs"). See Pl.'s Mem. of Costs attached as Exhibit 1. In that memorandum, Plaintiff set forth the costs he seeks both as a matter of right and at the discretion of the Court for costs that were necessary, reasonable and exceptional.

Idaho Rule of Civil Procedure 54(d)(1) entitles Plaintiff to recover certain costs as a matter of right, including "[a]ctual fees for service of **any pleading or document** in the action whether served by a public officer or other person." I.R.C.P. 54(d)(1)(C)(2) (emphasis added). Defendants make the specious argument that Plaintiff cannot recover the costs for the service of subpoenas because subpoenas are not specifically listed as a "document" covered by the rule. Yet, the rule itself lists only "pleadings" and otherwise applies to the service of "any...document" without specifying further any other type of document that would be covered. Such broad language was clearly meant to encompass all documents that would require "service"

in the course of litigation. Other than the summons or complaint, the most common documents requiring service in the course of litigation are subpoenas. To exclude them from the rule impermissibly renders the words "any document" practically meaningless. See State v. Yzaguirre, 144 Idaho 471, 478, 163 P.3d 1183, 1190 (2007) ("In interpreting statutory language, all the words of the statute must be given effect if possible, and the statute must be construed as a whole."). To give effect to the word "document" in the rule, subpoenas must be included and Plaintiff is entitled as a matter of right to $2,453.90 for the costs he incurred for the service of subpoenas in this case. Additionally, Plaintiff is entitled to all other costs listed in the Memorandum of Costs as a matter of right. See Exhibit 1 at pp. 2-4.

II. **Discretionary Costs**

Idaho Rule of Civil Procedure 54(d)(1)(D) provides that "[a]dditional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." I.R.C.P. 54. The grant or denial of discretionary costs is "committed to the sound discretion of the district court." Zimmerman v. Volkswagen of America, Inc., 128 Idaho 851, 857, 920 P.2d 67, 73 (1996), cert. denied, 520 U.S. 1115, 117 S.Ct. 1245, 137 L.Ed.2d 327 (1997).

In his Memorandum of Costs, Plaintiff requested an award of discretionary costs on the ground that such costs were necessary, reasonable and exceptional and incurred as a consequence of the retrial of this action and should, in the interest of justice, be assessed against the Defendants. Included in Plaintiff's Memorandum of Costs were fees for additional expert witness fees and travel expenses, both of which may be awarded as discretionary costs:

> Discretionary costs under Rule 54(d)(1)(D) can include travel expenses along with other expenses such as photocopying, faxes, postage and long distance

> telephone calls. Automobile Club Ins. Co. v. Jackson, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993). This Court ... has found that a trial court may assess additional expert witness fees under I.R.C.P. 54(d)(1)(D). Turner v. Willis, 116 Idaho 682, 686, 778 P.2d 804, 808 (1989).

Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc., 133 Idaho 180, 187, 983 P.2d 834, 841 (1999). Defendants cite Fish v. Smith for the proposition that such costs are not exceptional in a personal injury case for the purposes of Rule 54(d)(1)(D). Fish v. Smith, 131 Idaho 492, 960 P.2d 175 (1998). Yet, it is clear that the Court in that case simply applied its discretion to the facts in that case and the appeals court upheld the lower court's decision, as is required by the Rule. Richard J. & Esther E. Wooley Trust, 133 Idaho at 187 ("[Plaintiff] reads Fish as a determination that expert fees and travel costs are not exceptional. This is incorrect. Fish merely applied the abuse of discretion standard and concluded that the district court did not abuse its discretion."). Applying its discretion to the facts in this case, this Court should uphold Plaintiff's request for discretionary costs.

As stated in the Memorandum of Costs, this case was not defended as a simple medical malpractice action. The Defendants identified three standard-of-care witnesses, as well as Dr. Kerr himself. All four of these physicians are within the same specialty of cosmetic surgery, and are located both within and outside of the State of Idaho. Defendants did not call one of the experts, Dr. Gregory Laurence, yet a fee for Dr. Laurence's deposition was incurred by Plaintiff for this cumulative expert.

Further, despite an autopsy performed by an objective and non-retained pathologist, Dr. Glen Groben, Ada County Coroner, whose findings under Idaho law may be deemed to be the prima facie cause of death, Defendants nonetheless identified a pathologist, Dr. Garrison to rebut the cause of death identified in the autopsy report. The deposition of the pathologist occurred on

two occasions after it was determined at his first deposition that he had additional opinions that had not been disclosed. Defendants did not call Dr. Garrison at trial.

Because of the unique characteristics of the case, the Plaintiff was forced to present expert witnesses whose education, training and experience went beyond that of a typical expert witness. Dr. Dean Sorensen had the unique experience of being an inspector of various cosmetic surgery facilities, which brought to bear his experience of being able to identify the standard of care applicable to the entire Treasure Valley area. Similarly, Dr. Nichols is a nationally-recognized expert who has authored a number of different articles, on issues directly relevant to the case.

In addition, the actions of one of the parties can make a case exceptional for the purposes of awarding discretionary costs by making the case unnecessarily long or complicated. Puckett v. Verska, 144 Idaho 161, 169, 158 P.3d 937, 945 (2007). In Puckett, a medical malpractice case, the Court upheld the lower court's award of discretionary costs to the Plaintiff, including expert fees and travel costs. The award came after two trials, the first having ended in a mistrial. Id. The Court found that the costs requested by Plaintiff were exceptional given the "long course of litigation and complexity of this case" and that the lower court was not required to evaluate the costs requested, item by item, but instead "the district court's findings as to the general character of the travel expenses, expert witness fees and other litigation costs were sufficient." Id.

Accordingly, this case is exceptional simply by virtue of the fact that the initial case ended in a mistrial occasioned by the Defendants' actions at a point in the original trial where Defendants had the benefit of hearing all of the Plaintiff's case; a second trial had to be continued due to injury to one of the Defendants, and ultimately a retrial that lasted three weeks, although a vast majority of trial time was consumed by defense counsel examining witnesses,

thereby further increasing the costs of Plaintiff's experts. The Plaintiff's expert charges are in line on an hourly basis for what the Defendants' experts charged on an hourly basis, and therefore, were reasonable in cost. It is in the interest of justice that these discretionary costs should be awarded, especially in a situation where Defendants made no offer and forced Plaintiff to incur extraordinary costs in prosecuting the case, despite fairly clear and straightforward issues which should not have been in dispute. Likewise, costs for travel by the attorneys and the cost for video depositions are properly included in the overall exceptional litigation costs.

Finally, Defendants argue without meaningful elaboration that Dr. Sorensen's testimony at trial, related to the standard of practice, somehow violated Idaho Code § 6-1014. How this is pertinent to the determination of discretionary costs available to the Plaintiff is not clear. What is clear is that Idaho Code § 6-1014 is not in any way applicable to Dr. Sorensen's testimony and therefore his testimony and the evidence presented at trial did not violate the statute.

As stated in his Memorandum of Costs, Plaintiff is entitled to $19,018.91 in costs as a matter of right. In addition, Plaintiff requests $47,028.07 in discretionary costs on the ground that the costs were necessary, reasonable and exceptional and incurred as a consequence of the retrial of this action and should in the interest of justice be assessed against the Defendants as stated above. Therefore, Plaintiff respectfully requests that the Court deny Defendants' Motion to Disallow Costs and enter an Order granting the costs requested by Plaintiff in his verified memorandum of costs as a matter of right, discretionary costs and adjusted previous award of sanctions filed with this court on October 28, 2014.

DATED this 26 day of November, 2014.

Respectfully Submitted,

BAILEY & GLASSER LLP

By: _____
P. Gregory Haddad

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
David Z. Nevin
Scott McKay

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 2014, I served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISALLOW PLAINTIFF'S MEMORANDUM OF COSTS** delivering the same to the following via facsimile:

Jeremiah A. Quane, Esq.
Terrence S. Jones, Esq.
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
P. O. Box 1578
Boise, Idaho 83701
Facsimile: 208-780-3930

Scott McKay

Time	Speaker	Note
02:30:45 PM		**CVOC12-4792 Ballard v Kerr Mo/Fees & Costs**
02:30:52 PM	Judge	Calls case
02:30:54 PM	Scott McKay	on behalf of the Plaintiff
02:31:00 PM	Jeremiah Quane	on behalf of the Defendants
02:31:02 PM	S. McKay	Argues Motion for Fees and Costs
02:40:32 PM	J. Quane	Argues in opposition to Motion for Fees and Costs
03:09:59 PM	Judge	will issue a written decision

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER, and LIPO OF BOISE, Defendants.	Case No.: CV OC 2012-04792 ORDER RE: COSTS AND FEES

Krystal Ballard was a previously healthy young Staff Sergeant in the United States Air Force who died as a result of contaminated instruments used by Dr. Brian Kerr during a liposuction/fat transfer performed at his office at Silk Touch Laser, LLP. The jury concluded that Dr. Kerr and Silk Touch were negligent and reckless in the cleaning, disinfecting and sterilization of the reusable equipment used in the procedure and awarded damages of $3,790,431.00. One of the most critical pieces of evidence was a slide made by the pathologist who performed Krystal's autopsy which showed the deadly infection inside a fat transfer injection site, with no tracing of bacteria from the surface of the skin to the infection point. If the infection had come from the surface, there would have been signs from the surface of infection. There was none. Krystal had nothing else medically wrong with her except the deadly bacteria

injected during the procedure. The instrument became infected during the procedure. The angle of infection matched the angle at which Dr. Kerr injected fat and occurred in an injection site, below the skin. The plaintiff prevailed and is entitled to all costs of right and to discretionary costs as will be addressed hereafter.

The defense triggered a mistrial the first time this case went to trial on the first day of the defense case, after eight days of testimony, when their witness blatantly disregarded the Court's *in limine* order barring purported evidence of a lack of prior infections. The "evidence" of a lack of prior infections came from a review performed by Dr. Kerr's wife, who had no medical training or background, of undisclosed records of Silk Touch. The records were never disclosed by the defense to the plaintiff in spite of express requests and represented an inadmissible "summary" which did not meet any of the requirements of IRE 1006. Considerable time had been consumed the first morning of the first trial discussing the problems presented by the purported "summary": the lack of disclosure of any of the underlying data allegedly summarized, its preparation by an untrained person, lack of clarity about whether the procedures allegedly summarized were, in fact, similar, and the lack of any proper foundation for the purported evidence of lack of prior infections. While the defense had violated another order *in limine* barring reference to insurance when Mr. Quane engaged in extensive questioning of life insurance deductions on Krystal's paycheck, apparently insinuating that, since S.Sgt. Charles Ballard had received life insurance proceeds as a result of his wife's death, he was somehow not entitled to seek redress from a jury, that violation did not present the serious concerns caused by the grave misconduct of the defense witness, Dr. Gregory Stiller. Dr. Stiller, in direct violation of the Court's *in limine* order testified in response to a defense question asking why he held the opinion that contaminated instruments were not the cause of S.Sgt. Krystal Ballard's death:

"...Let alone the fact of that no pertinent or persistent infections in the office. There is no history of the fact that...." His answer ended only with the interjection by plaintiff's counsel of an objection. Dr. Stiller based his opinion on the excluded "summary" which was excluded because it did not meet even the most minimal standards for admissible evidence. While the defense, Mr. Quane, engaged in questionable conduct during the trial in violating a different *in limine* order, this violation was such grave misconduct that the Court granted a mistrial and indicated that sanctions would be awarded to, as much as possible, alleviate the harm caused by the misconduct. There is no credible evidence that there was a prior lack of infection because no medically trained person ever reviewed the purported records. The underlying data was never disclosed. It is not clear which results from which procedures were reviewed. It was prejudicial to imply that there was any legitimate, credible evidence of a lack of prior infections for the same procedure. The plaintiff was seriously prejudiced. The defense had a complete preview of the entire plaintiff's case. The defense can bill hourly and can recover its expenses regardless of outcome—not so the plaintiff. Krystal's husband, SSgt. Charles Ballard, had to come to Boise, obtain leave and stay here for two separate trials—a situation which should never have occurred. He was, and is, an active duty member of the United States Air Force.

Mr. Quane is an extremely experienced counsel. He was well aware of the length of time spent addressing the motion in limine, its critical importance and the reasons for the court's ruling. He has handled expert witnesses for decades. He should have been well aware of the risk presented when an expert who has not testified in any previous trial has based previous opinions on evidence that has been declared inadmissible and that was fundamentally flawed. The triggering of the mistrial was grave misconduct which gave the defense a significant and unfair advantage. It is the kind of misconduct which discredits the entire system of justice. The

foundational rule of the Idaho Rules of Civil Procedure is that the purpose of all of the rules is "to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1(a). The defense misconduct violated every aspect of the Rule. At the time the mistrial was declared, the Court indicated its intention to try to mitigate the unfairness caused by the defense deliberate misconduct. The Court ordered that the defense reimburse the plaintiff for the expenses which were incurred for the first trial and for attorney fees pursuant to I.R.C.P. 47(u) but a written Order was not entered for three reasons: first, to give the Court the chance to review the matter more fully when the record was more complete and to assess, in colder light, what sanctions, beyond costs incurred, should be reasonably assessed; two, how they might be crafted to avoid unfairness to either side, and finally, to preclude further delay in the retrial by defense interlocutory motions. The second trial had already been continued once because of the defendant's bicycle accident. Further delay would have occasioned further unwarranted harm to the plaintiff. The kind of conduct engaged in by the defense in this case was so outrageous that this Court has simply not seen such a pattern of conduct in over three decades of trying complex cases and it seemed like a colder, more measured analysis would be prudent. In the cold light of further review, sanctions remain warranted.

A. Costs of Right.

The plaintiff prevailed and is entitled to all costs of right. Under I.R.C.P. 54(d)(1), costs of right are awarded as follows:

1. Court filing fees. Filing fees are awarded of $88.00.

2. Actual fees for service of any pleading or document in the action whether served by a public officer or other person. Service fees are awarded of $2,453.90 in accordance with the rules. The Rule mandates costs for the service of "any pleading or document." The defense cites

no legal support for its argument rejecting the portion attributable to service of subpoenas. Subpoenas are a document for which service is required and is a permissible cost of right.

3. Travel expenses of witnesses. Travel fees for witnesses computed at the rate provided by I.R.C.P. 54(d)(1)(C)(4) are awarded in the amount of $567.00.

4. Costs for Preparation of Trial Exhibits. Costs for preparation of trial exhibits are awarded to the plaintiff in the amount of $500.00.

5. Reasonable expert witness fees for an expert who testifies at a deposition or at a trial of an action. Reasonable expert witness fees, capped at $2,000 per witness, are authorized under I.R.C.P. 54(d)(1)(C)(8) and are awarded in the amount of $5,96.00.

6. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action. The plaintiff is awarded costs of right for depositions of $9,450.01.

Total Costs of Right Awarded: $19,018.91.

B. Discretionary Costs. Under I.R.C.P. 54(d)(1)(D),additional costs may be awarded by the Court, in its sound discretion, "upon a showing that said costs were necessary and exceptional costs reasonably incurred" which "should in the interest of justice be assessed against the adverse party." In this case, the Court will award all costs associated with the expert testimony offered in the first trial because the trial was rendered a nullity as a result of deliberate misconduct by the defense and because the interests of justice require that the defense not profit by this misconduct any more than can be avoided. Nothing erases the fact that the plaintiff was placed in a position of providing a preview of its entire case but the plaintiff's recovery should not be further reduced by charges occasioned by the misconduct of the defense which required him to duplicate his proof.

On the first morning of trial, the Court granted the not uncommon motion *in limine* precluding references to insurance. On his examination purportedly to question the amount of damages, Mr. Quane deliberately questioned a witness on Krystal's pay stub which showed deductions for life insurance. To preclude a reoccurrence, the Court ordered that those references be redacted in the second trial. Although it was a violation of the in limine order, it was one which could have been addressed with a cautionary instruction to the jury.

Trial costs and expert fees for the first trial, less costs of right awarded above, are awarded in the amount of $48,121.51. SSgt. Ballard's travel fees and costs from his duty station in Florida to attend the first trial, including lodging and meals, are awarded in the amount of $4,324. 54 as a discretionary cost since they are reasonable, necessary and exceptional and, in the interests of justice, should be awarded to him as a result of the defense misconduct in this case. It is prudent and necessary for counsel to obtain transcripts of the prior trial, they are also awarded in the amount of $1,664.75 since they are exceptional costs which should, in the interests of justice, be awarded to the plaintiff.

As to the costs incurred with respect to expert witness fees in the second trial, those are not awarded as discretionary costs. The type of discovery counsel had to engage in is typical for a medical malpractice case. It is not uncommon to incur deposition costs and expenses in connection with a witness who does not testify. The Court has already awarded the maximum amount for each expert witness fee as provided for by I.R.C.P. 54(d)(1)(C)(8) as costs of right. The additional costs sought do not meet the requirement that they be "exceptional" costs. Travel costs connected with the second trial, additional witness fees are customary costs which do not fit the requirements for an award of discretionary costs since they will, presumably, be covered by the damage award fixed by the jury.

This Court has made every effort to allow the costs connected to the first trial to be covered as discretionary costs because they were reasonable, necessary and "exceptional" since the first trial was rendered worse than a nullity by the defense misconduct. No court could fully address the prejudice which may have resulted to the plaintiff by being placed in a position where they provided a full preview of their case to the defense. As much as possible however, the Court has endeavored to place plaintiff in the position that the plaintiff would have been had he been afforded one fair trial. These costs are also properly awarded on the equal ground provided by I.R.C.P. 47(u). On both grounds, costs are awarded as provided herein.

C. Attorney fees.

The mistrial in this case was triggered as a result of deliberate misconduct which came out of the direct violation of an *in limine* order. Dr. Stiller testified at his deposition about conclusions made from the spurious "study." When asked his opinion by the defense, he went straight into the area that the Court had barred *in limine*, after extensive discussion and argument. He had been repeatedly warned to stay away from the area. He gave his opinion that there was no negligence in the defendants' cleaning, sterilizing and disinfecting of reusable equipment used in the fat transfer by referring to the inadmissible "summary": "let alone the fact of that no pertinent or persistent infections in the office. There is no history of the fact that—". His answer was stopped by the plaintiff's objection. The information he based his opinion on was gathered in an unknown fashion by Dr. Kerr's wife who had no medical training--it is not clear if the information did relate to the same procedure--the underlying "data" supporting the "summary" was never produced for inspection even though requested by the plaintiff. The absence of similar accidents always requires a showing of relevance and a significant foundation establishing true similarity which was never made in this case. There are important, serious,

evidentiary requirements which must be established to permit this type of evidence—none of which were shown in this case. The requirements for admission of a summary under IRE 1006 were never met. The unsupported implication that there had never been prior infections in Dr. Kerr's office warranted the mistrial which was granted.

Under I.R.C.P. 47(u):

Rule 47(u). Declaration of mistrial Sanctions.

> After trial is commenced, at any time prior to the rendering of a verdict, the court on its own motion or upon motion of any party may declare a mistrial if it determines an occurrence at trial has prevented a fair trial. If the court determines that a mistrial was caused by the deliberate misconduct of a party or attorney, the court may require the adverse party or the attorney, or both, to pay the reasonable expenses including attorney fees incurred by the opposing party or parties resulting from such misconduct.

The Court ordered the mistrial and sanctions. Upon further reflection, the Court withdraws the order assessing jury fees and costs.

This was an extremely unusual situation. The defense had engaged in a prior violation of an *in limine* order which the Court intended to address by way of a cautionary instruction but to imply, without any solid basis, that there was absence of prior infections was a level of deliberate misconduct which necessitated a mistrial. As a result of the mistrial, the defense had a full preview of the plaintiff's case. The plaintiff incurred expenses related to a trial which ended midway. Plaintiff's counsel expended time for which they would not be fully recompensed even if the second trial was fair and did result in a verdict for the plaintiff. It is not uncommon for cases to be defended in a way that drives up costs unnecessarily but the deliberate misconduct which caused a mistrial in this case was beyond the pale. Having reviewed the plaintiff's application for attorney fees, attorney fees are awarded in connection with the first trial in the amount of $70, 566.50.

Counsel is directed to submit an Amended Judgment reflecting the Court's ruling on costs and fees. Counsel's attention is drawn to I.R.C.P. Rule 54(a):

> **Rule 54(a). Judgments Definition Form.**
>
> Judgment as used in these rules means a separate document entitled Judgment or Decree. A judgment shall state the relief to which a party is entitled on one or more claims for relief in the action. Such relief can include dismissal with or without prejudice. A judgment shall not contain a recital of pleadings, the report of a master, the record of prior proceedings, the court's legal reasoning, findings of fact, or conclusions of law. ... A judgment shall begin with the words JUDGMENT IS ENTERED AS FOLLOWS: , and it shall not contain any other wording between those words and the caption. A judgment can include any findings of fact or conclusions of law expressly required by statute, rule, or regulation.

(emphasis added).

It is so ordered.

Dated this 23rd day of January, 2015.

Deborah A. Bail
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of February, 2015, I mailed (served) a true and correct copy of the within instrument to:

SCOTT MCKAY
ATTORNEY AT LAW
PO BOX 2772
BOISE ID 83701

GREGORY HADDAD
ATTORNEY AT LAW
6 CANYON RD STE 200
MORGANTOWN WV 26508

JEREMIAH QUANE
ATTORNEY AT LAW
PO BOX 1576
BOISE ID 83701

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT - STATE OF - IDAHO - IN AND FOR ADA COUNTY

Appeal Office - mjr 2/13/15

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 OBJECTION TO PLAINTIFF'S PROPOSED SUPPLEMENTAL JUDGMENT

Defendants object to the proposed Supplemental Judgment of the Plaintiff on the grounds that the Judgment does not specify or designate the amounts awarded for costs of the trial and the fees and costs resulting from the mistrial.

No objection is asserted to the total amount of these awards of

$143,696.21.

The Order of the Court of February 3, 2015 for costs and fees provides for costs as a matter of right of $19,018.91 and award for discretionary costs and attorney fees of $124,677.30 as a result of the mistrial.

The Supplemental Judgment should reflect these separated and distinct awards.

DATED this 12th day of February, 2015.

QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2015, I served a true and correct copy of the foregoing OBJECTION TO PLAINTIFF'S PROPOSED SUPPLEMENTAL JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709

Jeremiah A. Quane

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D.; SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, d/b/a SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

SUPPLEMENTAL JUDGMENT

(Re: Costs and Fees)

JUDGMENT IS ENTERED AS FOLLOWS:

(a) the Plaintiff Charles Ballard shall recover from the Defendants Brian Calder Kerr, M.D., and Silk Touch Laser LLP the sum of One Hundred Forty Three Thousand Six Hundred and Ninety Six Dollars and Twenty One Cents ($143,696.21); and

(b) interest shall accrue on the foregoing amount at the applicable statutory rate from this date forward until paid in full.

DATED this 12th day of February, 2015.

Honorable Deborah A. Bail
District Judge

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: Ballard v. Kerr, Docket No. 42611

Notice is hereby given that on Monday, November 17, 2014, I lodged a transcript of 118 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 11/14/2014 Appeal

David Cromwell
Tucker & Associates

cc: sctfilings@idcourts.net
PDF format of completed files emailed to Supreme Court

KW

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720
(208) 334-2616

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., Defendants-Appellants.	Docket No. 42611

NOTICE OF TRANSCRIPT OF 2463 PAGES LODGED

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Deborah A. Bail, District Court Judge.

This transcript contains hearing held on: 2/12/14, 3/12/14, 3/16-10/3/14

DATE: February 2, 2015

Susan G. Gambee

Susan G. Gambee, Official Court Reporter
Official Court Reporter,
Judge Deborah Bail
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 18
Registered Merit Reporter

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720
(208) 334-2616

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants-Appellants.	Docket No. 42611

NOTICE OF TRANSCRIPT OF 31 PAGES LODGED

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Boise, Honorable Deborah A. Bail, District Court Judge.

This transcript contains:

11-05-14	**Partial Transcript of Proceedings -- Motions in Limine**

DATE: October 23, 2014

Tiffany Fisher, Official Court Reporter
Official Court Reporter to Judge Melissa Moody
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 979
Registered Professional Reporter

KW

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants-Appellants.	Supreme Court Case No. 42611 CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

I FURTHER CERTIFY, that the following documents will be submitted as CONFIDENTIAL EXHIBITS to the Record:

1. Jury Questions.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 23rd day of March, 2015.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JUDGE DEBORAH A. BAIL
Deputy Clerk: Tara Villereal
Court Reporter: Susan Gambee

September 17 – October 3, 2014

CHARLES BALLARD,
Plaintiff,
vs.
BRIAN KERR and SILK TOUCH LASER,
Defendants.

Case No. CV-OC-2012-04792

EXHIBIT LIST
JURY TRIAL

Appearances:
Counsel for Plaintiff: Scott McKay & Greg Haddad
Counsel for Defendant: Jeremiah Quane & Terry Jones

BY	NO.	DESCRIPTION	STATUS	DATE
Pltf.	1.	Curriculum Vitae of Dean Sorensen	Admitted	09/17/14
Pltf.	2.	Curriculum Vitae of George R. Nichols II	Admitted	09/18/14
Pltf.	4.	Curriculum Vitae of Cornelius A. Hofman	Admitted	09/23/14
Pltf.	5.	Medical Record and Chart-Silk Touch	Admitted	09/17/14
Pltf.	5a.	Photos of Krystal Ballard	Admitted	09/17/14
Pltf.	6.	Medical Record and Chart-Elmore Ambulance	Admitted	09/17/14
Pltf.	7.	Medical Record and Chart for-Elmore Med Ctr	Admitted	09/17/14
Pltf.	8.	Medical Record and Chart for –St. Alphonsus	Admitted	09/17/14
Pltf.	9.	Investigative Report – Ada County Coroner	Admitted	09/17/14
Pltf.	10.	Funeral Placard of Krystal Ballard	Admitted	09/17/14
Pltf.	11.	Funeral Placard of Krystal Ballard	Admitted	09/17/14
Pltf.	12.	Photos of Charles and Krystal Ballard	Admitted	09/17/14
Pltf.	13.	Photos of Charles and Krystal Ballard	Admitted	09/17/14
Pltf.	14.	Photos of Charles and Krystal Ballard	Admitted	09/17/14
Pltf.	15.	Photo of Krystal Ballard	Admitted	09/17/14
Pltf.	16.	Marriage License	Admitted	09/17/14
Pltf.	17.	Death Certificate for Krystal Ballard	Admitted	09/17/14
Pltf.	21.	Photos of Tissue Slides from Autopsy	Admitted	09/17/14
Pltf.	22.	Tillman Funeral Home Invoice	Admitted	09/23/14
Pltf.	23.	Artistic Flowers Invoice	Admitted	09/23/14
Pltf.	25.	Bill from St. Alphonsus	Admitted	09/23/14
Pltf.	26.	Bill from Elmore Medical Center	Admitted	09/23/14
Pltf.	27.	Bill from Rost Funeral Home	Admitted	09/23/14
Pltf.	28.	Bill form Lifeflight	Admitted	09/23/14
Pltf.	29.	USAF Records Certification for Krystal Ballard	Admitted	09/17/14
Pltf.	30.	Air Force Assignment	Admitted	09/17/14
Pltf.	31.	Line of Duty Determination	Admitted	09/17/14

Pltf.	32.	Awards and Decorations Information	Admitted	09/17/14
Pltf.	33.	Air Force Achievement Medal	Admitted	09/17/14
Pltf.	34.	Air Force Commendation Medal	Admitted	09/17/14
Pltf.	35.	DJMS LES for Krystal Ballard	Admitted	09/23/14
Pltf.	37.	Letter from Major Brown to Ssgt Charles Ballard	Admitted	09/17/14
Pltf.	38.	Statement of Service	Admitted	09/17/14
Pltf.	39.	Enlisted Performance Review 2010	Admitted	09/17/14
Pltf.	40.	Enlisted Performance Review 2009	Admitted	09/17/14
Pltf.	41.	Enlisted Performance Review 2008	Admitted	09/17/14
Pltf.	42.	Enlisted Performance Review 2007	Admitted	09/17/14
Pltf.	43.	Re-enlistment Eligibility Annex	Admitted	09/17/14
Pltf.	48.	Sound Surgical Tech-Vaser System User's Guide	Admitted	09/19/14
Pltf.	51a.	Present Value of Pecuniary Loss Table 1	Admitted	09/23/14
Pltf.	51b.	Money Earnings Table 2	Admitted	09/23/14
Pltf.	51c.	Money Earnings Table 3	Admitted	09/23/14
Pltf.	51d.	Money Earnings Table 4	Admitted	09/23/14
Pltf.	51k.	Future Money Earnings Table 11	Admitted	09/23/14
Pltf.	51l.	Future Money Earnings Table 12	Admitted	09/23/14
Pltf.	51m.	Future Money Earnings Table 13	Admitted	09/23/14
Pltf.	51n.	Future Money Earnings Table 14	Admitted	09/23/14

BY	NO.	DESCRIPTION	STATUS	DATE
Def.	A.	Curriculum Vitae of Brian Kerr	Admitted	09/24/14
Def.	D.	Curriculum Vitae of Thomas Coffman	Admitted	09/30/14
Def.	F.	Curriculum Vitae of John Lundeby	Admitted	09/26/14
Def.	G.	Curriculum Vitae of Geoffrey Stiller	Admitted	09/25/14
Def.	K.	Records of Life Flight	Admitted	09/25/14
Def.	O1.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O2.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O3.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O4.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O5.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O6.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O7.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O8.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O9.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O10.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O11.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O12.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O13.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O14.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O15.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O16.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O17.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O18.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O19.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O20.	Photo of Krystal Ballard	Admitted	09/24/14
Def.	O21.	Photo of Krystal Ballard	Admitted	09/24/14

Def.	Q1.	Photo of Susan Kerr	Identified	09/30/14
Def.	Q2.	Photo of Susan Kerr	Identified	09/30/14
Def.	Q3.	Photo of Susan Kerr	Identified	09/30/14
Def.	Q4.	Photo of Susan Kerr	Identified	09/30/14
Def.	T1.	Photo of Krystal Ballard	Admitted	09/25/14
Def.	T2.	Photo of Krystal Ballard	Admitted	09/25/14
Def.	T3.	Photo of Krystal Ballard	Admitted	09/25/14
Def.	T4.	Photo of Krystal Ballard	Admitted	09/25/14
Def.	Z14.	Medical supply or device	Admitted	09/25/14
Def.	Z16.	Medical supply or device	Identified	09/30/14
Def.	Z20.	Medical supply or device	Admitted	09/25/14
Def.	Z21.	Medical supply or device	Admitted	09/25/14
Def.	Z22.	Medical supply or device	Admitted	09/25/14
Def.	Z23.	Medical supply or device	Admitted	09/25/14
Def.	Z24.	Medical supply or device	Admitted	09/25/14
Def.	Z25.	Medical supply or device	Admitted	09/25/14
Def.	Z35.	Medical supply or device	Identified	09/30/14
Def.	Z36.	Medical supply or device	Identified	09/30/14
Def.	Z43.	Medical supply or device	Admitted	09/25/14
Def.	MM.	Screenshot from Website	Identified	09/17/14
Def.	NN.	Screenshot from Website	Identified	09/17/14

Deposition of Dean Sorensen published - September 17, 2014
Deposition of Briana Dumas published - September 25, 2014
Deposition of Thomas Coffman published - September 30, 2014
Deposition of Brian Kerr published (first) - October 1, 2014
Deposition of Brian Kerr published (second) - October 1, 2014

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants-Appellants.	Supreme Court Case No. 42611 CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

JEREMIAH A. QUANE
ATTORNEY FOR APPELLANT
BOISE, IDAHO

DAVID Z. NEVIN
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

COURT 4TH JUDICIAL DISTRICT OF THE STATE - OF - IDAHO AND FOR ADA COUNTY

Date of Service: MAR 0 3 2015

By _____
Deputy Clerk

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants-Appellants.	Supreme Court Case No. 42611 CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 16th day of October 2014.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT OF THE STATE - OF - IDAHO IN AND FOR ADA COUNTY

Appeal Office
3/11/15
LH

NO. _____ FILED
A.M. _____ P.M. 4:51

MAR 10 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
101 South Capitol Boulevard
Suite 1601
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Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 NOTICE OF SUPPLEMENTAL, ADDITIONAL AND AUGMENTED NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, CHARLES BALLARD, AND THE PARTY'S ATTORNEYS, DAVID Z. NEVIN, SCOTT MCKAY, NEVIN, BENJAMIN, MCKAY & BARTLETT LLP, P.O. BOX 2772, BOISE, IDAHO 83701, P. GREGORY HADDAD, BAILEY & GLASSER LLP, 2855 CRANBERRY SQUARE, MORGANTOWN,

ORIGINAL

WEST VIRGINIA 26508, JAMES B. PERRINE, BAILEY & GLASSER LLP, 3000 RIVERCHASE GALLERIA, SUITE 905, BIRMINGHAM, ALABAMA 35244, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, Brian Calder Kerr, M.D., Silk Touch Laser, LLP, an Idaho limited liability partnership; and Silk Touch Laser, LLP, an Idaho limited liability partnership, dba Silk Touch Med Spa and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser and Lipo of Boise, appeal against the above named Respondent to the Idaho Supreme Court from the Supplemental Judgment Re Costs and Fees of the District Judge entered by the Clerk February 13, 2015.

1. That the party has a right to appeal to the Idaho Supreme Court and the Judgment described in paragraph 1 above is appealable under and pursuant to Rule 11(1), I.A.R.

2. A preliminary statement of the issues on appeal which the Appellants then intend to assert in the appeal are as follows:

(a) Did the Supplemental Judgment Re Costs and Fees constitute error by the District Court.

3. No order has been entered sealing all or any portion of the record.

4. No reporter's transcript has been requested.

5. The Clerk's record contains the Supplemental Judgment Re Costs and Fees.

6. I certify:

(a) The requested $100.00 deposit for the preparation of the

clerk's record has been paid.

(b) Service has been made upon all parties required to be served pursuant to Rule 20.

(c) The appellate filing fee has been paid.

DATED this 10th day of March, 2015.

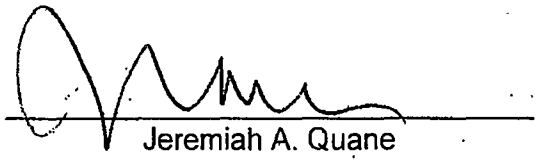
QUANE JONES McCOLL, PLLC

By _____
Jeremiah A. Quane, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2015, I served a true and correct copy of the foregoing NOTICE OF SUPPLEMENTAL, ADDITIONAL AND AUGMENTED NOTICE OF APPEAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709



Jeremiah A. Quane

ORIGINAL

FILED
A.M. P.M. 5

MAR 1 1 2015

CHRISTOPHER D. RICH, Clerk
By KATRINA HOLDEN
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
QUANE JONES McCOLL, PLLC
US Bank Plaza
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Telephone (208) 780-3939
Facsimile (208) 780-3930

Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL

COMES NOW Defendants by and through their counsel of record, Quane Jones McColl, PLLC and hereby moves this Court pursuant to Rules 28(c), 29 and 32 of the Idaho Appellate Rules, to have the Clerk's record on appeal augmented in order to include the following additional materials:

1. Copies of all written questions submitted by the jury to Judge Bail during the trial as well as any records showing the Court's response to and/or handling of those questions.
2. Copies of all written questions submitted by the jury to Judge Bail during jury deliberations as well as any records showing the Court's response to and/or handling of those questions.
3. Copy of Defendants' Exhibit H described as medical records of Dr. Kerr and Silk Touch Laser consisting of 27 pages.
4. Copy of Defendants' Exhibit AA described as Compilation of operative procedures of Dr. Kerr from December 2007 through December 23, 2010, consisting of 8 pages.
5. Copy of Defendants' Exhibit II described as brochure for detergent, consisting of 6 pages.
6. Copy of Defendants' Exhibit KK described as record of medical care of Mountain Home Air Force Base for Krystal Ballard dated July 23, 2010, consisting of 2 pages.

This request for supplementation is based upon and supported by the Idaho Appellate Rules, and is supported by the Affidavits of Counsel, filed contemporaneously herewith.

DATED THIS 11TH DAY OF MARCH, 2015.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2015, I served a true and correct copy of the foregoing OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin
Scott McKay
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P.O. Box 2772
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Attorneys for Plaintiff

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P. Gregory Haddad
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6 Canyon Road, Suite 200
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Telephone (304) 594-0087
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[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile (304) 594-9709

Terrence S. Jones

ORIGINAL

FILED
A.M. P.M.

MAR 1 1 2015

CHRISTOPHER D. RICH, Clerk
By KATRINA HOLDEN
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CV OC 1204792

AFFIDAVIT OF JEREMIAH A. QUANE IN SUPPORT OF OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL

STATE OF IDAHO)
: Ss.
County of Ada)

Jeremiah A. Quane, having been first duly sworn upon oath, deposes and says:

1). I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2). I was one of the attorneys of record in the trial conducted by Judge Bail.

3). During the trial the jury was allowed to submit written questions to the Judge. The jury also submitted at least one written question to the Judge during deliberations which is not identified or referred to in the official court transcript.

4). During multiple side bar conferences with Judge Bail, she stated to me that the juror questions, which were read, rejected or modified and read by the Judge, would be part of the record in this case. Upon receipt of the Clerk's record, however, the juror questions are not included and therefore the Clerk's record must be supplemented.

5). As the juror questions relate to several of the issues on appeal, the Clerk's record should be supplemented to include them.

6). Appellant therefore requests the Clerk's record on appeal be augmented pursuant to Idaho Appellate Rule 30 to include all written questions submitted by the jurors in this case. This request is intended to include those questions submitted by the jury during the trial as well as those questions that were submitted during jury deliberations.

7). In addition, the Judge refused to admit Defense Exhibits H, AA, II and KK all of which were included in the Defense list of exhibits and within the exhibits submitted prior to trial to the Judge and the Judge's clerk. As these exhibits relate directly to several of our assignments of err by the District Court as set forth in our Notice

of Appeal, Appellant therefore requests the Clerk's record on appeal be augmented pursuant to Idaho Appellate Rule 30 to include complete copies of Defense Exhibits H, AA, II and KK.

FURTHER your Affiant sayeth naught.

Jeremiah A. Quane

SUBSCRIBED AND SWORN to before me this 11th day of March, 2015.

(SEAL)

CORINA FERRIS
STATE OF IDAHO
NOTARY — • — PUBLIC

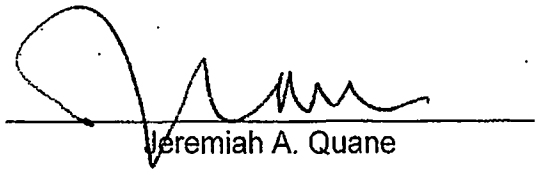
Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2015, I served a true and correct copy of the foregoing AFFIDAVIT OF JEREMIAH A. QUANE IN SUPPORT OF OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709



Jeremiah A. Quane

ORIGINAL

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
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Attorneys for Defendants

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants.	Case No. CV OC 1204792 AFFIDAVIT OF JENNIFER G. KING IN SUPPORT OF OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL

STATE OF IDAHO)
: Ss.
County of Ada)

Jennifer G. King, having been first duly sworn upon oath, deposes and says:

1). I am a member of the law firm of Quane Jones McColl, PLLC, attorneys of record for Defendants in the above-captioned action, and the following

statements are made of my own personal knowledge and are true and correct.

2). On March 10, 2015, I spoke on the telephone with Kelle Wegener, the Ada County Deputy Clerk who handles appeals.

3). I asked Ms. Wegener why the written questions the jury submitted to the Judge were not included in the recently produced Clerk's record for appeal. Ms. Wegener acknowledged that Mr. Quane asked for everything in the record to be included on the appeal.

4). I asked Ms. Wegener to determine whether the written questions submitted to the judge by the jury were included in the Clerk's file for this case. Ms. Wegener informed me that she located the juror's written questions inside an envelope within the Court's file.

5). Ms. Wegener instructed that I submit a request for the Clerk's record on appeal to also include the written questions the jury submitted to the Judge so that they may become part of the Clerk's record on appeal. This affidavit is submitted in support of the Defendants' accompanying Objection and/or Motion to Augment the Record on Appeal for that purpose.

FURTHER your Affiant sayeth naught.

Jennifer G. King

SUBSCRIBED AND SWORN to before me this 11th day of March, 2015.

(SEAL) CORINA FERRIS STATE OF IDAHO NOTARY — • — PUBLIC

Corina Ferris

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 03/01/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2015, I served a true and correct copy of the foregoing AFFIDAVIT OF JENNIFER G. KING IN SUPPORT OF OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

David Z. Nevin Scott McKay NEVIN, BENJAMIN, MCKAY & BARTLETT LLP P.O. Box 2772 Boise, Idaho 83701 Telephone (208) 343-1000 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (208) 345-8274
P. Gregory Haddad BAILEY & GLASSER LLP 6 Canyon Road, Suite 200 Morgantown, West Virginia 26508 Telephone (304) 594-0087 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Overnight Mail [X] Facsimile (304) 594-9709

Jennifer G. King

Bail/Tavo
mwp 3/20/15

Scott McKay (ISB#4309) smckay@nbmlaw.com
Robyn Fyffe (ISB#7063) rfyffe@nbmlaw.com
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Attorneys for Plaintiff

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD, Plaintiff-Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA, and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants-Appellants.	CASE NO. CVOC12-04792 **RESPONSE TO DEFENDANTS' MOTION TO AUGMENT RECORD ON APPEAL**

The Plaintiff-Respondent, Ssgt. Charles Ballard, through counsel, offers the following response to the Defendant-Appellants' Objection and/or Motion to Augment the Record on Appeal filed on March 11, 2015. Specifically, Defendant-Appellants ask the Court to augment

the record with documents related to written questions from jurors listed in paragraphs 1 and 2 and certain documents described as defense exhibits listed in paragraphs 3 to 6. SSgt. Ballard agrees that the records related to juror questions in paragraphs 1 and 2 are properly included in the appellate record and has no objection to the Defendant-Appellants' motion with respect to those documents. However, as described below, the Defendant-Appellants have not established that the other documents can be properly included in the record on appeal and ask that the motion as it pertains to paragraphs 3 to 6 be denied on that basis.

"Any party may request any written document filed or lodged with the district court . . . to be included in the clerk's . . . record." IAR 28(c). The Defense Exhibits listed in paragraphs 3 to 6 do not appear on the list of all exhibits identified during trial, whether admitted or not, and the Defendant-Appellants' motion does not attach file-stamped copies of the "exhibits" at issue or explain when they were filed or lodged with the Court. Accordingly, Defendant-Appellants have not established that the documents described in paragraphs 3 to 6 of the motion are properly included in the appellate record and the request should be denied on that basis.

DATED this 19th day of March, 2015.

Respectfully submitted,

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

By _____
Scott McKay

BAILEY & GLASSER LLP
P. Gregory Haddad

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 19th, 2015, I served a true and correct copy of the foregoing ***Response to Defendants' Motion to Augment Record on Appeal*** by facsimile to the following:

Jeremiah A. Quane
QUANE, JONES, McCOLL
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
P.O. Box 519
Boise, Idaho 83701-0519
208-780-3930

Scott McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHARLES BALLARD,

Plaintiff,

vs.

BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership, and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE,

Defendants.

Case No. CVOC12-4792

ORDER RE: OBJECTION AND/OR MOTION TO AUGMENT THE RECORD ON APPEAL

IT IS HEREBY ORDERED THAT the Defendant's Objection to the Record is granted in part and that the Clerk's record on appeal be augmented to include all written questions submitted by the jurors in this case.

IT IS FURTHER ORDERED that the Defendant's Objection to the Record be denied in part and Defense Exhibits H, AA, II and KK will not be made part of the Clerk's record on appeal. These exhibits were not identified or offered at trial.

Dated this 19th day of March, 2015.

DEBORAH A. BAIL
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of March, 2015, I mailed (served) a true and correct copy of the within instrument to:

JEREMIAH QUANE
ATTORNEY AT LAW
PO BOX 1576
BOISE ID 83701

SCOTT MCKAY
ATTORNEY AT LAW
PO BOX 2772
BOISE ID 83701

P GREGORY HADDAD
ATTORNEY AT LAW
6 CANYON RD STE 200
MORGANTOWN, WV 26508

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Court Clerk